IN THE HIGH COURT OF AUSTRALIA
BRISBANE REGISTRY

No. B15 of 2016

BETWEEN: **AUSTRALIAN COMPETITION AND CONSUMER COMMISSION**

Appellant

and

FLIGHT CENTRE TRAVEL GROUP LIMITED ACN 003 377 188

Respondent

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INTERVENER'S SUBMISSIONS

Part I: Suitable for publication

1. This submission is in a form suitable for publication on the internet.

Part II: Basis for intervention

2. By summons dated 9 May 2016, the International Air Transport Association (**IATA**) seeks leave to appear as *amicus curiae* in this appeal. The summons is supported by an affidavit of Justin Paul Oliver sworn 9 May 2016.

3. IATA was granted leave to intervene in the appeal to the Full Court and made
20 both written and oral submissions in the appeal.[1]

4. IATA seeks to offer the Court a submission on law which will assist the Court in a way which the Court may not otherwise be assisted, consistent with the principles stated in *Levy v Victoria* (1997) 189 CLR 579 at 604 per Brennan CJ and *Roadshow Films Pty Ltd v iiNet Ltd* (2011) 248 CLR 37 at [4].

5. IATA's submissions concern the proper approach to the application of s.45A(1) of the *Trade Practices Act* 1974 (Cth) (**Act**) and the legal significance of the agency relationship between Flight Centre and each of Singapore Airlines, Malaysian Airlines and Emirates under the IATA Passenger Sales Agency Agreement (**PSAA**). In overview, the submissions that IATA seeks to make are:

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[1] IATA's application to intervene or appear as amicus at the trial of the proceeding was unsuccessful: *ACCC v Flight Centre Limited* [2012] FCA 1161.

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(a) The *per se* prohibition of price fixing conduct, defined in s.45A(1), requires the identification of (relevantly) the services that are the subject of the alleged price fixing arrangement and determination of whether the parties to the arrangement are in competition with each other in relation to the supply of those services. That determination does not always require an exercise in market definition, and such an exercise will distract and miscarry if it is not directed to the services that are the subject of the alleged price fixing.

(b) The facts found by the trial judge (undisturbed on appeal) were that Flight Centre attempted to make a price fixing arrangement with each of Singapore Airlines, Malaysian Airlines and Emirates (separately) in respect of the supply to consumers of the airline's international passenger air services and the distribution and booking services provided in connection with such supply.

(c) The terms of the PSAA and Preferred Airline Agreements between Flight Centre and each airline compelled the conclusion that Flight Centre was acting as agent (in the strict or core sense[2]) of the airline in respect of the supply of that airline's international passenger air services and the distribution and booking services provided in connection with such supply.

(d) As such, Flight Centre was legally incapable of being a competitor of its airline principal in respect of the supply of such services, being the services that were the subject of the alleged attempted price fixing for the purposes of s.45A(1) of the Act.

6. The foregoing submissions support the conclusions reached by the Full Court below and, as such, support the respondent to the appeal, Flight Centre.

Part III: Why leave to intervene should be granted

7. The evidence filed in support of the application for leave to intervene includes the following matters:

(a) IATA is an association of international airlines and was incorporated in Canada in 1945 with the following purposes, objects and aims:

(i) to promote safe, regular and economical air transport for the benefit of the peoples of the world, to foster air commerce and to study the problems connected therewith;

(ii) to provide means for collaboration among the air transport enterprises engaged directly or indirectly in international air transport service; and

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[2] As described at Full Court Reasons [163].

(iii) to co-operate with the International Civil Aviation Organization (the United Nations specialised agency for civil aviation) and other international organizations.[3]

(b) IATA has approximately 260 members drawn from 115 countries, including Singapore Airlines, Emirates and Malaysian Airline System Berhad (being the recipients of the communications from Flight Centre that are the subject of this proceeding).[4]

(c) One of the functions of IATA is to accredit travel agents on behalf of its member airlines throughout the world. Flight Centre is an accredited travel agent.[5] IATA has established a Passenger Agency Conference with responsibility, among other things, for approving IATA resolutions governing the relationship between IATA members and accredited travel agents. These resolutions are contained in a Travel Agent's Handbook, which is a document published by IATA and provided to IATA members and accredited travel agents. One of these IATA resolutions, contained in the Travel Agent's Handbook, is the PSAA.[6]

(d) IATA, represented by its Director General, is a party to a PSAA with each accredited travel agent, including Flight Centre. The material terms and conditions of each of these agreements are similar to, or the same as, the terms and conditions of the PSAA (the subject of findings by the trial judge and the Full Court in this proceeding).[7] IATA is also responsible for managing the PSAA on behalf of member airlines.[8]

8. By reason of the foregoing, this Court's conclusions concerning the interaction of the PSAA and Australia's competition laws will have significance to the international airline industry.

9. IATA acknowledges that the submissions it seeks to make overlap with the submissions of Flight Centre. Nevertheless, there are additional points of principle that IATA wishes to draw to the Court's attention. As the international industry association that represents most of the world's international airlines, and as the body that developed the PSAA as a standard form agreement for use between IATA member airlines and travel agents throughout the world, IATA's arguments concerning the legal consequences of the PSAA reflect some matters additional to those of Flight Centre and, thus,

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[3] Oliver affidavit [3].
[4] Oliver affidavit [8].
[5] Oliver affidavit [9].
[6] Oliver affidavit [10].
[7] Oliver affidavit [11].
[8] Oliver affidavit [12].

IATA is able to assist the Court in a way which the Court may not otherwise be assisted.

Part IV: Applicable statutes and regulations

10. The relevant provisions of the Act, as they existed at the relevant time, are set out in the annexure to the Appellant's submissions.

Part V: Submissions

A. Section 45A(1)

11. The application of s.45A(1) to a given set of circumstances requires close attention to the statutory elements. Any analysis of competition must proceed from the application of the statutory language to the impugned conduct, and not as an exercise that is disconnected from the impugned conduct.

12. Section 45A(1) deems a provision of a contract, arrangement or understanding to have the purpose, effect or likely effect of substantially lessening competition if, relevantly:

> ... the provision has the purpose, or has or is likely to have the effect ... of fixing, controlling or maintaining ... the price for services supplied or to be supplied by the parties to the contract, arrangement or understanding ... or by any of them ... in competition with each other.

13. Thus, the section requires (relevantly) that the services that are the subject of the alleged attempted price fixing be supplied by the parties to the contract, arrangement or understanding in competition with each other.[9] Consistently with the approach taken by the Full Court,[10] it is necessary to start with an examination of the services that were the subject of the impugned conduct and then consider whether the parties to the alleged arrangement are in competition in the supply of those services.

14. In some cases involving the application of s.45A(1), it may not be necessary to consider market definition at all, as the existence or absence of competition between the parties may be clear and the extent of competition is not relevant (as price fixing is prohibited *per se*). For example, in a given case, one party may be a supplier of services and the other party may be an acquirer of those services, with the result that they are not competitors. In this case, consideration of the agency relationship between Flight Centre and each airline leads to the same conclusion. Even if an exercise of market definition is undertaken, "*The*

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[9] *ACCC v Pauls Ltd* [2002] FCA 1586 at [116]; *Emirates v ACCC* [2009] FCA 312 at [22]. See also in the analogous context of section 4D: *Eastern Express Pty Ltd v General Newspapers Pty Ltd* (1991) 30 FCR 385 at 419 - 420; *News Limited v ARL* (1996) 64 FCR 410 at 560; *News Limited v South Sydney District Rugby League Football Club* (2003) 215 CLR 563 at [57] and [58] per Gummow J.

[10] Full Court Reasons [32], [74] and [129].

process of market identification or definition is ... to be undertaken with a view to assessing whether the substantive criteria for the particular contravention in issue are satisfied, in the commercial context the subject of analysis."[11]

15. The ACCC's grounds of appeal, and the stated issues arising from the grounds, are misdirected because they fail to address the services that were the subject of the alleged attempted price fixing. As a consequence, the ACCC embarks upon a largely artificial exercise in market definition that is removed from the impugned conduct. The ACCC's approach stems from its pleaded case which, as the Full Court observed, was complex and convoluted in the definition of the relevant market.[12]

B. Findings concerning price fixing

16. The trial judge's primary finding was that the services that were the subject of the alleged attempted price fixing arrangements between Flight Centre and each airline were the respective airline's international passenger air services. This can be illustrated by alleged attempt 1.

17. The relevant email is at Trial Reasons [84]. The complaint by Flight Centre concerned the prices offered by Singapore Airlines for its international passenger air services over the internet, in circumstances where Flight Centre also offered the same flights (as agent for Singapore Airlines) but could not earn a sufficient commission on the sale because of the terms on which Singapore Airlines engaged Flight Centre to sell those flights.[13]

18. The trial judge's finding about the effect of the email is at Trial Reasons [160], and reflects the ACCC's allegation (reproduced at Trial Reasons [87]). The finding was that Flight Centre attempted to make an arrangement with Singapore Airlines in respect of the fares offered by Singapore Airlines over the internet for Singapore Airline flights such that those fares:

    (a) would also be made available to be purchased through Flight Centre; and

    (b) would be sold by Singapore Airlines over the internet at a total price of no less than the sum of the nett fare (the amount that Flight Centre would have had to remit to Singapore Airlines if it had sold the fare to a customer[14]) plus Flight Centre's expected commission (the commission that Flight Centre would have been entitled to be paid by Singapore Airlines if it had sold the fare to a customer).

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[11] *ACCC v Australian and New Zealand Banking Group* [2015] FCAFC 103; 324 ALR 392 at [137].
[12] Full Court Reasons [45].
[13] Flight Centre was required to remit to Singapore Airlines the published fare loaded on the GDS less the at-source commission: Trial Reasons [33(a)].
[14] Trial Reasons [33(a)].

19. Thus, the alleged attempted price fix concerned the sale of Singapore Airlines' international passenger air services.[15] It is important to note that each alleged attempt concerned Flight Centre and one of the three airlines. The conduct did not involve any attempt to fix, control or maintain the prices charged by the three airlines in competition with each other, and no such allegation was made.

20. The trial judge also found that the likely effect of fixing, controlling or maintaining the price of (relevantly) Singapore Airlines' air services was to fix, control or maintain the margin earned by Flight Centre from selling those air services on behalf of (relevantly) Singapore Airlines.[16] The trial judge found that the margin was a relevant "price" for the purposes of s.45A(1), stating that:

> *"In this case, the money consideration was at the very least the retail or distribution margin retained by Flight Centre with the airline's permission from the gross fare paid by the would-be passenger. That was the price the airline paid for the distribution and booking service provided by Flight Centre. That was a transactionally specific consideration for that service. In addition, in transactional aggregate, Flight Centre might also become entitled to other consideration from an airline under a preferred airline agreement."* (emphasis added)[17]

21. On the trial judge's findings, there was a second service that was the subject of the alleged attempted price fixing: the distribution and booking services undertaken by Flight Centre in effecting the sale of (for alleged attempt 1) Singapore Airlines' air services.[18] As made apparent in the above passage, the "price" for those services, the so-called distribution margin, was paid by Singapore Airlines to Flight Centre. Those services were supplied by Flight Centre to Singapore Airlines pursuant to the PSAA.[19]

22. Flight Centre also provided other travel-related services to customers, including advice and bookings for tours, accommodation, ground transport and insurance. However, as the Full Court correctly observed, those services were distinct from the supply of air services and the (distribution and booking) activities associated with the supply of air services.[20] As such, those services are not relevant to the proper application of s.45A(1).

23. Having identified the services that were the subject of the alleged attempted price fixing, it is necessary to consider whether Singapore Airlines and Flight

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[15] The trial judge found that the email was directed to persuading Singapore Airlines no longer to "undermine" or "undercut" Flight Centre by offering lower fares directly to the public: Trial Reasons [156] and [157]. See also Full Court Reasons at [34].
[16] Trial Reasons [149].
[17] Trial Reasons[151].
[18] As observed by the Full Court, the trial judge's findings did not correspond with any of the markets pleaded by the ACCC: Full Court Reasons [126] – [129].
[19] Trial Reasons [21] and [22]; Full Court Reasons [131].
[20] Full Court Reasons [21], [161].

Centre were in competition with each other in respect of the supply of those services.

C. The agency relationship between Flight Centre and each airline

24. The trial judge found that, so far as the sale of air travel services is concerned, the relationship between each airline and Flight Centre was that of principal and agent.[21] That finding was not in dispute on appeal to the Full Court.[22] It is plainly supported by the contractual terms and conditions governing the relationship between each airline and Flight Centre, which were contained in the PSAA[23] and various "Preferred Airline Agreements".[24]

25. The PSAA was a standard form agreement entered into between IATA, on behalf of its member airlines (which included each of Singapore Airlines, Malaysian Airlines and Emirates), and individual travel agents (including Flight Centre).[25] As reproduced in the Full Court Reasons at [14], the PSAA contained the following terms:

> *"3. SELLING CARRIER'S SERVICES*
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> *3.1 the Agent is authorised to sell air passenger transportation on the services of the Carrier and on the services of other carriers as authorised by the Carrier. The sale of air passenger transportation means all activities necessary to provide a passenger with a valid contract of carriage including but not limited to the issuance of a valid Traffic Document and the collection of monies therefor. The Agent is also authorised to sell such ancillary and other services as the carrier may authorise;*
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> *3.2 all services sold pursuant to this Agreement shall be sold on behalf of the Carrier and in compliance with Carrier's tariffs, conditions of carriage and the written instructions of the Carrier as provided to the Agent. The Agent shall not in any way vary or modify the terms and conditions set forth in any Traffic Document used for services provided by the Carrier, and the Agent shall complete these documents in the manner prescribed by the Carrier;".*

26. The PSAA also contained the following terms:

(a) under clause 9, the carrier agreed to remunerate the agent for the services provided by the agent (the sale of the carrier's air services and ancillary services) in a manner and amount agreed;

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[21] Trial Reasons[21].
[22] Full Court Reasons [67] (fifth dot point) and [80].
[23] Trial Reasons [36]; Trial Exhibit 1, Tab A11 (FC Appeal Book Tab 31.7).
[24] Trial Reasons [38]; Trial Exhibit 1, Tabs A5, A16A, A29A, A30A, A51, A60 (FC Appeal Book Tabs 31.4, 31.12, 31.25, 31.27, 31.34, 31.39).
[25] Trial Reasons [36].

(b) under clause 7.1, the agent was generally required to pay the carrier the amount payable for the air service sold by the agent regardless of whether the agent has collected that amount from the customer (commonly referred to as *del credere* agency[26]);

(c) under clause 7.2, the agent agreed to collect the monies payable for the carrier's air services sold by the agent and hold the monies on trust for the carrier (and, unless otherwise instructed by the carrier, the agent was entitled to deduct its commission from remittances).

27. Critically, under the PSAA, a travel agent does not purchase a seat for resale, does not hold inventory of seats for sale and takes no risk of unfilled seats.

28. A Preferred Airline Agreement was an additional agreement negotiated between a travel agent and a particular airline, which included provision for "back-end commission" to be paid in addition to at-source commission.[27] A Preferred Airline Agreement was often premised upon a given revenue target being met by the travel agent (being the revenue earned for sales of the airline's air services).[28] Flight Centre and each of Singapore Airlines, Malaysian Airlines and Emirates were parties to Preferred Airline Agreements.[29]

29. The effect of clauses 3.1 and 3.2 of the PSAA was that Flight Centre was authorised to sell the international passenger air services of each airline as an agent for the airline.[30] Flight Centre was authorised to create legal relations between each airline and passengers, and to undertake all necessary activities to sell the services of the airline (promoting the availability of the services and booking, ticketing and collecting monies for the services).[31]

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[26] See Dal Pont, *Law of Agency*, 3rd Ed at [1.12].

[27] Trial Reasons [38].

[28] Trial Reasons [38].

[29] Trial Reasons [39]-[74].

[30] Trial Reasons [21]; Full Court Reasons [131]. The agency relationship created by clauses 3.1 and 3.2 of the PSAA was reinforced by the Preferred Airline Agreements - for example, the provisions of each of the Preferred Airline Agreements concerning marketing activities: see Singapore Airlines 2005-2006 agreement, clause 9 (Trial Exhibit 1, Tab A16A (FC Appeal Book Tab 31.12)); Singapore Airlines 2006-2007 agreement, clause 9 (Trial Exhibit 1, Tab A27A (FC Appeal Book Tab 31.22)); Singapore Airlines 2007-2008 agreement, clause 7 (Trial Exhibit 1, Tab A29A (FC Appeal Book Tab 31.25)); Singapore Airlines 2008-2009 agreement, clause 7 (Trial Exhibit 1, Tab A5 (FC Appeal Book Tab 31.4)); Emirates Airlines 2007-2008 agreement, attachment clause C (Trial Exhibit 1, Tab A30A (FC Appeal Book Tab 31.27)); Emirates Airlines 2008-2009 agreement, clause 12 (Trial Exhibit 1, Tab A51 (FC Appeal Book Tab 31.34)); Malaysia Airlines agreement dated 15 January 2009, clause 11.1 (Trial Exhibit 1, Tab A60 (FC Appeal Book Tab 31.39)).

[31] Clause 7.2 of the PSAA further provided that all monies collected by Flight Centre for passenger air travel and ancillary services sold under the agreement are the property of the airline and are held by Flight Centre on trust for the airline until satisfactorily accounted for and settlement made: see also *Stephens Travel Service International Pty Ltd v Qantas Airways Ltd*

30. The trial judge found that Flight Centre was the agent of the airlines in respect of the sale of international passenger air services and also supplied promotional, booking and payment services to the airlines.[32] It follows that Flight Centre was the agent of each airline in respect of the sale of the airline's international passenger air services, which were the services the subject of the alleged attempted price fixing.

31. The trial judge also found that each airline relied on travel agents to promote (or co-promote) the airline's air services, to deal with members of the public in relation to booking the airline's air services and to receive and to remit payments for those air services, as agent for the airline,[33] and that each airline had a demand for those services from travel agents.[34] The finding flows from the terms of the PSAA and the Preferred Airline Agreements, which compelled the conclusion that promoting, booking and receiving payment for an airline's air services were undertaken by travel agents as agent for the airline.[35] Those activities were encompassed within the authority to "sell" the international passenger air services of the airlines within the meaning of clauses 3.1 and 3.2 of the PSAA and were necessary and ordinary incidents of the authority to sell air services.[36] Flight Centre was paid by the airline for the supply of those services.[37]

32. The Full Court concluded, with respect correctly, that it is artificial to disaggregate distribution and booking from the sale of the air services to which they relate.[38] Nevertheless, even if the activities undertaken by Flight Centre in distributing and booking an airline's air services can be disaggregated from the

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(1988) 13 NSWLR 331 at 344D per Hope JA (with whom Kirby P and Priestly JA agreed); *Peter Cox Investments Pty Ltd v IATA* (1991) 161 ALR 105 at [50] per O'Loughlin J.

[32] Trial Reasons [21], [23] and [35]. This was not affected by the finding that travel agents in Australia were generally permitted by airlines to sell international passenger air services on behalf of airlines at a price chosen by the agent (while remitting to the airlines the published fare less the agreed commission), rather than a price specified by the airline concerned: Trial Reasons [33] and [34]. In other words, the fact that the airlines had elected not to specify the price at which their international passenger air services were sold to passengers by Flight Centre pursuant to clause 3.2 of the PSAA did not alter the agency relationship between the airlines and Flight Centre.

[33] Trial Reasons [31].

[34] Trial Reasons [22].

[35] Full Court Reasons [152] and [153]. Where an agency agreement is in writing, the scope of authority conferred on the agent is ascertained by reference to the terms of the agreement, applying the usual principles of construction: see Dal Pont, *Law of Agency*, 3rd Ed at [7.3] and [7.5].

[36] An agent has an implied authority to do whatever is necessary for, or ordinarily incidental to, the effective execution of the agent's express authority in the usual way: P Watts and F M B Reynolds, *Bowstead and Reynolds on Agency*, 18th Ed at [3-018].

[37] Trial Reasons [151].

[38] Full Court Reasons [149] – [151].

sale of the air services and are considered as a separate service, those services were supplied by Flight Centre as agent for the airline concerned.[39] The services are properly characterised as being supplied by Flight Centre to the relevant airline (to satisfy the airline's need or demand for those services) or as supplied by Flight Centre to consumers as agent for and on behalf of the relevant airline.[40]

D. Agency in the context of the Trade Practices Act (now the Competition and Consumer Act)

33. By reason of the matters stated in section C, each airline and Flight Centre were not in competition with each other in respect of the supply of the services that were the subject of the alleged attempted price fixing within the meaning of s.45A(1).

34. The nature of the agency relationship between each airline and Flight Centre negatives competition in respect of the relevant services. Whatever way the relevant services are characterised (and the ACCC presents a confusing and artificial array), there can be no competition by reason of the agency relationship:

(a) In so far as the alleged attempted price fixing concerned the supply of the airline's international passenger air services to consumers, there was no competition between the airline and Flight Centre because the only supplier was the airline (directly or via the agency of Flight Centre).[41]

(b) In the same manner, even if the alleged attempted price fix could be characterised as concerning the supply of distribution and booking services to consumers in the course of selling the relevant airline's international passenger air services, there was no competition between the airline and Flight Centre because the only supplier was the airline (directly or via the agency of Flight Centre).[42]

(c) Even if the alleged attempted price fix could be characterised as concerning the supply of distribution and booking services to the airline in the course of selling the relevant airline's international passenger air services, it is entirely artificial to characterise Flight Centre and the airline as being in competition in respect of the supply of such services to the airline.[43] As the Full Court observed, the airline's distribution and booking activities carried out in selling its air services involves one supply, of the air service, to consumers, and not a separate internal supply to itself of

[39] Full Court Reasons [152].
[40] Full Court Reasons [153] and [154].
[41] Full Court Reasons [131] and [154].
[42] Full Court Reasons [152], [153], [157] and [160].
[43] Full Court Reasons [134].

booking and distribution services. Furthermore, there can be no relevant competitive rivalry in supply when the only acquirer is the airline and the relevant choice for the airline is whether to "contract out" distribution and booking services to a travel agent such as Flight Centre.[44] If the position were otherwise, it would lead to the absurd conclusion that Singapore Airlines would engage in price fixing simply by appointing Flight Centre as its selling agent - and thereby acquiring distribution and booking services - for a fixed price commission.[45] Indeed, it would mean that any time a corporation chose to contract out to a third party a service that it was also performing for itself it would engage in price fixing (because, on the ACCC's argument, the corporation is in competition with the third party for the supply of those services).

35. The core concept of agency is "an authority or capacity in one person to create legal relations between a person occupying the position of principal and third parties".[46] More generally, 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".[47]

36. In the context of trade and commerce involving the supply or acquisition of goods or services, a distinction is recognised at law between an agent (in the strict sense) and a distributor or reseller. An agent supplies the principal's goods or services on behalf of the principal such that it can be said, at law, that it is the principal that undertakes the supply. In contrast, a distributor supplies the relevant goods or services on its own behalf, resupplying the goods or services acquired from a supplier. In respect of marketing and selling services performed by the agent, those services are supplied to the principal in return for remuneration (typically commission) paid by the principal to the agent.

37. The distinction between agency and distribution has particular significance under Part IV of the Act. The prohibitions in Part IV concern competition in the supply or acquisition of goods or services. The proper application of the prohibitions requires the identification of competing suppliers and competing acquirers of goods or services.

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[44] Full Court Reasons [138]ff.

[45] On the ACCC's argument, Singapore Airlines and Flight Centre are competitors for the supply of distribution and booking services to Singapore Airlines, and the agency agreement would fix the price of supply by Flight Centre.

[46] *International Harvester Company of Australia Pty Ltd v Carrigan's Hazeldene Pastoral Company* (1958) 100 CLR 644 at 652 per Dixon CJ, McTiernan, Williams, Fullagar and Taylor JJ.

[47] *Erikson v Carr* (1945) 46 SR (NSW) 9 at 12 per Jordan CJ. See also *Tonto Home Loans Australia Pty Ltd v Tavares* [2011] NSWCA 389 at [170]-[177] per Allsop P (with whom Bathurst CJ and Campbell JA agreed).

38. As noted earlier, parties to a price fixing understanding within s.45A(1) must be in competition with each other in relation to the goods or services that are the subject of the price fixing provision. An agent that markets and sells particular goods or services to a consumer on behalf of a principal (and thereby supplies marketing and selling services to the principal) cannot be a competitor of the principal in respect of the supply of those goods or services, or the marketing and selling activities associated with the supply, within the meaning of s.45A(1). At law, the agent does not supply the relevant goods or services, nor the associated marketing and selling services, to consumers. The commercial activities of the agent are undertaken in a representative capacity for the principal, and constitute the commercial activities of the principal. It is the principal who is the supplier of the goods or services, and the associated marketing and selling activities, to consumers, through the agency of the appointed agent. The agent supplies the marketing and selling activities to the principal for reward.

39. Similarly, the definition of resale price maintenance in Part VIII of the Act requires there to be a supply and resale. The acts of resale price maintenance defined in s.96(3) all involve the supply of goods or services by one person (the supplier) to another subject to a restraint on the latter's freedom to sell the goods or services at a price less than a price specified by the supplier. The prohibition of resale price maintenance does not apply in circumstances where a principal specifies the price at which an agent may offer the principal's goods or services for sale on behalf of the principal (a common occurrence).[48] This is because the agent does not undertake a resale of the goods or services. The agent sells the goods or services on behalf of the principal, such that it is the principal's sale.[49]

40. This conclusion is consistent with, and supported by, the definition of the word "supply" in s.4(1) of the Act (and the equivalent definition of "acquire"). Supply is defined to include:

    (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.

41. The statutory language, read in context (the regulation of anti-competitive conduct undertaken in trade or commerce), refers to legal or commercial supply (in the sense of a transaction under which legal rights to goods or services are

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[48] Although the airlines had permitted Flight Centre and other travel agents in Australia to determine the price offered to consumers for the air services (Trial Reasons [34]), clause 3.2 of the PSAA nonetheless entitled the airlines to direct the agents to sell the air services for a specified price.

[49] Heydon, *Competition and Consumer Law* [80.70].

conveyed by one person to another), not mere physical supply (in the sense of physical dealings).[50] For example, a courier that physically delivers goods that are purchased over the internet is not the supplier of those goods within the meaning of s.4(1); an employee of a computer maintenance company is not the supplier of the maintenance services that he or she performs as employee. To determine who is a supplier and who is an acquirer and of what, it is necessary to examine the legal arrangements that govern the relevant transactions that are undertaken in trade or commerce.

42. This has been illustrated on a number of occasions in the context of the third line forcing prohibition in s.47(6): *Castlemaine Tooheys Limited v Williams & Hodgson Transport Pty Ltd*,[51] *Paul Dainty Corporation Pty Ltd v The National Tennis Centre Trust*[52] and *Australian Automotive Repairers Association (Political Action Committee) Inc v Insurance Australia Limited (No. 6)*.[53] In each of those cases, the court found that s.47(6) was not engaged because the goods or services said to constitute the "third line" were not supplied by a third party but were supplied as part of a bundle by the first supplier, based upon the contractual arrangements governing the supply.

43. *Castlemaine Tooheys*[54] establishes that, in applying the reciprocal terms 'supply' and 'acquire', the Act is concerned with the legal arrangements governing the supply and acquisition and not merely the physical arrangements. In that case, the beer was transported to hotels by QRX. In other words, QRX supplied, in a physical sense, a transport service to hotels and the hotels received the benefit of the physical transport service from QRX. But QRX was not the supplier of those services to hotels for the purposes of s.47(6). Under the contractual arrangements in place, QRX supplied the transport service to Castlemaine Tooheys and Castlemaine Tooheys supplied the bundled product - transport and beer - to hotels. As observed by Gibbs CJ:

> *"It was of course clear that if [Castlemaine Tooheys] had itself carried the beer there would have been no exclusive dealing within s. 47. The position was not altered when [Castlemaine Tooheys] arranged for a third person to carry on its behalf. In those circumstances the services were acquired by [Castlemaine Tooheys] and not by the retailer. No doubt in a loose sense the retailer received a*

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[50] In other contexts, the word "supply" might have a meaning of mere physical dealings. An example is section 25 of the *Drug Misuse and Trafficking Act* 1985 (NSW) that prohibits the supply of prohibited drugs.
[51] (1986) 162 CLR 395.
[52] (1989) 22 FCR 495.
[53] [2004] FCA 700.
[54] Trial Reasons [140].

benefit from the services, but in truth what the retailer acquired was the beer and not the services of the carrier."[55] *(emphasis added)*

44. To the same effect was the conclusion of Brennan J that "...the delivery services supplied by QRX are acquired by the brewery [Castlemaine Tooheys], not by the licensee [hotels]".[56]

45. The ACCC contends that the Full Federal Court decision in *ACCC v IMB Group*,[57] another third line forcing case, supports the proposition that an agent can "supply" a service (within the meaning of s.4(1)) by entering into a contract on behalf of a principal. Examination of the reasons at first instance and on appeal reveals that the contention is wrong.

46. *IMB* was an unusual and complex case. It involved an investment scheme for the development of a sporting and entertainment complex in Logan, Queensland. IMB promoted the investment scheme. The relevant allegation was that IMB engaged in third line forcing by offering shares or membership in a proposed rugby league club on condition that investors acquired an insurance policy from a third party insurance company. The ACCC's case failed at first instance[58] (before Drummond J) principally because the proposed rugby league club had not yet been formed, and hence there was no service in the nature of shares or membership able to be offered by IMB at the relevant time.[59] On appeal by the ACCC, the Full Court supported Drummond J's principal conclusion.[60]

47. A second finding made by Drummond J was that the relevant condition being imposed by IMB was not that investors acquire an insurance policy from the third party insurance company; rather it was that investors acquire the insurance policy through the agency of IMB.[61] As a result, the condition being imposed was not of the kind specified in s.47(6). On appeal, the Full Court also supported that finding.[62]

48. A third finding made by Drummond J at first instance was that investors acquired insurance policies from IMB notwithstanding that IMB was the agent of the relevant insurance companies.[63] It is that finding that the ACCC apparently relies upon. The finding does not support the weight that the ACCC wishes to give to it:

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[55] (1986) 162 CLR 395 at 400.
[56] Ibid at 405.
[57] [2003] FCAFC 17.
[58] [2002] FCA 402.
[59] [2002] FCA 402 at [66] and [67].
[60] [2003] FCAFC 17 at [86] - [88].
[61] [2002] FCA 402 at [85].
[62] [2003] FCAFC 17 at [89].
[63] [2002] FCA 402 at [101].

(a) First, the finding was not essential to Drummond J's decision. His Honour dismissed the allegation of third line forcing on the 2 grounds stated above.

(b) Second, on appeal the Full Court upheld Drummond J's decision on the 2 other grounds stated above. The Full Court did not consider or endorse any finding that IMB, as agent of the insurance company, was the supplier of the insurance.[64]

49. As stated above, to determine who is a supplier and who is an acquirer and of what for the purposes of the Act, it is necessary to examine the legal arrangements that govern the relevant trading transaction. That was recognised by the Full Court below:

> *"It is necessary to emphasise, however, that the existence of an agency relationship between two parties does not always mean that those two parties cannot be in competition with each other for the purposes of Part IV of the Act. Each case must be considered on its own facts. The precise nature of the agency relationship will no doubt be important, particularly given the broad range of commercial relationships that are sometimes referred to as involving agency: see* Tonto Home Loans Australia Pty Ltd v Tavares *[2011] NSWCA 389; (2011) 15 BPR 29,699; NSWCA 389 at [170]. If the so-called agent was in fact no more than a distributor or re-seller of the other party's product, there may well be competition between parties to such an agreement in relation to the supply of the product. But the position is likely to be different where, as here, the agent has the power and authority (and accompanying legal and equitable duties) to contract – sell the product – for and on behalf of the principal. It is less likely that an agent, in that strict or core sense, can relevantly be considered to compete with its principal in relation to the supply of products within the scope of the agency agreement."*[65]

E. A comparison with US and European competition laws

50. While recognising that the statutory language of the competition laws in the US and Europe differs substantially from the language of the Act, the treatment of agency relationships under those laws is largely consistent with the principles described in the preceding section D.

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[64] Even if the ACCC's contention were correct, in each case the precise nature of the agency relationship requires examination and the findings in *IMB* would not be determinative. It is not necessary, in the circumstances of this case, to reach any view on the correctness of the reasoning in *IMB*.

[65] Full Court Reasons [163]. In *Tonto Home Loans Australia Pty Ltd v Tavares* [2011] NSWCA 389, Allsop P (with whom Bathurst CJ and Campbell JA agreed) stated at [177] that the agent's *"duty will conform with the extent and scope of the agency and thus be of potentially varied content, recognising that context (in particular, perhaps a market or commercial context) may attenuate the rigour or content of the fiduciary duty"*: cf ACCC's submissions [54].

51. In *US v General Electric*,[66] the US Supreme Court decided that the *per se* prohibition against resale price maintenance did not apply in a case where there was a genuine relationship of principal and agent.[67] The relevant question was whether the sales were by the company through its agents to the consumer, or were in fact by the company to the so-called agents at the time of consignment, the Court observing that the *"distinction in law and fact between an agency and a sale is clear"*.[68]

52. In *Simpson v Union Oil*,[69] the US Supreme Court subsequently held that the principle stated in *General Electric* is not applicable to a consignment "device". *Union Oil* concerned arrangements by which a large gasoline supplier leased retail petrol sites to independent businesses on condition that they entered into consignment agreements for gasoline. Under the consignment agreements, the consignees took possession of the gasoline supplied by Union Oil, but title remained with Union Oil until the gasoline was sold to the motorist. Despite that, the consignee carried the risk in the gasoline in its possession. Union Oil specified the retail price for the gasoline. The Court concluded that the consignment was a "device" and that Union Oil had contravened the antitrust laws by specifying the retail price for the sale of the gasoline to motorists.[70]

53. The principle stated in *General Electric*, subject to the limitation stated in *Union Oil*, continues to reflect the law in the US: see for example *Morrison v Murray Biscuit*[71] and *Illinois Corporate Travel v American Airlines*[72] (both decisions of the US Court of Appeals for the 7th Circuit). The latter case concerned the question whether American Airlines engaged in resale price maintenance by refusing to allow a travel agent, Illinois Corporate Travel, to discount the price of American Airlines' flights. The Court concluded that there was no resale price maintenance. In response to an argument that the principle stated in *General Electric* had not survived *Union Oil*, Justice Easterbrook stated:

> *"...General Electric is healthy. Employment relations do not violate the antitrust laws; Sears may tell the managers of its stores at what price to sell lawn mowers. Morrison held that genuine agency relations should be treated like employment relations."*[73]

54. Justice Easterbrook found that the travel agent was a genuine agent and did not resell air travel; amongst other factors, the travel agent did not purchase a seat

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[66] 272 US 476; 47 S. Ct. 192 (1926).
[67] Ibid at 488.
[68] Ibid at 485.
[69] 377 US 13 (1964).
[70] Ibid at 21 and 24.
[71] 797 F.2d 1430 (1986).
[72] 806 F.2d 722 (1986).
[73] Ibid 724-5.

for resale and did not hold an inventory of seats for sale, and the travel agent takes no risk of unfilled seats.[74]

55. *Illinois Corporate Travel* came back before the 7th Circuit in 1989.[75] In the course of again dismissing the complaint made by the travel agent, Justice Easterbrook observed that the fact that travel agents worked with many airlines, hotel chains and other suppliers of travel services did not alter the Court's analysis, commenting that "*...this is a common form of organization. Real estate agents work for many clients, and multiple-listing services allow many agents access to the same properties; auction houses sell works of art furnished by hundreds of owners at a single sitting*".[76] The US Supreme Court denied *cert* in respect of the 1989 decision.[77]

56. In respect of European law, the ACCC places reliance[78] on *DaimlerChrysler AG v Commission of the European Communities*[79] (***Daimler***). The decision involves very different facts, and a very different competition law issue, compared to the present proceeding. Nevertheless, to the extent that the reasoning of the European Court is relevant, it supports the conclusion of the Full Court below.

57. *Daimler* concerned the application of Article 81(1) of the EC Treaty[80] (now Article 101(1) of the Treaty on the Functioning of the European Union) to a series of agreements between Mercedes Benz (a Daimler subsidiary) and its agents which included various restraints, including a sales territory restraint.[81] Mercedes Benz argued that the sales restrictions effected through its agency agreements were not subject to the prohibition in Article 81(1) because the agents were integrated into the Mercedes Benz organisation and had the same legal relationship as its employees.[82] The European Court observed that:

    (a) "...the prohibition [in Art 81(1)]...concerns exclusively conduct that is coordinated bilaterally or multilaterally, in the form of agreements between undertakings ... and concerted practices";[83]

    (b) "It follows that, where a decision by a manufacturer constitutes unilateral conduct of the undertaking, that decision escapes the prohibition laid down in Art 81(1)";[84]

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[74] Ibid at 725.
[75] 889 F.2d 751 (1989).
[76] Ibid at 752-753.
[77] 495 US 919 (1990).
[78] ACCC submissions [63].
[79] (2005) ECR II-3319.
[80] In summary, Article 81(1) prohibits agreements between undertakings and concerted practices which have as their object or effect the prevention, restriction or distortion of competition within the common market.
[81] Ibid at [21].
[82] Ibid at [39].
[83] Ibid at [83].

(c) "...in competition law the term 'undertaking' must be understood as designating an economic unit for the purpose of the subject matter of the agreement in question, even if in law that agreement consists of several persons, natural or legal".[85]

58. The European Court concluded that Mercedes Benz's agents were part of a single economic unit and that, as a result, Article 81(1) did not apply to the impugned restrictions. The terms of agency between Mercedes Benz and its agents have similarities with the terms of agency between the airlines and Flight Centre in the present proceeding:

10 (a) while the agent was free to discount its own commission upon a sale (and thereby reduce the price paid by the consumer), it had no authority with regard to the price received by Mercedes Benz;[86] and

(b) the agent was not required to buy and hold stock for resale,[87] and therefore did not bear the risk of unsold stock.[88]

59. The EC Guidelines on Vertical Restraints (2010) state that agency agreements, within certain parameters, fall outside Article 101(1) TFEU because the selling or purchasing function of the agent forms part of the principal's activities.[89] The Guidelines, after referring to the principles stated in *Daimler*, also state that it is not material whether the agent acts for one or several principals.[90]

20 F. Errors in the ACCC's submissions

60. The ACCC's arguments on the appeal include the following errors.

61. First, as stated earlier, the ACCC fails to start with the statutory language, which requires the identification of the services that are the subject of the alleged attempted price fixing. Its discussion of market definition is misdirected for that reason, and is conducted at too high a level of abstraction.

62. Second, the ACCC falls into the trap, the subject of comment in *Visy Paper Pty Ltd v ACCC*,[91] of describing the commercial arrangements in a market by reference to economic jargon that is not reflected in the language of the Act.[92] The ACCC argues that: "*A critical feature of the operation of the present field of*
30 *commerce is the functional distinction between the retail level (downstream) of the*

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[84] Ibid at [84].
[85] Ibid at [85].
[86] Ibid at [94].
[87] Ibid at [96].
[88] Ibid at [97].
[89] Ibid at [18].
[90] Ibid at [13].
[91] (2003) 216 CLR 1 at [23] – [26].
[92] The Full Court expressed the same criticism of the ACCC's argument below at [122].

international travel market and the wholesale/carriage level (upstream)."[93] The error in the argument is that it fails to take account of the contractual arrangements governing supply. The supply of air services by the airlines to consumers does not involve activities in functionally separate retail and wholesale markets. There is no functional separation of "sales" and "carriage" when airlines transact with consumers via the internet. Nor is there a separation when air services are sold by airlines to consumers via travel agents. The sale is by the airline to the consumer.

63. Third, the ACCC wrongly contends that the behaviour of Flight Centre was explicable only by it being in competition with each airline.[94] Flight Centre's behaviour reflected a commercial problem. The problem arose from the terms of the PSAA, which required Flight Centre, upon sale of an airline's air service, to remit to the airline its published fare less the agreed commission.[95] If the airline sold equivalent air services to consumers via the internet at lower prices, Flight Centre's commercial position as an agent could be undermined. It may have been unable to earn a commercial return on its provision of agency services to the airline. This commercial problem is common to sales agency arrangements and is resolved through negotiation between the principal and agent (as attempted by Flight Centre). Understandably, an agent may be unwilling to provide sales agency services to a principal in those circumstances, because there would be no commercial profit to be made by the agent in providing those services. The concern expressed by the agent is not a competition concern. It is a concern over the ability to earn reward for the provision of agency services to the principal.

64. Fourth, the ACCC's arguments concerning the scope of the agency relationship between each airline and Flight Centre[96] are again misdirected because the ACCC fails to address the services that were the subject of the alleged attempted price fixing. The ACCC is correct when it submits that: "*...it is important to identify with precision the particular act or matter in respect of which agency subsists and the point in time that it attaches*".[97] But it is in error when it focuses upon the so-called "*bundle of travel intermediary services*" supplied by Flight Centre.[98] As found by the Full Court, "*this case has nothing to do with those broader range of services supplied by travel agents*".[99] The services that were the subject of the alleged attempted price fix with each airline were the supply to consumers of the airline's international passenger air services and the

[93] ACCC submissions [39].
[94] ACCC submissions [48].
[95] Trial Reasons [33].
[96] ACCC submissions [54]ff.
[97] ACCC submissions [55].
[98] ACCC submissions [57].
[99] Full Court Reasons [161].

distribution and booking services associated with such supply. Those services were the subject of the agency, governed by the PSAA.[100]

65. Fifth, for the reasons set out in section E above, the ACCC is wrong to contend that Flight Centre can supply a service to a consumer within the meaning of s.4(1) notwithstanding that it may ultimately be doing so as agent for a principal, having regard to the terms of the PSAA governing the agency relationship and the findings of the trial judge.[101]

Part VI: Estimate of time required for presentation of oral argument

66. If leave to appear were granted, IATA would seek 20 minutes for the presentation of its oral argument.

Dated: 12 May 2016

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[100] Trial Reasons [21], [22] and [35]; Full Court Reasons [152].
[101] ACCC submissions [59].