AUSTRALIAN COMPETITION & CONSUMER COMMISSION v FLIGHT CENTRE TRAVEL GROUP LIMITED (B15/2016)

Court appealed from: Full Court of the Federal Court of Australia [2015] FCAFC 104

Date of judgment: 31 July 2015

Special leave granted: 11 March 2016

The respondent ("Flight Centre") operates a travel agency business involving the sale of international passenger air travel services to customers. Flight Centre provides information and books flights with various airlines, obtaining income from commission it earns on each fare paid by a customer. Many airlines, including Singapore Airlines, Malaysia Airlines and Emirates (the latter three together, "the Airlines") sell flights directly to customers in addition to accepting bookings and payments from travel agencies such as Flight Centre.

In the relevant period, between 2005 and 2009, Flight Centre became concerned over the sale of flights by the Airlines directly to customers at prices lower than the prices at which Flight Centre needed to sell in order to receive commission. Flight Centre corresponded with each of the Airlines, complaining of their undercutting of prices and addressing various considerations including margins and a potential reduction in future sales by Flight Centre.

The appellant ("the ACCC") commenced proceedings against Flight Centre, alleging that its dealings with the Airlines concerning prices and margins amounted to inducements to make arrangements that would lessen competition in a market, in contravention of s 45(2)(a)(ii) of the *Trade Practices Act* 1974 (Cth) ("the TPA"). A necessary element of the ACCC's case was that Flight Centre provided services in competition with each of the Airlines within the meaning of s 45A of the TPA.

Justice Logan held that Flight Centre had contravened s 45(2)(a)(ii) of the TPA and ordered it to pay a pecuniary penalty of $11 million to the Commonwealth. His Honour found that Flight Centre was a competitor of the Airlines, each of which it had attempted to induce to enter into an agreement which would control the prices that they each charged for airfares. Justice Logan held that this had occurred in a single market of distribution and booking services for international air travel.

The Full Court of the Federal Court (Allsop CJ, Davies & Wigney JJ) unanimously allowed Flight Centre's appeal. Their Honours held that Justice Logan had erred in identifying the relevant market. It was artificial to characterise, without supporting evidence, an airline's selling of flights directly to customers as involving the provision of a distribution service by the airline to itself. It was also artificial to consider booking services as constituting a separate supply. The Full Court found that booking services were an inseparable part of the supply of international air travel, falling within the agency agreement between Flight Centre and the Airlines. Their Honours held that the market in which Flight Centre's conduct occurred was the market for the supply

of international air travel, in which Flight Centre acted as agent for the Airlines rather than in competition with them.

The grounds of appeal include:

- The Full Court, having accepted that Flight Centre and the Airlines operated independent businesses and engaged in rivalry or competition for the sale to consumers of international passenger air travel services, erred in finding that:

    1. there was no separate market for the supply of booking services and/or distribution services in which Flight Centre and the Airlines were in competition for the purposes of s 45A of the TPA; and

    2. the agency relationship between Flight Centre and each of the Airlines precluded them from being in competition with each other in a market for the supply of booking services and/or distribution services for the purposes of s 45A of the TPA.