

**IN THE HIGH COURT OF AUSTRALIA  
BRISBANE REGISTRY**

**NO B 15 OF 2016**

**BETWEEN: AUSTRALIAN COMPETITION AND  
CONSUMER COMMISSION**

Appellant

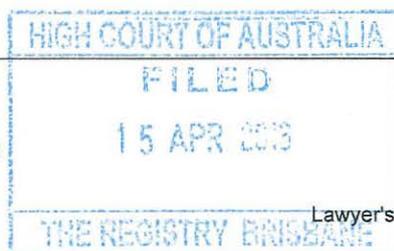
**AND: FLIGHT CENTRE TRAVEL GROUP LTD  
ACN 003 377 188**

Respondent

**APPELLANT'S SUBMISSIONS**

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## PART I PUBLICATION

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1. These submissions are in a form suitable for publication on the internet.

## PART II ISSUES

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2. *First*, where it was accepted by the Trial Judge and the Full Court that the respondent, Flight Centre, and the airlines operated independent businesses and engaged in rivalry or competition, did the Full Court err in finding that:

2.1. Flight Centre and the airlines were not in competition in a market to supply booking services to consumers (or booking services to consumers together with distribution services to airlines)?

2.2. the agency relationship between Flight Centre and the airlines precluded them from being in competition with each other in such market for the purposes of the *Trade Practices Act 1974* (Cth) (now the *Competition and Consumer Act 2010* (Cth) (**the Act**))?

3. *Secondly*, in the alternative, if Flight Centre and the airlines should be regarded as rivals solely in a larger market for international passenger air travel services, did the Full Court err in finding that Flight Centre was not supplying services in competition with the airlines in that market because of the agency agreements between Flight Centre and each of the airlines?

## PART III JUDICIARY ACT 1903, SECTION 78B

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4. The appellant has considered whether a notice should be given under s 78B of the *Judiciary Act 1903* (Cth) and certifies that no notice needs to be given.

## PART IV CITATION

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5. The decision of the Full Court of the Federal Court (Allsop CJ, Davies and Wigney JJ) is reported as *Flight Centre Limited v Australian Competition and Consumer Commission* (2015) 234 FCR 367. The medium neutral citation is [2015] FCAFC 104 (**FC**).

6. The decision of the trial judge, Logan J, is reported as *Australian Competition and Consumer Commission v Flight Centre Ltd (No 2)* (2013) 307 ALR 209. The medium neutral citation is [2013] FCA 1313 (**TJ**).

## PART V RELEVANT FACTS

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7. The facts were largely not in dispute at trial or on appeal: FC [9]. The key factual matters are summarised as follows.

8. *Flight Centre's business*: Flight Centre operated a travel agency business in Australia and overseas, comprising a large distribution network of shop fronts, call centres and internet sales: TJ [3], [17], FC [11]. It employed staff, including "travel consultants", being the employees who dealt directly with potential passengers: TJ [57]. One of its main areas of business was the sale of international passenger air travel services (flights) to consumers: FC [10]. Flight Centre does not operate aircraft as such: TJ [20]; FC [67].

10 9. *Booking services*: Flight Centre offered consumers travel advice and facilitation services that included providing advice about particular overseas destinations, the available flights on different airlines to reach such destinations, the booking of international air travel on behalf of the customer to those destinations and the receipt of payment from the customer for that air travel (**booking service**): TJ [22]. It provided this service via direct contact with customers at its shop fronts, by telephone dealings with them and via the internet: TJ [3]. In providing the booking services to customers, Flight Centre simultaneously provided a distribution service to the airlines, by disseminating to the public the availability of the airline's flights and dealing with potential passengers in relation to ticketing: TJ [21]. Cumulatively, Flight Centre performed the role of an international air travel intermediary: when it contracted with a customer for a particular flight, Flight Centre did so on behalf of the airline concerned, but in booking that air travel Flight Centre did so on behalf of the consumer concerned: TJ [23].

20 30 10. *Rivalry and competition between Flight Centre and the airlines*: Airlines could, and did, avail themselves of the distribution network of third parties such as Flight Centre to make air travel availability known to potential passengers. Alternatively, airlines could make the availability of air travel known directly to potential passengers (described as "disintermediation"): TJ [142]. If a customer booked a flight with a travel agent, s/he did so as an alternative to dealing directly with an airline: TJ [27]. The reward available to Flight Centre and airlines for success in securing a customer booking was the retail or distribution margin. This margin was part of the grossed up fare paid by a passenger when acquiring air travel: TJ [112], [119]. Travel agents, including Flight Centre, also sometimes charged customers a separate "service fee": TJ [3].<sup>1</sup>

40 50 11. *Price Beat Guarantee*: As part of its marketing strategy, Flight Centre promoted a "price beat guarantee", advertising that it would better the price for a flight quoted by any other Australian travel agent or website, including airline websites, by \$1, and would give the potential passenger a voucher for \$20: FC [25]; TJ [75]-[76] (**Price Beat Guarantee**). During the relevant period, the financial cost to Flight Centre of honouring this policy, arising from the ability of customers to cite to it a lower fare directly available from an airline via that airline's website, was of enduring and increasing commercial concern to Flight Centre. It was a key threat to Flight Centre's business: TJ [117]. A separate but related concern was not making a sale at all, where a consumer chose to deal directly with an airline via its website: TJ [95], [97]; FC [26], [27].

<sup>1</sup> Flight Centre Amended Defence, 10 August 2012, [11(h)]; Clarke T92.9-19; Schwass T124.1-13, T132.35-41.

12. *PSAA agreements*: Flight Centre was a party to a standard form agreement entered into between individual travel agents and the International Airline Transport Association (**IATA**) on behalf of its members. That agreement was called a Passenger Sales Agency Agreement (**PSAA**). Amongst other things, the PSAA imposed obligations on Flight Centre in relation to the remission of funds to a relevant airline at the point at which Flight Centre received payment from a consumer for a flight: TJ [36]. Each of Singapore Airlines, Malaysia Airlines and Emirates was a member of IATA, and accordingly was a party to the PSAA with Flight Centre: FC [13]-[14]. When Flight Centre ultimately enters into a transaction with a customer, by issuing a ticket for a flight on a particular airline, it does so as agent for that particular airline. Prior to that point, Flight Centre could potentially enter into a transaction on behalf of many different airlines in respect of one consumer's demand for travel. When providing booking services to a customer, Flight Centre is not required to sell the flights of any particular airline and has no obligation to an international airline unless and until it books that airline's fare through a Global Distribution System (**GDS**).
13. *The GDS*: There are several different GDS: TJ [138]. Through a GDS, airlines made available flights for sale by travel agents: FC [15]; TJ [31]. One way in which flights were loaded onto a GDS by airlines was as a "published fare": FC [15]; TJ [33]. A published fare was at a price determined by the airline: FC [15]; TJ [33]. That price included an amount of commission (**at-source commission**) for the travel agent and enabled the calculation of the "nett amount" that needed to be remitted to the airline if a sale was made: FC [15], [16]; TJ [33].
14. *Flight Centre's freedom to price*: Flight Centre was free to sell a flight at whatever price it chose: FC [17]; TJ [34]. It received the money from the customer, remitted the "nett amount" to the airline and retained the balance as its commission or margin: FC [16]; TJ [33]. If it sold the flight at a price above the published fare, it received a greater margin: FC [17]. Conversely, if it sold below the published fare, it received a lower margin: FC [17]. Indeed, if it sold below the "nett amount", it made a loss on selling that flight: FC [17]. Flight Centre was also free to set and maintain the price of its service fees to customers.<sup>2</sup>
15. *Evidence of competition*: Flight Centre recognised in its internal, contemporaneous documents that it was in competition with the airlines where the airlines were offering direct sales: FC [145]; TJ [117]-[119]. The evidence from two other market participants, Mr Clarke, the Chairman of Webjet Ltd, an online travel agent, and Ms Schwass, the operator of Travel by Tracey, a travel agency shop front business, was that they too regarded themselves as being in competition with airlines that made direct sales to consumers: TJ [116]. The evidence of the market participants was consistent with the expert evidence.

<sup>2</sup> Under the PSAA, when Flight Centre received payment from a customer for international air travel, the amount owed to the airline was automatically taken from Flight Centre's bank account through what was known as the billing and settlement plan (also called the bank settlement plan) operated by IATA. That amount was the sum equal to the published fare (inclusive of taxes and surcharges) less the allowable at-source commission: TJ [36].

The only expert called at trial, Dr Fitzgerald, expressed the opinion that Flight Centre and the airlines were in competition to make the sale to consumers: TJ [110]. He gave evidence that: "travel agents do compete — horizontally — with international airlines at the retail level of the international travel market. This is very clearly so, since if one makes the sale, the other does not. What they are competing for at this level, of course, is the retail or distribution margin": TJ [110]. His opinion was that, in defining the market in which this competition occurred, it was best to identify only a single market in which travel agents compete for the supply of booking services and distribution services, being the downstream or distribution functional level of the overarching market for international travel and ancillary products: TJ [113]; [139]. This single market had both an upstream and downstream side. On the downstream side, the booking service was supplied by travel agents and airlines (selling directly) to consumers. On the upstream side, the distribution service was supplied by travel agents to the airlines and to the airlines by themselves (through "self-supply" that eliminated the need to use a third party).

16. *The threat posed by competition from the airlines:* Airlines have for a number of years offered fares directly to customers, including at prices lower than the published fares on a GDS: FC [24]. During the relevant period there was a discernible trend to ever greater use of the internet by the airlines to bypass travel agents and notify availability of offerings to the public and book and take payment directly from customers: TJ [29]. Flight Centre identified direct dealings between airlines and consumers in its contemporaneous documents as "External Threats" and "Industry or Market Driving Forces": TJ [117]. The airlines' use of websites to make direct sales created two problems for Flight Centre. *First*, the risk of the loss of a sale to the airlines "because of a choice made by a would-be customer, in light of the availability of a lower fare, to deal directly with an airline via its website": TJ [95]; FC [27]. *Secondly*, if Flight Centre secured the sale but was required to better a fare offered directly by an airline to secure the sale, particularly because of its Price Beat Guarantee, it almost certainly made a loss: FC [26].

17. *The impugned conduct:* Between 19 August 2005 and 16 May 2009, Flight Centre sent six series of emails to Singapore Airlines, Malaysia Airlines, and Emirates. These emails: (a) evidenced the rivalry or competition between Flight Centre and the airlines; and (b) were an attempt to stop the airlines engaging in direct sales at discounted prices: FC [28]. The Trial Judge found that Flight Centre's purpose in sending the emails, as a concerted pattern of reactive corporate conduct, (TJ [82], [94], [95], [117]; FC [26], [27]) was to stop the airlines, in their direct sales using the internet, from undercutting the published fares on the GDS that were available to Flight Centre: FC [70]. Each series of emails was an attempt to induce the relevant airline to enter into a contract, arrangement or understanding with Flight Centre that would have prevented the airline from undercutting Flight Centre through direct sales and thereby protect Flight Centre's retail or distribution margin: TJ [196]-[197]. The Trial Judge's findings in this respect were not directly challenged on appeal: FC [31], [32].

18. *Likely effect of the conduct:* The Trial Judge found that the likely effect of the arrangement or understanding sought by Flight Centre with each airline was to: (a) prevent the airlines from selling below a price floor and to ensure price neutrality; (b) thereby, maintain or control Flight Centre's retail or distribution margin: TJ [114], [158], [164], [166], [170]-[171], [177], [187], [189], [196]-[197]. Those findings also were not directly challenged on appeal: FC [32] and [68].
19. *Trial Judge's conclusion on market:* The Trial Judge concluded that there was a market for flights (FC [77]; TJ [135], [138], [139], [141]) but that Flight Centre and the airlines were not in competition in that market because only the airlines supplied flights, as only they owned and operated aircraft: TJ [135]; FC [79]-[80]. The Trial Judge also found that Flight Centre and the airlines were in competition in a market for booking and distribution services. He found that each series of emails constituted an attempt to induce the relevant airline to make an arrangement that would have contravened s 45(2)(a)(ii) of the Act by virtue of s 45A of the Act: FC [73].
20. *Full Court's conclusion on market:* The Full Court allowed an appeal by Flight Centre. It concluded that: (a) there was no separate market for booking or distribution services: FC [168]; (b) Flight Centre operated in the market for flights, and that the rivalry or competition between Flight Centre and the airlines existed in that market: FC [173], [175]; yet (c) in the market for flights, Flight Centre and the airlines did not supply goods or services in competition with each other because, as the Trial Judge had found, only airlines supplied flights and, in issuing tickets, Flight Centre did so as agent for the airline: FC [75].

## **PART VI ARGUMENT**

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### **A INTRODUCTION**

#### **(1) The elements of the ACCC's primary and alternative cases**

21. Flight Centre was alleged to have made six separate attempts, between 19 August 2005 and 16 May 2009, to induce one of Singapore Airlines, Malaysia Airlines and Emirates to enter into, or arrive at, a contract, arrangement or understanding that would, if made, have contravened s 45(2)(a)(ii) of the Act by reason of the deeming effect of s 45A. Sections 76 and 80 respectively authorise the Court to impose a pecuniary penalty and grant an injunction where a person has attempted to induce another person, whether by threats or promises or otherwise, to contravene a provision of Part IV of the Act.
22. It is convenient to begin by indicating how the ACCC's primary and alternative cases map onto ss 45 and 45A of the Act.
23. Section 45(2)(a)(ii) of the Act prohibits a corporation from making a contract or arrangement, or arriving at an understanding if the contract or arrangement

contains a provision that would have the purpose, effect, or likely effect of substantially lessening competition. Until its repeal on 24 July 2009,<sup>3</sup> s 45A deemed a provision of a contract or arrangement to have the purpose, effect or likely effect of substantially lessening competition if, relevantly:

23.1. the provision had the purpose, effect or likely effect of fixing, controlling or maintaining, or providing for the fixing, controlling or maintaining of the price for services supplied or to be supplied by one or more of the parties or proposed parties to the contract, arrangement or understanding; and

10 23.2. the services in respect of which the price is fixed, controlled or maintained were supplied in competition with the other parties or proposed parties to the contract, arrangement or understanding.

24. Section 45(3) of the Act relevantly provided that "competition" for the purposes of s 45A means "competition in any market in which a corporation that is a party to the contract, arrangement or understanding ... supplies ... services".<sup>4</sup>

20 25. The ACCC's *primary case*, which was accepted by the Trial Judge, was that:

25.1. the airlines and Flight Centre were in competition in a market<sup>5</sup> to supply:

25.1.1. booking services to consumers; and

25.1.2. distribution services to airlines;

30 25.2. by each series of emails, Flight Centre attempted to induce the airlines to enter into, or arrive at, an arrangement or understanding;

25.3. each proposed arrangement or understanding included a provision that, if made, had the purpose, effect or likely of setting a floor under the price of flights offered for sale directly by airlines and thereby maintaining or controlling the price of Flight Centre's booking services; and

25.4. the price that was controlled or maintained in respect of Flight Centre's booking services was the retail or distribution margin.<sup>6</sup>

40 The findings at subparagraphs 25.2 – 25.4 were not directly challenged on appeal: FC [32], [68].

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<sup>3</sup> By the *Trade Practices Amendment (Cartel Conduct and Other Measures) Act* 2009, No 59 of 2009, (assented to 26 June 2009). With effect from 24 July 2009, s. 45A was repealed and was effectively replaced by the cartel regime that is now Division 1 of Part IV of the Act.

<sup>4</sup> "Section 4 of the Act defines "supply" and "services". Section 4C of the Act also addresses references to "supply" in the Act.

50 <sup>5</sup> The ACCC separately pleaded the booking services market and the distribution services market. Dr Fitzgerald and the Trial Judge combined the services into a single market. Nothing turns upon this. The distribution market is further addressed at [69] herein.

<sup>6</sup> See references at [18] herein.

26. The Trial Judge accepted the primary case. He accepted the opinion of Dr Fitzgerald and found that the competition occurred in the market for the supply of booking services and distribution services in relation to available international passenger air travel: FC [5]; TJ [143]. Conversely the Full Court did not accept that Flight Centre supplied booking services to consumers or that there was competition to supply (and therefore a market for) booking services separate from the supply of international passenger air travel (flights) itself.

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27. The ACCC's *alternative case* proceeded on the premise that Flight Centre and the airlines did not compete to supply booking services to consumers as a service separate from the flights themselves. It accordingly differed from the primary case in respect of market definition and the affected price. It was alleged that Flight Centre and the airlines were in competition in a market to supply flights to consumers and, had the arrangement been made, the impugned provision had the purpose, effect or likely effect of controlling or maintaining the price of flights.

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28. The Trial Judge rejected the alternative case. The alternative case was not advanced by the ACCC on appeal. However, in allowing the appeal, the Full Court concluded that the rivalry between Flight Centre and the airlines in fact took place in the market for the supply of flights, a market in which Flight Centre acted as agent for, and therefore not in competition with, the airlines: FC [8].

## (2) The contradiction in the Full Court's conclusion

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29. Both the Trial Judge and the Full Court recognised that the evidence disclosed rivalry or competition between Flight Centre and the airlines: TJ [117], FC [145]. It was Flight Centre's "manifest, internal understanding that it was in competition with [the] airlines": TJ [121]. It was a "commercial imperative" for Flight Centre to sell flights on the airlines' behalf "rather than the airline effecting the sale directly itself": TJ [149].

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30. The concepts of service, supply, competition and market are interrelated. A market is an analytical tool for assessing the effects of conduct on competition, where competition is rivalry, relevantly, to supply services. In allowing the appeal, the Full Court decoupled these elements and produced a result that is contradictory on its face: Flight Centre and each airline were engaged in rivalrous conduct, that rivalry occurred in a market, yet only one of them supplied services in that market because one rival was the agent of the other: FC [175]-[176]. The reality of competition is said to be defeated by agency. Nonetheless, on the Full Court's reasoning, the agent is a rival of the principal.

## B PRIMARY CASE: COMPETITION TO SUPPLY BOOKING SERVICES

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31. The Full Court rejected the conclusions of the Trial Judge that Flight Centre and the airlines competed to supply booking services to consumers on four bases:

31.1. *first*, it is “artificial” to conceive of Flight Centre and the airlines as supplying booking services separate from the supply of flights: FC [149]-[151];

31.2. *secondly*, the booking services supplied by Flight Centre are supplied as agent of the airlines and therefore is not a separate service for the Act: FC [152]-[163];

10 31.3. *thirdly*, there could be no single market for booking services because each airline could only supply booking services with respect to their own flights whereas Flight Centre could supply booking services with respect to flights on multiple airlines: FC [164]-[165]; and

31.4. *fourthly*, and related to the third basis, there was no analysis of substitutability of booking services by the Trial Judge: FC [166]-[167].

20 32. These grounds will be considered in turn. The first and second grounds are key to the Full Court's judgment. The third and fourth grounds are ancillary.

20 (1) **The supply of booking services occurs separately from the supply of flights**

30 33. The Full Court considered it artificial to conceive of Flight Centre and the airlines as supplying booking services separately from the supply of flights because “booking services were in reality no more than essential and inseparable incidents or actions involved in selling international passenger air travel services”: FC [149]. To understand why this is not so, it is necessary to identify: (a) the principles applicable to market definition, especially as concerns its functional dimension; (b) the services provided and their distinct economic and commercial characteristics; and (c) the competition that occurs in the supply of those services.

(a) ***Market is defined purposively having regard to function***

40 34. Market definition is a purposive exercise, which situates impugned conduct within an area of competitive activity by reference to four dimensions: product, geography, functional level and time. It involves “the recognition and use of an economic tool or instrumental concept related to market power, constraints on power and the competitive process which is best adapted to analyse the asserted anti-competitive conduct”: FC [118].<sup>7</sup> As a consequence of its purposive and instrumental character, market definition “may give rise to different market definitions in relation to the same product in different

50 <sup>7</sup> *Australian Competition and Consumer Commission v Liquorland (Australia) Pty Ltd* [2006] ATPR 42-123 (*Liquorland*) at 45,243, [429] (Allsop J). The purposive approach to market definition finds its classic exposition in *Queensland Wire Industries Pty Ltd v The Broken Hill Pty Co Ltd* (1989) 167 CLR 177 at 187 (Mason CJ and Wilson J). See also S Breyer, “Five Questions About Australian Anti-Trust Law” (1977) 51 *Australian Law Journal* 28 at 34 cited with approval in *Singapore Airlines Limited v Taprobane Tours WA Pty Ltd* (1991) 33 FCR 158 (*Taprobane Tours*) at 175 (French J, as his Honour then was); M Brunt, “Market Definition” Issues in Australian and New Zealand Trade Practices Litigation’ (1990) 18 *Australian Business Law Review* 86, at 126-127; *Australian Competition and Consumer Commission v P.T. Garuda Indonesia Ltd* [2016] FCAFC 42 at [110] (Dowsett and Edelman JJ).

circumstances".<sup>8</sup> In undertaking this exercise, the Court must select what emerges as the clearest picture of relevant competitive processes in the light of economic and commercial realities and the policy and purposes of the Act.<sup>9</sup> Relevantly, s 2 identifies the object of enhancing the welfare of Australians through the promotion of competition and fair trading. Section 4E of the Act guides the exercise. While s 4E does not define what a market is for the purposes of the Act, it makes clear that the parameters of the market are governed by the concepts of substitution and competition.<sup>10</sup>

10 35. Analysis of the *product dimension* begins with identification of the product or group of products supplied by the parties whose conduct is under enquiry.<sup>11</sup> Products are substitutes where they have a reasonable inter-changeability of use and a high cross-elasticity of demand; that is, where a small decrease in the price of a particular product would cause significant demand for, and switching to, a similar product.<sup>12</sup> The *geographic dimension* is defined to include the area of economic activity over which consumers can realistically turn for alternative sources of substitutable goods or services.<sup>13</sup> The *temporal dimension* of the market concerns the time frame over which substitution possibilities should be considered and actual and potential competitors identified.<sup>14</sup> Each of these dimensions is defined primarily by reference to notions of substitution. That is not so in respect of the remaining dimension of market, the one most crucial to the present case, the *functional dimension*.

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30 36. Analysis of the functional dimension of a market identifies the stage of production, within a supply chain, at which the relevant economic activities occur.<sup>15</sup> In order to consider the implications for competition in respect of certain conduct, one begins with the activities under consideration and then identifies adjacent activities in the supply chain (labelled upstream and downstream by economists). Upstream markets are markets for input factors, such as raw materials. In downstream markets these inputs are commercialised to produce outputs. In this analysis, it is not generally appropriate to consider whether one function ought to be substituted for another, because activity at each functional level complements activity at adjacent levels. Instead, one must enquire whether substitution between products or geographic sources of supply at one functional level constrains the behaviour of market participants at

40 <sup>8</sup> R Smith and J Walker, "Australian Trade Practices and the Emerging Role of Commercial Reality versus Substitution in Market Definition" (1997) 5 *Competition and Consumer Law Journal* 1, 3; *Liquorland*, 45,245, [439].

<sup>9</sup> *Taprobane Tours* at 174 and 178 (French J).

<sup>10</sup> *Boral Besser Masonry Limited v Australian Competition and Consumer Commission* (2003) 215 CLR 374 (*Boral Besser*) at 454, [247] (McHugh J).

<sup>11</sup> *Boral Besser* at 454-5, [250]-[253] (McHugh J); *Re Howard Smith Industries Pty Ltd and Adelaide Steamship Industries Pty Ltd* (1977) 28 FLR 385 at 394-395 (Northrop J, Walker and Johns); *Seven Network Limited v News Limited* (2009) 182 FCR 160 at 295, [621] (Dowsett and Lander JJ)

<sup>12</sup> The Swanson Committee proposed the amendment to s 4E of the Act by Act No. 81 of 1977 in these terms.

<sup>13</sup> *Queensland Wire Industries Pty Ltd v The Broken Hill Proprietary Company Limited & Anr* (1988-89) 167 CLR 177 at 196 (Deane J); *Australian Meat Holdings Pty Ltd v Trade Practices Commission* (1989) ATPR 40-932 at 50,092 (Shepard J).

<sup>14</sup> *Taprobane Tours* at 177 (French J) citing with approval *Re Tooth & Co Ltd*; *Re Tooheys Ltd* (1979) 39 FLR 1.

50 <sup>15</sup> *QIW Retailers Ltd v Davids Holdings Pty Ltd*; *Attorney-General (Cth) v Davids Holdings Pty Ltd* (No 3) (1993) 42 FCR 255 (*QIW Retailers*); R Smith and N Norman, "Functional Market Definition" (1996) 4 *Competition and Consumer Law Journal* 1; R Smith and J Walker, "Part IIIA Efficiency and Functional Markets" (1998) 5 *Competition and Consumer Law Journal* 183.

another functional level, and whether there are independent transactions between functional levels.<sup>16</sup> Put differently, one enquires whether the various functional levels are economically separable.

37. This analysis is necessarily sophisticated where, as here, certain participants in a relevant product market are vertically integrated while others are not. If all actual and potential participants are fully vertically integrated over the relevant range of activities, the various functional levels that have been internalised are likely to form part of a single functional market. However, this will not naturally follow where non-vertically integrated entities participate in the relevant activity. In the present case one must ask: what is the function performed in relation to the services of booking international flights to and from Australia?

**(b) The function performed in relation to the relevant services**

38. Airlines and travel agents compete in respect of the activity of making bookings for air carriage. Each offers a distinct booking service. Each airline offers travel information and assistance through a webpage. As demonstrated by the evidence of the market participants,<sup>17</sup> different travel agents offer different styles of booking service. Flight Centre offers personal service, through a shopfront location, with access to multiple airlines. These services are substitutes. On the demand-side, consumers can select between the services based upon their perceived value. On the supply-side, whichever party makes the booking receives the retail margin. Forward integration by airlines into direct sales was in part directed at capturing this margin.

39. A critical feature of the operation of the present field of commerce is the functional distinction between the retail level (downstream) of the international travel market and the wholesale/carriage level (upstream). Travel agents such as Flight Centre operate solely at the retail level of the international travel market. At that level, they compete with each other but also with airlines to sell flights to consumers. The airlines operate at both the retail and the wholesale/carriage levels of the market.

40. At the retail level, consumers could obtain a promise from an airline that it would use best endeavours to carry passengers and baggage on flights to nominated destinations.<sup>18</sup> They could obtain that promise either directly from the airline or from Flight Centre, which had the authority to make that promise on behalf of the airlines. But the making of that promise would ordinarily be only part of what a consumer sought. The consumer would ordinarily seek the larger range of activities identified by the Trial Judge as constituting the booking service: travel advice and facilitation services including providing advice about destinations abroad, the available flights to reach such destinations, the

<sup>16</sup> *Taprobane Tours* at 182; *QIW Retailers* at 268-270; J Walker and L Woodward, "The Ampol/Caltex Merger: Trade Practices Issues" (1996) 4(1) *Trade Practices Law Journal* 21.

<sup>17</sup> See references at paragraph [15] herein.

<sup>18</sup> *Federal Commissioner of Taxation v Qantas Airways Ltd* (2012) 247 CLR 286 at [33] (Gummow, Hayne, Kiefel and Bell JJ).

booking of the travel on behalf of the consumer to a destination and the receipt of payment from the customer for the travel.

41. The correct enquiry is whether it is appropriate, in distinguishing between the relevant retail level of the market (being the only level at which travel agents operated) and the wholesale/carriage level of the market (at which only airlines operated) to define the relevant retail market as being for the supply of the booking service itself or for the supply of flights.

10 (c) *The field of rivalry*

42. The term “competition”, as it appears in s 45 of the Act, is used in a commercial or economic sense.<sup>19</sup> It is a “rich concept” that expresses itself as rivalrous market behavior.<sup>20</sup> The views of the parties to an alleged contract, arrangement or understanding may often be highly relevant to assessing whether they are in competition with each other;<sup>21</sup> so too the views and practices of market participants: TJ [120].<sup>22</sup>

- 20 43. *The views of the parties to the arrangements:* The Trial Judge concluded that Flight Centre’s internal documentation established Flight Centre’s “complete contemporary understanding of and sensitivity to this source of competition”: TJ [144] and [117]-[121]. The emails the subject of the allegations amply disclose the language of competition. Some examples follow.

- 30 44. The email of August 2005 from Flight Centre to Singapore Airlines stated “we are faced with being uncompetitive to the effect of some AUD150-200 per person to a wide range of destinations”, and “[t]he losses we are incurring matching this [Singapore internet] offer are significant” and “It is difficult to be both friend and foe”: FC [33]. Singapore Airlines replied: “It is inappropriate ... for Singapore Airlines to be labelled a foe and subjected to veiled threats from [Flight Centre] about shifting distribution. Singapore Airlines will not hesitate to take whatever action is necessary to defend our position in this market if forced to do so”: TJ Exhibit 1 Tab A25.

- 40 45. The email of December 2008 from Flight Centre to Emirates stated “we are currently paying out some AUD50K per month to consultants in order for them to make a margin on fares that are matched from the EK [Emirates] website”, and “[a]dditional mileage offers online are also continuing to cause great difficulties for us in retaining customers”: FC [37].

46. The request issued in Flight Centre’s May 2009 email to Singapore Airlines contemplated “[a]n agreement that we will not be undercut on the web”:

<sup>19</sup> *Stirling Harbour Services Pty Limited v Bunbury Port Authority* (2000) ATPR 41-783 at [95] (Carr J).

<sup>20</sup> *Re Queensland Co-Operative Milling Association Ltd; Re Defiance Holdings* (1976) 8 ALR 481 at 514-515 (Woodward J, Shipton and Brunt)

<sup>21</sup> *Rural Press Ltd v Australian Competition and Consumer Commission* (2003) 216 CLR 53 at 72, [45] (Gummow, Hayne and Heydon JJ).

<sup>22</sup> *Boral Besser* at 457 [257] (McHugh J); *Amotts Ltd v Trade Practices Commission* (1990) 24 FCR 313 at 334 (Lockhart, Wilcox and Gummow JJ); *Australian Competition and Consumer Commission v Liquorland* (2006) ATPR 42-123 at 45,246 at [444] (Allsop J).

FC [40]. The response reflects competition: "We do not undercut on the web but we cannot give any undertaking [sic] in this regards as our website pricing is outside the scope of this agreement. Our internet site is our shop front which sells SQ exclusively unlike FC [Flight Centre] and other agents": TJ Exhibit 1 Tab A82.

10 47. *The views of other market participants and expert evidence*: The evidence from travel agents at trial was that they considered themselves to be in competition with airlines: TJ [116]. That view of competition was reflected in the evidence of Mr Clarke and Ms Schwass: TJ [116], [26]-[27]. This lay evidence was consistent with the expert opinion of Dr Fitzgerald, the only expert economist who gave evidence at trial: TJ [112]-[116]. Dr Fitzgerald expressed the unequivocal opinion that, as a matter of economics, there was competition between Flight Centre and the airlines: TJ [110].

20 48. *Rivalrous behaviour*. The behaviour of Flight Centre was explicable only by it being in competition with the airlines. The Price Beat Guarantee cannot be understood in any other way. Flight Centre's implicit (TJ [165]) and overt ([TJ [177]; [196]) threats to the airlines to persuade them to enter into arrangements that would remove the competitive pressure on its prices from direct sales from airlines (TJ [197]) are explicable only by Flight Centre and the airlines being in competition with each other.

(d) *Conclusion on primary market definition*

30 49. Against this background, it emerges that the Trial Judge was correct to separate the international travel market into two functional dimensions, corresponding to economically separable activities and to define the retail level as the market for booking services. This market definition recognises that, as well as choosing an international air travel service (the flight), a consumer separately chooses from a range of market participants competing to facilitate his or her access to the flight by the provision of *booking services*. It is not "artificial". Instead, it reflects common sense and best captures the economic forces of competition at work.

40 50. The Full Court failed to appreciate the commercial reality that Flight Centre and the airlines did provide a service to consumers that differed from the mere provision of a flight itself. As the Trial Judge understood (TJ [22]-[23]), it is important to take account of the breadth of services provided by travel agents and airlines to consumers, including the dynamic and innovative ways in which those services are supplied; all with the aim of facilitating the consumer's air travel: TJ [25] and [28].

50 51. At FC [135], the Full Court asks: "If the airline then chose to sell some of its flights via different distribution channels, including through the use of agents, why would this necessarily compel a change in characterisation of the direct supply of flights by the airline?" The answer is that a market is defined purposively to assess the effect of conduct on competition. The same product may be characterised as being in different markets in different circumstances. If no airline had engaged a travel agent, there may be no reason to undertake a

definition of market that sought to account for discrete economic activity by travel agents. To the contrary, where such conduct occurs. There are not, in the present circumstances, such efficiencies of vertical integration within the relevant airlines that market co-ordination between buyers and sellers is superseded by in-house co-ordination. It is accordingly appropriate to recognise a functional split to reflect market transactions between stages of production.<sup>23</sup>

**(2) Agency does not defeat the supply of booking services by Flight Centre**

10 52. Turning to the Full Court's second ground for rejecting the booking services market, it concluded that the activities described as booking services fell within the terms of the PSAA, such that any such services provided to consumers were provided for and on behalf of airlines: FC [152]-[154], [157], [160]-[163]. As a result, Flight Centre did not itself supply booking services: FC [153]. The error in these conclusions can be demonstrated by identifying: (a) germane legal principles concerning agency; (b) aspects of the agency relationship that can arise under the PPSA, and (c) why agency does not defeat (i) supply of a service, or (ii) competition, within the meaning of the Act.

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**(a) The nature of the agency relationship between Flight Centre and the airlines**

53. Agency involves "an authority or capacity in one person to create legal relations between a person occupying the position of principal and third parties".<sup>24</sup> An agent is "a person who has authority to act on behalf of a principal, either generally or in respect of some particular act or matter".<sup>25</sup> The conditions under which, and extent to which, Flight Centre can be an agent of the airlines is critical to an understanding of the possibility of competition between them.

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54. The category of travel agents is in certain respects anomalous.<sup>26</sup> Travel agents are able to contract on behalf of principals and thereby satisfy one aspect of agency. They owe contractual and tortious duties to principals,<sup>27</sup> and may owe equitable duties, especially when in receipt of trust money.<sup>28</sup> However, when acting as an intermediary, a travel agent may owe duties both to the intending traveller and the carrier, as it may be agent for the carrier or operator for one purpose while concurrently an agent for the traveller for another purpose.<sup>29</sup> When not acting as an intermediary, a travel agent may also provide certain services as principal and not merely as agent.<sup>30</sup> Further, a travel agent may act

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<sup>23</sup> *QIW Retailers* at 268 (Spender J, citing M Brunt).

<sup>24</sup> *International Harvester Company of Australia Pty Ltd v Carrigan's Hazeldene Pastoral Company* (1958) 100 CLR 644 at 652 (Dixon CJ, McTiernan, Williams, Fullagar and Taylor JJ).

<sup>25</sup> *Erikson v Carr* (1945) 46 SR (NSW) 9 at 12 (Jordan CJ); *Tonto Home Loans Australia Pty Ltd v Tavares* [2011] NSWCA 389 at [170]-[177] (Allsop P, Bathurst CJ and Campbell JA agreeing).

<sup>26</sup> G E Dal Pont *Law of Agency* (3<sup>rd</sup> edition) (LexisNexis, Butterworths 2014) at 36, [1.50].

<sup>27</sup> *Douglas v Steele*, 816 P 2d 586 (Okla App 1991).

<sup>28</sup> *Stephens Travel Service International Pty Ltd (receivers and managers appointed) v Qantas Airways Limited* (1988) 13 NSWLR 331 (Hope JA, Kirby P and Priestly JA agreeing).

<sup>29</sup> *Levine v British Overseas Airways Corp*, 66 Misc 2d 766 (civ Ct, NY County 1971).

<sup>30</sup> In *Wong Wee Wan v Kwan Kin Travel Services Ltd* [1996] 1 WLR 38, the defendant travel agent was found to have undertaken to provide all the tour services and not merely arrange for their provision, even though many of the services were intended to be provided by other persons. A term was implied into the contract that reasonable skill and care would be used in rendering the contracted services, whether they were carried out by the travel

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for more than one potential principal and may indeed compete with a potential principal:<sup>31</sup>

The principal criticism of agency is that travel agents do not fall comfortably within the definition of a fiduciary. The essence of a fiduciary relationship is supposed to be one of absolute trust and confidence, requiring the agent to sacrifice the pursuit of self-interest. The relationship between travel agents and customers or suppliers is more akin to everyday commercial transactions. Suppliers are in direct competition with travel agents and there is constant haggling over rates and commissions, particularly with airlines. Similarly, a travel agent may often choose between a number of suppliers when making recommendations to the customer and is under no duty to use any in particular. Many factors will influence the decision: price, incentives, features, location, frequency, personal experience or recommendation. If this were a fiduciary relationship, there would be some sort of limitation over the selection process. As it stands, the element of control by the principal is not apparent.<sup>32</sup>

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20 55. It is, accordingly, important to identify with precision the particular act or matter in respect of which agency subsists and the point in time at which it attaches. At FC [67], the Full Court imperfectly summarised the findings of the Trial Judge as being that “the relationship between the respective airlines and Flight Centre was that of principal and agent.” The Trial Judge in fact found that: “In each instance, *so far as the sale of air travel is concerned*, the relationship between the respective airlines and Flight Centre was that of principal and agent” (TJ [21], emphasis added).

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**(b) The PSAA does not encompass the entirety of the booking services**

56. Clause 3 of the PSAA (extracted at FC [14]) governs sales of an airline’s air passenger transportation services by the travel agent.

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57. The PSAA does not provide that Flight Centre is acting on behalf of particular airlines in respect of all acts engaged in by Flight Centre in the course of providing travel advice and facilitation services to potential consumers seeking to purchase air travel on any one of a number of airlines. Rather, the PSAA confers authority on Flight Centre to enter into a contract of carriage on behalf of an airline and to undertake the activities necessary to provide a passenger with a valid contract of carriage. The bundle of “travel intermediary” services found by the learned trial judge to be provided by Flight Centre<sup>33</sup> (and the airlines when engaged in direct selling<sup>34</sup>) went beyond any act that Flight Centre was authorised to undertake on behalf of the airline. Contrary to the Full Court’s narrow focus (FC [147]), the booking services in issue included the

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agent or by someone else. See further *Moore v Hotelplan Ltd (t/as Inghams Travel)* [2010] EWHC 276 (QB); *Hone v Going Places Leisure Travel Ltd* [2001] EWHC Civ 947; P Watts and FMB Reynolds, *Bowstead & Reynolds on Agency* (19<sup>th</sup> edition) (London: Sweet & Maxwell, 2010) at 32-33, [1-034].

<sup>31</sup> G E Dal Pont *Law of Agency* (3<sup>rd</sup> edition) (LexisNexis, Butterworths 2014) at 213-214, [10.18] and 286, [12.15].

<sup>32</sup> Y Chittenden “Legal Liability of Travel Agents: Are They Agents At All?” (1999) 8 *Auckland L Rev* 1061, 1088-9.

<sup>33</sup> TJ [22]-[23] and [137]-[138].

<sup>34</sup> TJ [142].

full range of booking and advisory services provided by travel agents (and airlines, through their websites): TJ [22]-[25], [27]-[30], [37], [112]-[113], [116]-[117], [137]-[139], [141]-[144].

58. The PSAA does not, accordingly, produce the result that Flight Centre is acting as the agent of an airline in respect of the entirety of the services it provides. The booking service provided by Flight Centre includes activities that fall outside of the agency relationship, including informing the consumer of travel details and arranging the travel. Indeed, provision of the booking service has aspects that cannot sit within an agency relationship. Flight Centre is appointed as agent of multiple competing airlines pursuant to the PSAA. Flight Centre could not simultaneously discharge its duties as agent to one airline while informing a consumer about the availability of flights on a competing airline.

(c) *Agency does not preclude supply of a service for the purposes of the Act*

59. The Act provides that a person has supplied a service if they have provided, granted or conferred the service. Flight Centre can “provide, grant or confer” the service to a consumer notwithstanding that it may ultimately be doing so as agent for a principal. The booking service is accordingly a “service” for the purposes of the Act, provided by Flight Centre, even if some part of that service were supplied by Flight Centre as agent of one or more airlines.

60. *Castlemaine Tooheys Ltd v Williams & Hodgson Transport Pty Ltd* (1986) 162 CLR 395 is not authority against this proposition. This Court held, in considering the competition issue raised, that there was a single supply by the brewer to the publicans, and no separate supply by the subcontractor to the publicans. The Court was not considering the question whether the subcontractor delivery business would be making a supply to the publicans were it given authority by the brewer to sell beer as agent for the brewer to publicans at a price of its choosing.

61. *ACCC v IMB Group Pty Ltd (in liq)* (2003) Aust Contract R 90-165; [2003] FCAFC 17 supports the proposition that an agent can “supply” a service by entering into a contract on behalf of a principal. At first instance, Drummond J observed in *ACCC v IMB Group Pty Ltd (in liq)* (2002) ATPR (Digest) 46-221; (2002) FCA 402 at [83] that the provisions of Part IV of the Act “are concerned with whether the way business activities are arranged is restrictive of competition... Though the contractual form into which business activities may be structured is a relevant consideration in determining whether activities come within a provision in PtIV, contractual form is not determinative of that.” His Honour found, and the Full Court agreed, that the service of insurance was “acquired” from IMB, notwithstanding that IMB was acting as agent for an insurer.<sup>35</sup> “Supply” and “acquire” are symmetrical, such that when one party to a transaction acquires services, the other party must be supplying them.<sup>36</sup> If in

<sup>35</sup> *ACCC v IMB Group Pty Ltd (in liq)* (2002) ATPR (Digest) 46-221 at [101]; *ACCC v IMB Group Pty Ltd (in liq)* (2003) Aust Contract R 90-165 at [89] (Cooper, Kiefel and Emmett JJ).

<sup>36</sup> See *Cook v Pasmenco Ltd* (2000) 99 FCR 548 at 552, [26] (Lindgren J) in relation to goods. Applied to services in *ACCC v P T Garuda Indonesia Ltd* [2016] FCAFC 42 at [653] (Yates J, dissenting).

*IMB* it was possible for a person to acquire the service of insurance from an agent, it follows that it was possible for that agent to supply the service. The Full Court observed that the facts and issues in *IMB* were far removed from the facts and issues in this case: FC [162]. However, there was no further explanation to support that distinction.

(d) **Agency does not preclude competition in an economic sense**

10 62. The Act contains an inclusive definition of competition, which is an economic concept. Where an agent is free to set its own price and assumes the risk of competing to provide a service in a market by incurring its own costs, nothing in principle prevents the agent from being in competition with a principal that also directly provides that service to the market. This is particularly so when the putative “agent” is free to act against the wishes and interests of its “principal”. The principal is not competing with itself. It confronts the activities of an independent rival, acting in its own interests and against the interests of the principal. Both strive to make the sale and obtain the retail margin. They are both “friend and foe”: TJ [84] and [156].

20 63. European Union jurisprudence reflects a similar position. Whether the cognate prohibition on price-fixing<sup>37</sup> applies to an agreement between principal and agent depends upon the extent to which the principal and its agent “form a single economic unit”.<sup>38</sup> The agent will be treated as separate from the principal “if the agreements entered into between the principal and its agents confer upon the agent or allow him to perform duties which from an economic point of view are approximately the same as those carried out by an independent dealer, because they provide for the agent accepting the financial risks of selling or of the performance of the contracts entered into with third parties”.<sup>39</sup> Conversely, “where an agent, although having separate legal personality, does not independently determine his own conduct on the market, but carries out the instructions given to him by his principal, the prohibitions laid down under Article 81(1) of the EC (now Article 101 of the TFEU) do not apply to the relationship between the agent and the principal with which he forms an economic unit.”<sup>40</sup> The approach adopted by the EU in relation to whether the prohibition on price-fixing will apply to an agreement between principal and agent provides useful guidance for identifying when an Australian court should look more deeply at an agency relationship to determine whether true competition exists between the parties.

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64. Flight Centre operates shopfronts and employs staff. It seeks to secure consumers’ bookings in preference to such bookings being made directly with the airlines. It regarded the airlines as a competitive threat. Absent the arrangement that was sought by Flight Centre, Flight Centre and the airlines competed and would compete to win consumers on, among other things, price.

50 <sup>37</sup> Which was Article 81(1) of the Treaty establishing the European Community (EC) and is now Article 101(1) of the Treaty on the Functioning of the European Union (TFEU).

<sup>38</sup> *DaimlerChrysler AG v Commission of the European Communities* (2005) ECR II-3319, at [86].

<sup>39</sup> *DaimlerChrysler AG v Commission of the European Communities* (2005) ECR II-3319 at [87].

<sup>40</sup> *DaimlerChrysler AG v Commission of the European Communities* (2005) ECR II-3319 at [88].

There is no reason that this limited, even narrow, agency relationship would preclude competition in an economic sense. The contrary conclusion is inconsistent with the perceptions of the market participants and the expert economic evidence of Dr Fitzgerald.

**(3) Flight Centre and the airlines supplied substitutable booking services**

10 65. The Full Court concluded that a fundamental difficulty with the booking services market was the fact that Flight Centre could provide information about, and facilitate travel on, multiple airlines, while an airline could only provide a booking service with respect to its own flights (or affiliated airlines): FC [164]. On this basis, the Court erroneously concluded that, while there would be separate markets for the supply of each airline's booking services, there could be no single market for booking services to airlines: FC [164] and that any booking services supplied by airlines were not substitutable for those supplied by Flight Centre: FC [165]-[166].

20 66. However, this is merely to recognise that, on the supply side, the extent of available booking services differs as between Flight Centre (and other travel agents) and the various airlines. It does not entail that there is a separate booking services market in respect of each airline. Analysed by reference to demand-side substitution – which the Full Court did not consider – consumers are able to acquire contractual rights in respect of flights made available for sale by Flight Centre, other travel agents and multiple air carriers. The resultant transactions occur in one, and not multiple, markets. Demand-side substitution constitutes the most immediate and effective disciplinary force on suppliers of a product, in particular in relation to pricing decisions.<sup>41</sup>

30 67. An important determinant of a consumer's choice of booking service is the price of the flight that the booking facilitates. If Singapore Airlines and Emirates each offer competitively priced flights, and provide a booking service of direct internet sales to facilitate this, the two booking services are substitutable because the underlying flights are substitutable. The Trial Judge correctly recognised that airlines offering booking services directly to the public became competitors in "the downstream or distribution functional level of the overarching market for international travel and ancillary products": TJ [142].

40 68. The Trial Judge identified the market as one for the supply of both distribution and booking services in which both the airlines and travel agents, including Flight Centre, competed. The services that both Flight Centre and the airline supplied in competition with each other were booking and distribution services: TJ [113], [138] [139].

50 69. The distribution services market is the obverse of the booking services market. The issue that arose in respect to distribution services was whether the airlines competed in relation to those services by self-supply. The Full Court accepted, by reference to *Re Fortescue Metals Group Ltd* (2010) 242 FLR 136; (2010)

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<sup>41</sup> *European Commission Notice on the Definition of the Relevant Market* OJ C 372 [1997] at [13].

271 ALR 256 at [1035]-[1039] that, as a matter of economic principle, it might be open to regard self-supply as forming part of the market where a single legal entity is comprised of separate economic units: FC [137]. However, *Re Fortescue* does not refer to a requirement that there be separate economic units within a legal entity for a self-supplier to be a participant in a market. Rather, the relevant question is whether self-supply of distribution services by the airlines is substitutable for, and therefore an economic constraint upon, the supply of distribution services by travel agents. In any event, while the Full Court was wrong to conclude that airlines do not self-supply distribution services, it is irrelevant to the outcome of this appeal. It is the effect of the elimination of competition on the price for the booking services, namely the retail or distribution margin, that is the critical issue in this proceeding.

70. The arrangement that Flight Centre sought to induce three airlines to make was one that would have eliminated price competition with those airlines in that market, thereby maintaining or controlling the price that Flight Centre charged for its distribution and booking services.

**(4) Analysis of substitutability by the Trial Judge**

71. Finally, the Full Court stated that there was no analysis by the Trial Judge of substitutability in relation to booking services and concluded that the booking services of the airlines and Flight Centre were not substitutable: FC [166]-[167]. Four errors affected that conclusion.

72. *First*, the Full Court asserted that "neither Flight Centre nor the airlines exacted any price from consumers in respect of so-called booking services": FC [167]. This was factually incorrect: see [10] herein. *Secondly*, the Full Court proceeded on the premise that the respective booking services of Flight Centre and the airlines were not substitutable because the airlines could offer a booking service only with respect to their own flights. This error is addressed at [65] – [66] with respect to the proposition that there must be multiple booking services markets. *Thirdly*, the Full Court evaluated competition with respect to the booking service as if it was a primary, rather than ancillary, product. However, the booking service does not stand alone. It is supplied by Flight Centre and the airlines to enable the acquisition of the primary product, the international passenger air travel service. There is still a service supplied, and Flight Centre and the airlines are rivals to supply that service, as a matter of fact (as found by the Trial Judge). Whether the competition with respect to that service should be analysed by defining the market as being only with respect to that supply, or as conduct taking place within the larger market for flights, will depend upon the competition issue that confronts the Court. *Fourthly*, precise quantification of the degree of substitutability is unnecessary. The facts of competition and rivalry speak for themselves.

**C THE ACCC'S ALTERNATIVE CASE: COMPETITION TO SUPPLY FLIGHTS**

73. The Full Court recognised that there was rivalry between Flight Centre and the airlines, but concluded that the relevant rivalry concerned the supply of international passenger air travel services to consumers: FC [171]-[182]. The

only product supplied in that market was international passenger air travel services or flights, not services relating to the distribution or booking of flights. Accordingly, the Full Court concluded that the rivalry did not occur in a market in which both Flight Centre and the airlines supplied goods or services in competition with each other. Instead, Flight Centre operated in this market only as an agent for the airlines.

- 10 74. The Trial Judge made findings necessary to establish an attempt by Flight Centre to induce the airlines to enter into an arrangement that would have contravened the Act by fixing, controlling or maintaining the price for flights supplied by airlines and Flight Centre, if that was the service that Flight Centre and the airlines competed to supply. His Honour found that Flight Centre proposed a provision that would prevent the airlines concerned from selling their air fares below a specified floor. This was a necessary step towards the Trial Judge's conclusion as to the purpose, effect or likely effect of fixing, controlling or maintaining Flight Centre's retail or distribution margin if the conduct is analysed using the primary case: TJ [114] and [160]. The Full Court held that, in that market, travel agents, such as Flight Centre, plainly wanted to sell as many flights as they could on behalf of the airlines. The more flights sold the greater the retail margin retained from consumers: FC [173] – [175].
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- 30 75. The meaning of "supply" is addressed in Section B(1)(b)-(d) above. If the relevant competition is with respect to the supply of "flights", the service relevantly supplied is the contract of carriage for international flight. By entering into a contract of carriage with a consumer on behalf an airline, Flight Centre provided, granted or conferred the right to carriage (or best endeavours at carriage) to, or on, the consumer. It follows that it supplied a service for the purposes of the Act. As in *IMB*,<sup>42</sup> what was of concern to Flight Centre was not that a consumer purchased a flight on a particular airline, but that the consumer purchased a flight through Flight Centre.
- 40 76. As to price, if Flight Centre and the airlines competed to supply flights, the provision of the arrangement or understanding proposed by Flight Centre would have the purpose, effect or likely effect of fixing, controlling or maintaining the price at which both the airlines and Flight Centre supplied airfares.<sup>43</sup>
77. The meaning of "competition" is addressed in Section B(1)(c) above. Both the Full Court and the Trial Judge recognised the rivalry between Flight Centre and the airlines. If that rivalry should be characterised as occurring with respect to flights, rather than at the separate functional level of the booking services, there is no reason that this is not competition for the purposes of the Act.
78. The only remaining barrier to the alternative case is the argument from agency. For the reasons developed in Section B(2) above, that does not defeat competition in the present case.

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<sup>42</sup> *ACCC v IMB Group Pty Ltd (in liq)* (2003) Aust Contract R 90-165 at [89]

<sup>43</sup> *Apco Service Stations Pty Ltd v Australian Competition and Consumer Commission* (2005) 159 FCR 452 at 464, [44] (Heerey, Hely and Gyles JJ).

## D CONCLUSION

79. Once it is accepted that Flight Centre and the airlines are in competition, it follows that, whether the competition was with respect to booking services or flights, Flight Centre engaged in six courses of conduct to attempt to induce a competitor to make, or reach, a contract, arrangement or understanding containing a provision with the purpose, effect or likely effect of fixing, controlling or maintaining the price of either Flight Centre's booking services (if the market is for booking services) or flights supplied by Flight Centre and the airlines (if the market is for flights).

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## PART VII LEGISLATIVE PROVISIONS

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80. The relevant provisions of the Act are set out in full in the Annexure.

## PART VIII ORDERS SOUGHT

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81. The appellant seeks the following orders:

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81.1. The orders of the Full Court of the Federal Court dated 31 July 2015 be overturned.

81.2. The matter be remitted to the Full Court of the Federal Court for the determination of the appeal and cross appeal as to penalty.

81.3. The respondent pay the appellants' costs of the proceedings in the Full Court of the Federal Court and in this Court.

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81.4. Such further or other orders as the Court deems appropriate.

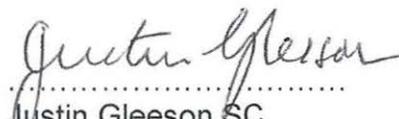
## PART IX TIME ESTIMATE

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82. It is estimated that 2 hours will be required for the presentation of the oral argument of the appellants in chief and 15 minutes in reply.

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Dated: 13 April 2016

  
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## ANNEXURE



# Trade Practices Act 1974

**Act No. 51 of 1974 as amended**

This compilation was prepared on 24 December 2008  
taking into account amendments up to Act No. 139 of 2008

**Volume 1** includes: Table of Contents  
Sections 1 – 119

The text of any of those amendments not in force  
on that date is appended in the Notes section

The operation of amendments that have been incorporated may be  
affected by application provisions that are set out in the Notes section

**Volume 2** includes: Table of Contents  
Sections 10.01 – 173  
Schedule

**Volume 3** includes: Note 1  
Table of Acts  
Act Notes  
Table of Amendments  
Note 2  
Table A

Prepared by the Office of Legislative Drafting and Publishing,  
Attorney-General's Department, Canberra

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# **An Act relating to certain Trade Practices**

## **Part I—Preliminary**

### **1 Short title** *[see Note 1]*

This Act may be cited as the *Trade Practices Act 1974*.

### **2 Object of this Act**

The object of this Act is to enhance the welfare of Australians through the promotion of competition and fair trading and provision for consumer protection.

### **2A Application of Act to Commonwealth and Commonwealth authorities**

- (1) Subject to this section and sections 44AC, 44E and 95D, this Act binds the Crown in right of the Commonwealth in so far as the Crown in right of the Commonwealth carries on a business, either directly or by an authority of the Commonwealth.
- (2) Subject to the succeeding provisions of this section, this Act applies as if:
  - (a) the Commonwealth, in so far as it carries on a business otherwise than by an authority of the Commonwealth; and
  - (b) each authority of the Commonwealth (whether or not acting as an agent of the Crown in right of the Commonwealth) in so far as it carries on a business;  
were a corporation.
- (3) Nothing in this Act makes the Crown in right of the Commonwealth liable to a pecuniary penalty or to be prosecuted for an offence.
- (3A) The protection in subsection (3) does not apply to an authority of the Commonwealth.
- (4) Part IV does not apply in relation to the business carried on by the Commonwealth in developing, and disposing of interests in, land in the Australian Capital Territory.

## Part I Preliminary

### Section 3

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**government body** means the Commonwealth, a State, a Territory, an authority of the Commonwealth or an authority of a State or Territory.

**licence** means a licence that allows the licensee to supply goods or services.

**primary products** means:

- (a) agricultural or horticultural produce; or
  - (b) crops, whether on or attached to the land or not; or
  - (c) animals (whether dead or alive); or
  - (d) the bodily produce (including natural increase) of animals.
- (4) For the purposes of this section, an authority of the Commonwealth or an authority of a State or Territory is **non-commercial** if:
- (a) it is constituted by only one person; and
  - (b) it is neither a trading corporation nor a financial corporation.

### 3 Repeal

The *Restrictive Trade Practices Act 1971* and the *Restrictive Trade Practices Act 1972* are repealed.

### 4 Interpretation

- (1) In this Act, unless the contrary intention appears:

**acquire** includes:

- (a) in relation to goods—acquire by way of purchase, exchange or taking on lease, on hire or on hire-purchase; and
- (b) in relation to services—accept.

**AEMC** or **Australian Energy Market Commission** means the body established by section 5 of the *Australian Energy Market Commission Establishment Act 2004* of South Australia.

**AER** or **Australian Energy Regulator** means the body established by section 44AE.

**AER Chair** means the Chair of the AER.

**AER member** means a member of the AER.

*competition* includes competition from imported goods or from services rendered by persons not resident or not carrying on business in Australia.

*Competition Principles Agreement* means the Competition Principles Agreement made on 11 April 1995 between the Commonwealth, New South Wales, Victoria, Queensland, Western Australia, South Australia, Tasmania, the Australian Capital Territory and the Northern Territory, being that agreement as in force from time to time.

*Conduct Code Agreement* means the Conduct Code Agreement made on 11 April 1995 between the Commonwealth, New South Wales, Victoria, Queensland, Western Australia, South Australia, Tasmania, the Australian Capital Territory and the Northern Territory, being that agreement as in force from time to time.

*corporation* means a body corporate that:

- (a) is a foreign corporation;
- (b) is a trading corporation formed within the limits of Australia or is a financial corporation so formed;
- (c) is incorporated in a Territory; or
- (d) is the holding company of a body corporate of a kind referred to in paragraph (a), (b) or (c).

*Council* means the National Competition Council established by section 29A.

*Councillor* means a member of the Council, including the Council President.

*Council President* means the Council President referred to in subsection 29C(1).

*covenant* means a covenant (including a promise not under seal) annexed to or running with an estate or interest in land (whether at law or in equity and whether or not for the benefit of other land), and *proposed covenant* has a corresponding meaning.

*debenture* includes debenture stock, bonds, notes and any other document evidencing or acknowledging indebtedness of a body corporate, whether constituting a charge on property of the body corporate or not.

*personal injury* has (except in section 68B) a meaning affected by section 4KA.

*practice of exclusive dealing* means the practice of exclusive dealing referred to in subsection 47(2), (3), (4), (5), (6), (7), (8) or (9).

*practice of resale price maintenance* means the practice of resale price maintenance referred to in Part VIII.

*President* means the President of the Tribunal and includes a person appointed to act as President of the Tribunal.

*presidential member* or *presidential member of the Tribunal* means the President or a Deputy President.

*price* includes a charge of any description.

*provision*, in relation to an understanding, means any matter forming part of the understanding.

*Registrar* means the Registrar of the Tribunal.

*require*, in relation to the giving of a covenant, means require or demand the giving of a covenant, whether by way of making a contract containing the covenant or otherwise, and whether or not a covenant is given in pursuance of the requirement or demand.

*send* includes deliver, and *sent* and *sender* have corresponding meanings.

*services* includes any rights (including rights in relation to, and interests in, real or personal property), benefits, privileges or facilities that are, or are to be, provided, granted or conferred in trade or commerce, and without limiting the generality of the foregoing, includes the rights, benefits, privileges or facilities that are, or are to be, provided, granted or conferred under:

- (a) a contract for or in relation to:
  - (i) the performance of work (including work of a professional nature), whether with or without the supply of goods;
  - (ii) the provision of, or the use or enjoyment of facilities for, amusement, entertainment, recreation or instruction; or

- (iii) the conferring of rights, benefits or privileges for which remuneration is payable in the form of a royalty, tribute, levy or similar exaction;
  - (b) a contract of insurance;
  - (c) a contract between a banker and a customer of the banker entered into in the course of the carrying on by the banker of the business of banking; or
  - (d) any contract for or in relation to the lending of moneys;
- but does not include rights or benefits being the supply of goods or the performance of work under a contract of service.

*share* includes stock.

***South Australian Electricity Legislation*** means:

- (a) the National Electricity Law set out in the Schedule to the *National Electricity (South Australia) Act 1996* of South Australia as in force from time to time; and
- (b) any regulations, as in force from time to time, made under Part 4 of that Act.

The reference in paragraph (a) to the National Electricity Law set out in the Schedule to the *National Electricity (South Australia) Act 1996* of South Australia as in force from time to time includes a reference to any Rules or other instruments, as in force from time to time, made or having effect under that Law.

***South Australian Gas Legislation*** means:

- (a) the National Gas Law set out in the Schedule to the *National Gas (South Australia) Act 2008* of South Australia as in force from time to time; and
- (b) any regulations, as in force from time to time, made under Part 3 of that Act.

The reference in paragraph (a) to the National Gas Law set out in the Schedule to the *National Gas (South Australia) Act 2008* of South Australia as in force from time to time includes a reference to any Rules or other instruments, as in force from time to time, made or having effect under that Law.

***State/Territory AER member*** means an AER member referred to in section 44AP.

***State/Territory energy law*** means any of the following laws:

- (a) a uniform energy law that applies as a law of a State or Territory;
- (b) a law of a State or Territory that applies a law mentioned in paragraph (a) as a law of its own jurisdiction;
- (c) any other provisions of a law of a State or Territory that:
  - (i) relate to energy; and
  - (ii) are prescribed by the regulations for the purposes of this paragraph;
 being those provisions as in force from time to time.

*supply*, when used as a verb, includes:

- (a) in relation to goods—supply (including re-supply) by way of sale, exchange, lease, hire or hire-purchase; and
- (b) in relation to services—provide, grant or confer;

and, when used as a noun, has a corresponding meaning, and *supplied* and *supplier* have corresponding meanings.

*Territory* means:

- (a) an internal Territory; or
- (b) the Territory of Christmas Island; or
- (c) the Territory of Cocos (Keeling) Islands.

*the Court* or *the Federal Court* means the Federal Court of Australia.

*the Family Court* means the Family Court of Australia.

*trade or commerce* means trade or commerce within Australia or between Australia and places outside Australia.

*trading corporation* means a trading corporation within the meaning of paragraph 51(xx) of the Constitution.

*Tribunal* means the Australian Competition Tribunal, and includes a member of that Tribunal or a Division of that Tribunal performing functions of that Tribunal.

*uniform energy law* means:

- (a) the South Australian Electricity Legislation; or
- (b) the South Australian Gas Legislation; or
- (c) the Western Australian Gas Legislation; or
- (d) provisions of a law of a State or Territory that:

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- (e) without limiting by implication the meaning of the expression *services* in subsection 4(1), the obtaining of credit by a person in connection with the acquisition of goods or services by him or her shall be deemed to be the acquisition by him or her of a service and any amount by which the amount paid or payable by him or her for the goods or services is increased by reason of his or her so obtaining credit shall be deemed to be paid or payable by him or her for that service.
- (3) Where it is alleged in any proceeding under this Act or in any other proceeding in respect of a matter arising under this Act that a person was a consumer in relation to particular goods or services, it shall be presumed, unless the contrary is established, that the person was a consumer in relation to those goods or services.
- (4) In this section, *commercial road vehicle* means a vehicle or trailer acquired for use principally in the transport of goods on public roads.

**4C Acquisition, supply and re-supply**

In this Act, unless the contrary intention appears:

- (a) a reference to the acquisition of goods includes a reference to the acquisition of property in, or rights in relation to, goods in pursuance of a supply of the goods;
- (b) a reference to the supply or acquisition of goods or services includes a reference to agreeing to supply or acquire goods or services;
- (c) a reference to the supply or acquisition of goods includes a reference to the supply or acquisition of goods together with other property or services, or both;
- (d) a reference to the supply or acquisition of services includes a reference to the supply or acquisition of services together with property or other services, or both;
- (e) a reference to the re-supply of goods acquired from a person includes a reference to:
  - (i) a supply of the goods to another person in an altered form or condition; and
  - (ii) a supply to another person of goods in which the first-mentioned goods have been incorporated;

- (f) a reference to the re-supply of services (the *original services*) acquired from a person (the *original supplier*) includes a reference to:
  - (i) a supply of the original services to another person in an altered form or condition; and
  - (ii) a supply to another person of other services that are substantially similar to the original services, and could not have been supplied if the original services had not been acquired by the person who acquired them from the original supplier.

#### 4D Exclusionary provisions

- (1) A provision of a contract, arrangement or understanding, or of a proposed contract, arrangement or understanding, shall be taken to be an exclusionary provision for the purposes of this Act if:
  - (a) the contract or arrangement was made, or the understanding was arrived at, or the proposed contract or arrangement is to be made, or the proposed understanding is to be arrived at, between persons any 2 or more of whom are competitive with each other; and
  - (b) the provision has the purpose of preventing, restricting or limiting:
    - (i) the supply of goods or services to, or the acquisition of goods or services from, particular persons or classes of persons; or
    - (ii) the supply of goods or services to, or the acquisition of goods or services from, particular persons or classes of persons in particular circumstances or on particular conditions;by all or any of the parties to the contract, arrangement or understanding or of the proposed parties to the proposed contract, arrangement or understanding or, if a party or proposed party is a body corporate, by a body corporate that is related to the body corporate.
- (2) A person shall be deemed to be competitive with another person for the purposes of subsection (1) if, and only if, the first-mentioned person or a body corporate that is related to that person is, or is likely to be, or, but for the provision of any contract, arrangement or understanding or of any proposed

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contract, arrangement or understanding, would be, or would be likely to be, in competition with the other person, or with a body corporate that is related to the other person, in relation to the supply or acquisition of all or any of the goods or services to which the relevant provision of the contract, arrangement or understanding or of the proposed contract, arrangement or understanding relates.

### 4E Market

For the purposes of this Act, unless the contrary intention appears, *market* means a market in Australia and, when used in relation to any goods or services, includes a market for those goods or services and other goods or services that are substitutable for, or otherwise competitive with, the first-mentioned goods or services.

### 4F References to purpose or reason

- (1) For the purposes of this Act:
  - (a) a provision of a contract, arrangement or understanding or of a proposed contract, arrangement or understanding, or a covenant or a proposed covenant, shall be deemed to have had, or to have, a particular purpose if:
    - (i) the provision was included in the contract, arrangement or understanding or is to be included in the proposed contract, arrangement or understanding, or the covenant was required to be given or the proposed covenant is to be required to be given, as the case may be, for that purpose or for purposes that included or include that purpose; and
    - (ii) that purpose was or is a substantial purpose; and
  - (b) a person shall be deemed to have engaged or to engage in conduct for a particular purpose or a particular reason if:
    - (i) the person engaged or engages in the conduct for purposes that included or include that purpose or for reasons that included or include that reason, as the case may be; and
    - (ii) that purpose or reason was or is a substantial purpose or reason.

## Part IV—Restrictive trade practices

### 45 Contracts, arrangements or understandings that restrict dealings or affect competition

- (1) If a provision of a contract made before the commencement of the *Trade Practices Amendment Act 1977*:
  - (a) is an exclusionary provision; or
  - (b) has the purpose, or has or is likely to have the effect, of substantially lessening competition;that provision is unenforceable in so far as it confers rights or benefits or imposes duties or obligations on a corporation.
- (2) A corporation shall not:
  - (a) make a contract or arrangement, or arrive at an understanding, if:
    - (i) the proposed contract, arrangement or understanding contains an exclusionary provision; or
    - (ii) a provision of the proposed contract, arrangement or understanding has the purpose, or would have or be likely to have the effect, of substantially lessening competition; or
  - (b) give effect to a provision of a contract, arrangement or understanding, whether the contract or arrangement was made, or the understanding was arrived at, before or after the commencement of this section, if that provision:
    - (i) is an exclusionary provision; or
    - (ii) has the purpose, or has or is likely to have the effect, of substantially lessening competition.
- (3) For the purposes of this section and section 45A, *competition*, in relation to a provision of a contract, arrangement or understanding or of a proposed contract, arrangement or understanding, means competition in any market in which a corporation that is a party to the contract, arrangement or understanding or would be a party to the proposed contract, arrangement or understanding, or any body corporate related to such a corporation, supplies or acquires, or is likely to supply or acquire, goods or services or would, but for the

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provision, supply or acquire, or be likely to supply or acquire, goods or services.

- (4) For the purposes of the application of this section in relation to a particular corporation, a provision of a contract, arrangement or understanding or of a proposed contract, arrangement or understanding shall be deemed to have or to be likely to have the effect of substantially lessening competition if that provision and any one or more of the following provisions, namely:
- (a) the other provisions of that contract, arrangement or understanding or proposed contract, arrangement or understanding; and
  - (b) the provisions of any other contract, arrangement or understanding to which the corporation or a body corporate related to the corporation is or would be a party;
- together have or are likely to have that effect.
- (5) This section does not apply to or in relation to:
- (a) a provision of a contract where the provision constitutes a covenant to which section 45B applies or, but for subsection 45B(9), would apply;
  - (b) a provision of a proposed contract where the provision would constitute a covenant to which section 45B would apply or, but for subsection 45B(9), would apply; or
  - (c) a provision of a contract, arrangement or understanding or of a proposed contract, arrangement or understanding in so far as the provision relates to:
    - (i) conduct that contravenes section 48; or
    - (ii) conduct that would contravene section 48 but for the operation of subsection 88(8A); or
    - (iii) conduct that would contravene section 48 if this Act defined the acts constituting the practice of resale price maintenance by reference to the maximum price at which goods or services are to be sold or supplied or are to be advertised, displayed or offered for sale or supply.
- (6) The making of a contract, arrangement or understanding does not constitute a contravention of this section by reason that the contract, arrangement or understanding contains a provision the giving effect to which would, or would but for the operation of

subsection 47(10) or 88(8) or section 93, constitute a contravention of section 47 and this section does not apply to or in relation to the giving effect to a provision of a contract, arrangement or understanding by way of:

- (a) engaging in conduct that contravenes, or would but for the operation of subsection 47(10) or 88(8) or section 93 contravene, section 47; or
  - (b) doing an act by reason of a breach or threatened breach of a condition referred to in subsection 47(2), (4), (6) or (8), being an act done by a person at a time when:
    - (i) an authorization under subsection 88(8) is in force in relation to conduct engaged in by that person on that condition; or
    - (ii) by reason of subsection 93(7) conduct engaged in by that person on that condition is not to be taken to have the effect of substantially lessening competition within the meaning of section 47; or
    - (iii) a notice under subsection 93(1) is in force in relation to conduct engaged in by that person on that condition.
- (6A) The following conduct:
- (a) the making of a dual listed company arrangement;
  - (b) the giving effect to a provision of a dual listed company arrangement;
- does not contravene this section if the conduct would, or would apart from subsection 88(8B), contravene section 49.
- (7) This section does not apply to or in relation to a contract, arrangement or understanding in so far as the contract, arrangement or understanding provides, or to or in relation to a proposed contract, arrangement or understanding in so far as the proposed contract, arrangement or understanding would provide, directly or indirectly for the acquisition of any shares in the capital of a body corporate or any assets of a person.
- (8) This section does not apply to or in relation to a contract, arrangement or understanding, or a proposed contract, arrangement or understanding, the only parties to which are or would be bodies corporate that are related to each other.
- (8A) Subsection (2) does not apply to a corporation engaging in conduct described in that subsection if:
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- (a) the corporation has given the Commission a collective bargaining notice under subsection 93AB(1) describing the conduct; and
  - (b) the notice is in force under section 93AD.
- (9) The making by a corporation of a contract that contains a provision in relation to which subsection 88(1) applies is not a contravention of subsection (2) of this section if:
- (a) the contract is subject to a condition that the provision will not come into force unless and until the corporation is granted an authorization to give effect to the provision; and
  - (b) the corporation applies for the grant of such an authorization within 14 days after the contract is made;
- but nothing in this subsection prevents the giving effect by a corporation to such a provision from constituting a contravention of subsection (2).

**45A Contracts, arrangements or understandings in relation to prices**

- (1) Without limiting the generality of section 45, a provision of a contract, arrangement or understanding, or of a proposed contract, arrangement or understanding, shall be deemed for the purposes of that section to have the purpose, or to have or to be likely to have the effect, of substantially lessening competition if the provision has the purpose, or has or is likely to have the effect, as the case may be, of fixing, controlling or maintaining, or providing for the fixing, controlling or maintaining of, the price for, or a discount, allowance, rebate or credit in relation to, goods or services supplied or acquired or to be supplied or acquired by the parties to the contract, arrangement or understanding or the proposed parties to the proposed contract, arrangement or understanding, or by any of them, or by any bodies corporate that are related to any of them, in competition with each other.
- (4) Subsection (1) does not apply to a provision of a contract, arrangement or understanding, or of a proposed contract, arrangement or understanding, being a provision:
- (a) in relation to the price for goods or services to be collectively acquired, whether directly or indirectly, by parties to the contract, arrangement or understanding or by proposed parties to the proposed contract, arrangement or understanding; or

- (b) for the joint advertising of the price for the re-supply of goods or services so acquired.
- (5) For the purposes of this Act, a provision of a contract, arrangement or understanding, or of a proposed contract, arrangement or understanding, shall not be taken not to have the purpose, or not to have or to be likely to have the effect, of fixing, controlling or maintaining, or providing for the fixing, controlling or maintaining of, the price for, or a discount, allowance, rebate or credit in relation to, goods or services by reason only of:
- (a) the form of, or of that provision of, the contract, arrangement or understanding or the proposed contract, arrangement or understanding; or
  - (b) any description given to, or to that provision of, the contract, arrangement or understanding or the proposed contract, arrangement or understanding by the parties or proposed parties.
- (6) For the purposes of this Act but without limiting the generality of subsection (5), a provision of a contract, arrangement or understanding, or of a proposed contract, arrangement or understanding, shall not be taken not to have the purpose, or not to have or to be likely to have the effect, of fixing, controlling or maintaining, or providing for the fixing, controlling or maintaining of, the price for, or a discount, allowance, rebate or credit in relation to, goods or services by reason only that the provision recommends, or provides for the recommending of, such a price, discount, allowance, rebate or credit if in fact the provision has that purpose or has or is likely to have that effect.
- (7) For the purposes of the preceding provisions of this section but without limiting the generality of those provisions, a provision of a contract, arrangement or understanding, or of a proposed contract, arrangement or understanding, shall be deemed to have the purpose, or to have or to be likely to have the effect, of fixing, controlling or maintaining, or providing for the fixing, controlling or maintaining of, the price for, or a discount, allowance, rebate or credit in relation to, goods or services supplied as mentioned in subsection (1) if the provision has the purpose, or has or is likely to have the effect, of fixing, controlling or maintaining, or providing for the fixing, controlling or maintaining of, such a price, discount, allowance, rebate or credit in relation to a re-supply of the goods or services by persons to whom the goods or services are or would be
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supplied by the parties to the contract, arrangement or understanding or the proposed parties to the proposed contract, arrangement or understanding, or by any of them, or by any bodies corporate that are related to any of them.

- (8) The reference in subsection (1) to the supply or acquisition of goods or services by persons in competition with each other includes a reference to the supply or acquisition of goods or services by persons who, but for a provision of any contract, arrangement or understanding or of any proposed contract, arrangement or understanding, would be, or would be likely to be, in competition with each other in relation to the supply or acquisition of the goods or services.

**45B Covenants affecting competition**

- (1) A covenant, whether the covenant was given before or after the commencement of this section, is unenforceable in so far as it confers rights or benefits or imposes duties or obligations on a corporation or on a person associated with a corporation if the covenant has, or is likely to have, the effect of substantially lessening competition in any market in which the corporation or any person associated with the corporation supplies or acquires, or is likely to supply or acquire, goods or services or would, but for the covenant, supply or acquire, or be likely to supply or acquire, goods or services.
- (2) A corporation or a person associated with a corporation shall not:
- (a) require the giving of a covenant, or give a covenant, if the proposed covenant has the purpose, or would have or be likely to have the effect, of substantially lessening competition in any market in which:
    - (i) the corporation, or any person associated with the corporation by virtue of paragraph (7)(b), supplies or acquires, is likely to supply or acquire, or would, but for the covenant, supply or acquire, or be likely to supply or acquire, goods or services; or
    - (ii) any person associated with the corporation by virtue of the operation of paragraph (7)(a) supplies or acquires, is likely to supply or acquire, or would, but for the covenant, supply or acquire, or be likely to supply or acquire, goods or services, being a supply or acquisition
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**Part VI—Enforcement and remedies****75B Interpretation**

- (1) A reference in this Part to a person involved in a contravention of a provision of Part IV, IVA, IVB, V or VC, or of section 75AU, 75AYA or 95AZN, shall be read as a reference to a person who:
  - (a) has aided, abetted, counselled or procured the contravention;
  - (b) has induced, whether by threats or promises or otherwise, the contravention;
  - (c) has been in any way, directly or indirectly, knowingly concerned in, or party to, the contravention; or
  - (d) has conspired with others to effect the contravention.
- (2) In this Part, unless the contrary intention appears:
  - (a) a reference to the Court in relation to a matter is a reference to any court having jurisdiction in the matter;
  - (b) a reference to the Federal Court is a reference to the Federal Court of Australia; and
  - (c) a reference to a judgment is a reference to a judgment, decree or order, whether final or interlocutory.

**76 Pecuniary penalties**

- (1) If the Court is satisfied that a person:
  - (a) has contravened any of the following provisions:
    - (i) a provision of Part IV;
    - (ii) section 75AU or 75AYA;
    - (iii) section 95AZN; or
  - (b) has attempted to contravene such a provision; or
  - (c) has aided, abetted, counselled or procured a person to contravene such a provision; or
  - (d) has induced, or attempted to induce, a person, whether by threats or promises or otherwise, to contravene such a provision; or

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(e) has been in any way, directly or indirectly, knowingly concerned in, or party to, the contravention by a person of such a provision; or

(f) has conspired with others to contravene such a provision; the Court may order the person to pay to the Commonwealth such pecuniary penalty, in respect of each act or omission by the person to which this section applies, as the Court determines to be appropriate having regard to all relevant matters including the nature and extent of the act or omission and of any loss or damage suffered as a result of the act or omission, the circumstances in which the act or omission took place and whether the person has previously been found by the Court in proceedings under this Part or Part XIB to have engaged in any similar conduct.

Note: Section 87AA provides that, if boycott conduct is involved in proceedings, the Court must have regard to certain matters in exercising its powers under this Part. (*Boycott conduct* is defined in subsection 87AA(2).)

(1A) The pecuniary penalty payable under subsection (1) by a body corporate is not to exceed:

(a) for each act or omission to which this section applies that relates to section 45D, 45DB, 45E or 45EA—\$750,000; and

(b) for each act or omission to which this section applies that relates to any other provision of Part IV—the greatest of the following:

(i) \$10,000,000;

(ii) if the Court can determine the value of the benefit that the body corporate, and any body corporate related to the body corporate, have obtained directly or indirectly and that is reasonably attributable to the act or omission—3 times the value of that benefit;

(iii) if the Court cannot determine the value of that benefit—10% of the annual turnover of the body corporate during the period (the *turnover period*) of 12 months ending at the end of the month in which the act or omission occurred; and

(c) for each act or omission to which this section applies that relates to section 95AZN—\$33,000; and

(d) for each other act or omission to which this section applies—\$10,000,000.

Note: For *annual turnover*, see subsection (5).

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- (1B) The pecuniary penalty payable under subsection (1) by a person other than a body corporate is not to exceed:
- (a) for each act or omission to which this section applies that relates to section 95AZN—\$6,600; and
  - (b) for each other act or omission to which this section applies—\$500,000.
- (2) Nothing in subsection (1) authorises the making of an order against an individual because the individual has contravened or attempted to contravene, or been involved in a contravention of, section 45D, 45DA, 45DB, 45E or 45EA.
- (3) If conduct constitutes a contravention of two or more provisions of Part IV, a proceeding may be instituted under this Act against a person in relation to the contravention of any one or more of the provisions but a person is not liable to more than one pecuniary penalty under this section in respect of the same conduct.
- (4) The single pecuniary penalty that may be imposed in accordance with subsection (3) in respect of conduct that contravenes provisions to which the 2 limits in paragraphs (1A)(a) and (b) apply is an amount up to the higher of those limits.

*Annual turnover*

- (5) For the purposes of this section, the *annual turnover* of a body corporate, during the turnover period, is the sum of the values of all the supplies that the body corporate, and any body corporate related to the body corporate, have made, or are likely to make, during that period, other than:
- (a) supplies made from any of those bodies corporate to any other of those bodies corporate; or
  - (b) supplies that are input taxed; or
  - (c) supplies that are not for consideration (and are not taxable supplies under section 72-5 of the *A New Tax System (Goods and Services Tax) Act 1999*); or
  - (d) supplies that are not made in connection with an enterprise that the body corporate carries on; or
  - (e) supplies that are not connected with Australia.

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- (6) Expressions used in subsection (5) that are also used in the *A New Tax System (Goods and Services Tax) Act 1999* have the same meaning as in that Act.

**76A Defence to proceedings under section 76 relating to a contravention of section 75AYA or 95AZN**

- (1) In this section:

*contravention*, in relation to a section, includes conduct referred to in paragraph 76(1)(b), (c), (d), (e) or (f) that relates to a contravention of the section.

- (2) In proceedings against a person (the *respondent*) under section 76 in relation to an alleged contravention of section 75AYA or 95AZN, it is a defence if the respondent establishes:
- (a) that the contravention in respect of which the proceedings were instituted was due to reasonable mistake; or
  - (b) that the contravention in respect of which the proceedings were instituted was due to reasonable reliance on information supplied by another person; or
  - (c) that:
    - (i) the contravention in respect of which the proceedings were instituted was due to the act or default of another person, to an accident or to some other cause beyond the respondent's control; and
    - (ii) the respondent took reasonable precautions and exercised due diligence to avoid the contravention.
- (3) In paragraphs (2)(b) and (c), *another person* does not include a person who was:
- (a) a servant or agent of the respondent; or
  - (b) if the respondent is a body corporate—a director, servant or agent of the respondent;
- at the time when the alleged contravention occurred.

**76B What happens if substantially the same conduct is a contravention of section 75AYA or 95AZN and an offence?**

- (1) In this section:
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- (11) This section applies only in relation to fines imposed for offences committed after the commencement of this section.

### **79B Preference must be given to compensation for victims**

If the Court considers that:

- (a) it is appropriate to order a person (the *defendant*):
  - (i) to pay a pecuniary penalty under section 76; or
  - (ii) to impose a fine under Part VC;in respect of a contravention, or an involvement in a contravention, of this Act; and
- (b) it is appropriate to order the defendant to pay compensation to a person who has suffered loss or damage in respect of the contravention or the involvement; and
- (c) the defendant does not have sufficient financial resources to pay both the pecuniary penalty or fine and the compensation;

the Court must give preference to making an order for compensation.

### **80 Injunctions**

- (1) Subject to subsections (1A), (1AAA) and (1B), where, on the application of the Commission or any other person, the Court is satisfied that a person has engaged, or is proposing to engage, in conduct that constitutes or would constitute:
- (a) a contravention of any of the following provisions:
    - (i) a provision of Part IV, IVA, IVB, V or VC;
    - (ii) section 75AU or 75AYA;
  - (b) attempting to contravene such a provision;
  - (c) aiding, abetting, counselling or procuring a person to contravene such a provision;
  - (d) inducing, or attempting to induce, whether by threats, promises or otherwise, a person to contravene such a provision;
  - (e) being in any way, directly or indirectly, knowingly concerned in, or party to, the contravention by a person of such a provision; or
  - (f) conspiring with others to contravene such a provision;
- the Court may grant an injunction in such terms as the Court determines to be appropriate.

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Note: Section 87AA provides that, if boycott conduct is involved in proceedings, the Court must have regard to certain matters in exercising its powers under this Part. (*Boycott conduct* is defined in subsection 87AA(2).)

- (1AA) Where an application for an injunction under subsection (1) has been made, whether before or after the commencement of this subsection, the Court may, if the Court determines it to be appropriate, grant an injunction by consent of all the parties to the proceedings, whether or not the Court is satisfied that a person has engaged, or is proposing to engage, in conduct of a kind mentioned in subsection (1).
- (1A) A person other than the Commission is not entitled to make an application under subsection (1) for an injunction by reason that a person has contravened or attempted to contravene or is proposing to contravene, or has been or is proposing to be involved in a contravention of, section 50, 75AU or 75AYA.
- (1AAA) Subject to subsection (1B), a person other than the Minister or the Commission may not apply for an injunction on the ground of:
- (a) a person's actual, attempted or proposed contravention of section 50A; or
  - (b) a person's actual or proposed involvement in a contravention of section 50A.
- (1B) Where the Tribunal has, on the application of a person (in this subsection referred to as the *applicant*) other than the Minister or the Commission, made a declaration under subsection 50A(1) in relation to the acquisition by a person of a controlling interest in a corporation, the applicant is entitled to make an application under subsection (1) for an injunction by reason that the corporation has contravened or attempted to contravene or is proposing to contravene subsection 50A(6) in relation to that declaration.
- (2) Where in the opinion of the Court it is desirable to do so, the Court may grant an interim injunction pending determination of an application under subsection (1).
- (3) The Court may rescind or vary an injunction granted under subsection (1) or (2).
- (4) The power of the Court to grant an injunction restraining a person from engaging in conduct may be exercised:
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- (a) whether or not it appears to the Court that the person intends to engage again, or to continue to engage, in conduct of that kind;
  - (b) whether or not the person has previously engaged in conduct of that kind; and
  - (c) whether or not there is an imminent danger of substantial damage to any person if the first-mentioned person engages in conduct of that kind.
- (5) The power of the Court to grant an injunction requiring a person to do an act or thing may be exercised:
- (a) whether or not it appears to the Court that the person intends to refuse or fail again, or to continue to refuse or fail, to do that act or thing;
  - (b) whether or not the person has previously refused or failed to do that act or thing; and
  - (c) whether or not there is an imminent danger of substantial damage to any person if the first-mentioned person refuses or fails to do that act or thing.
- (6) Where the Minister or the Commission makes an application to the Court for the grant of an injunction under this section, the Court shall not require the applicant or any other person, as a condition of granting an interim injunction, to give any undertakings as to damages.
- (6A) Subsection (6) does not apply to an application by the Minister for an injunction relating to Part IV.
- (7) Where:
- (a) in a case to which subsection (6) does not apply the Court would, but for this subsection, require a person to give an undertaking as to damages or costs; and
  - (b) the Minister gives the undertaking;
- the Court shall accept the undertaking by the Minister and shall not require a further undertaking from any other person.
- (8) Subsection (7) does not apply in relation to an application for an injunction relating to Part IV.
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