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 REPLY

Filed on behalf of the Appellant by:

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PART I PUBLICATION

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

PART II REPLY

A FLIGHT CENTRE'S RESPONSE ON AGENCY

2. Flight Centre contends that, as there was "an agency relationship in the legal sense" it follows that "the flights sold through the agency of Flight Centre were supplied by the airlines and not by Flight Centre" (Respondent's Submissions (**RS**) [33]-[34]). The premise of Flight Centre's approach is said to be that to accept the ACCC's submission would construe the *Trade Practices Act 1974* (Cth) (**the Act**) in a manner that will "interfere with or alter the established laws of contract or of agency" (RS [36]). Flight Centre's approach is mistaken in its premise, its analysis of the terms of the Act, as a matter of economics, and is stated in terms that are too absolute.

(1) Mistaken premise

3. Flight Centre invokes the undoubted principle of statutory construction "that there is no intention to interfere with basic common law doctrines unless the words of the statute expressly or necessarily require that result" (RS [35]), in order to contend that the Act ought not be interpreted so as to interfere with the established law of contract or agency (RS [36]). This submission is misdirected.

4. The construction of ss 45 and 45A for which the ACCC contends does not interfere with the common law of agency.. It does not intrude upon the capacity of an agent to create legal relations between its principal and third parties (cf RS [26]). It does not alter the common law liability of an agent for an obligation incurred in the name of the principal (cf RS [27]). It does not affect the receipt of money on behalf of a principal (cf RS [28]) or the ability of a principal to remunerate an agent by commission (cf RS [29]). The extent of an agent's liability to consumers for defects or false representations will be the consequence of both contractual and statutory provisions. Whether a principal must indemnify or be indemnified by an agent for any liability to a consumer will principally be a product of contractual arrangements.

5. Statutory provisions such as ss 45 and 45A of the Act are, by their terms, context and purpose, self-evidently intended to alter the ordinary law of contract. They protect competition by constraining what would otherwise be the freedom of competitors to contract with each other and to fix prices. The central question is whether Flight Centre and the airlines were in competition in respect of the supply of the relevant services in a market. That question is not answered, or advanced, by the statutory presumption relied on by Flight Centre.

(2) Mistaken analysis of the Act

6. Flight Centre submits that the ordinary meaning of the statutory text is that "flights sold through the agency of Flight Centre were supplied by the airlines

and not by Flight Centre" (RS [34]). It relies upon the statutory definitions of "services" and "supply" (RS [36]), submitting that the Act defines "supply" to mean "when used as a verb in relation to services, is the act of providing, granting or conferring rights, benefits or privileges under contract" (RS [36]). That explanation unduly narrows the meaning of both "services" and "supply" in the Act. "Services" are defined non-exhaustively in s 4 of the Act to include "any rights ... benefits, privileges or facilities that are, or are to be, provided, granted or conferred in trade or commerce". This is defined to include rights granted or conferred under certain specified types of contracts. The definition of "supply" in relation to services when used as a verb is "provide, grant or confer".

7. The implication of Flight Centre's submission is that it is only possible for a person to "provide, grant or confer" a right pursuant, and as a party, to a contract. There is no cause to read the Act so narrowly. It is not how the Full Court interpreted "supply" in *ACCC v IMB Group Pty Ltd (in liq)* (2003) Aust Contract R 90-165; [2003] FCAFC 17 at [89]. By entering into a contract of carriage on behalf of an airline, Flight Centre conferred the right to carriage to, or on, the consumer. Nor does the Act treat conduct of an agent as being solely the conduct of the principal rather than the agent. Section 84 of the Act refers "to an agent acting within the scope of the actual or apparent authority of the agent" (RS [36]). Section 84(2) of the Act expressly provides not that conduct of an agent will be deemed to be conduct only of the principal, but that conduct of an agent will be deemed "to have been engaged in *also* by the body corporate" (emphasis added). It is possible for an agent to contravene a statutory prohibition and for the acts of the agent also to constitute a contravention by the principal.[1] If the conduct of an agent is a "supply" for the purposes of the Act, it may be that the conduct of the agent constituting the supply could also constitute, or lead to, a "supply" by the principal.

(3) Mistaken economic approach

8. Flight Centre's approach is mistaken as a matter of economics because it treats all relationships involving "agency...in the legal sense" as being economically identical. The effect of Flight Centre's submission is that an agent is indistinguishable from its principal, and competition between the two cannot subsist. However, competition is an economic concept,[2] and whether entities are in competition, and the effect of their conduct on competition, cannot be ascertained by looking merely to the nature of their legal relationship. That an entity supplies as agent, rather than distributor, of a wholesaler, in and of itself, does not mean that there cannot be competition with the wholesaler. Whether there is competition will depend upon the facts of the case.

9. Consideration of consignment sales illustrates the difficulty in Flight Centre's economic approach. A consignment sale can be effected in one of two ways. Goods may be consigned to an agent to sell as agent of the owner or they may be consigned to a re-seller who does not buy the goods from the owner until the

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1 *Hamilton v Whitehead* (1988) 166 CLR 121 at 128; *Houghton v Arms* (2006) 225 CLR 553 at 567-568.

2 *Re Queensland Co-Operative Milling Association Ltd; Re Defiance Holdings* (1976) 8 ALR 481 at 514-515; *Queensland Wire Industries Pty Ltd v The Broken Hill Pty Co Ltd* (1989) 167 CLR 177 at 194 (Deane J)

re-seller has found a purchaser and can return the goods to the owner if no purchaser is found. In either case, the risk of carrying stock principally remains with the owner. If the agent is free to sell the goods at any price the agent chooses and the amount received by an owner on a sale by the agent (net commission) is the same as would be paid by the re-seller to the owner if a sale is made, there will be no substantive economic difference whether the sale is made by an agent or a re-seller. The two different legal arrangements will have different consequences in different contexts (for example, the application of GST). The question is whether, for competition law purposes, there is a difference that results in the agent not supplying the goods when it makes the sale but the re-seller does. If the owner is also selling the goods directly, the price that consumers pay for the product is controlled by the competition between each of the re-seller, the agent and the owner. In analysing the competition that occurs in the market, the re-seller and the agent are indistinguishable. They are operating their own businesses and making their own decisions as to the price at which they will sell and how they will sell. If the re-seller sought to have the owner agree not to sell directly at less than a certain price, that would be an attempt to make an arrangement in contravention of s 45(2)(a)(ii) of the Act by reason of the deeming effect of s 45A.[3] The *effect* on competition is the same if it is the agent rather than the re-seller that seeks to have the owner agree not to sell directly at less than a certain price. The *application* of statutory provisions concerned with preventing harm to competition should be the same.

10. Flight Centre seeks to characterise its behaviour as being "explicable on the basis that Flight Centre was a sales agent for reward, seeking to maximise its volume of sales on behalf of (and thus the commission it earned from) its principals, the airlines" (RS [39]). This is an obfuscation. There are many ways, not involving anti-competitive conduct, by which Flight Centre might seek to maximise its volume of sales. What Flight Centre sought to do in this case was to induce the airlines to enter an arrangement that would control the price at which the *airlines* would sell directly to consumers. That *specific conduct* raises a competition problem because it would have suspended, and was intended to suspend, the rivalry between Flight Centre and the relevant airline. The impugned arrangements would have prevented the airlines from offering lower prices than Flight Centre, thereby maintaining Flight Centre's margin, and denying would-be passengers access to cheaper fares (cf RS [40]).

11. Contrary to RS [39], the position of Flight Centre is economically distinct from that of an employee of an airline. Flight Centre operates its own business and shopfronts, employs its own sales consultants, sells flights from multiple airlines, has discretion as to whom it will sell, sets its own price at which it will offer flights from any of those airlines to consumers and collects payment from the consumer without informing the airline of the total price at which it has sold the airfare. An employee of an airline does none of these things. While *Re Queensland Co-operative Milling Association Ltd* (1976) 25 FLR 317 is not directed to the precise question in this case – in so far as it assumes the

[3] And would now contravene section 44ZZRJ of the Act.

separateness of firms and enquires as to the necessary conditions for competition – the basal principles it identifies assist in answering the question whether there are relevantly two firms competing on price or quality and hence in competition. The key factual matters which support a conclusion that Flight Centre and the airlines are separate for economic purposes include: (a) each is an alternative source of supply to which customers can resort; (b) each offers different prices and, but for the arrangement sought to be imposed, the airline and the agent are free to set their own prices; (c) each has a different quality of offering, and (d) each of the rivals makes its own substantial investment in various costs necessary to supply the relevant services.

12. *DaimlerChrysler AG* provides guidance as to the correct economic approach to competition questions involving agency (cf RS [46]-[48]). However, it is factually distinct from this case. The Court of First Instance held that the German agents sold Mercedes-Benz vehicles "in all material respects under the direction of the [principal]" and were akin to an "employee".[4] Those agents were not "either under the agency agreement or in practice" obliged to give up part of their commission to sell a car that was in stock. Had that been the case, this would have been a "real price risk".[5] In contrast, although Flight Centre did not carry ticket stock, its price beat policy meant that in practice its commissions and the price of the flight itself were at risk to competing offers. This included competing offers made by its airline principals selling airfares directly to consumers. The close degree of integration present in *DaimlerChrysler AG* is not present here. Clearly Flight Centre could not be said to be in all material respects acting at the direction of all of its principals, at the same time.

13. The United States authorities are not decided within the same statutory or factual matrix. The critical United States authorities upon which Flight Centre relies fix upon different facts – the agent is set up to be a person selling at a price pre-determined by the principal, which allows the agent to be assimilated to the status of an employee. In the present case the converse is true: the putative agent seeks to constrain the price at which the putative principal supplies the services directly to the market. The European authorities provide more useful guidance by enquiring into whether the agent accepts independent financial risk in respect of the pricing of goods or the costs of supplying services.

(4) The conditional character of the agency relationship

14. On various occasions, Flight Centre states the legal conclusion of agency in absolute terms: e.g., RS [31]-[33]; [37]; [38]. This ignores the diachronic and conditional nature of Flight Centre's relationship with the airlines. As noted at AS [12] and [62], before entering into a particular transaction with a consumer, Flight Centre could potentially enter into a transaction on behalf of many different airlines in respect of one consumer's demand for travel. Critically, Flight Centre was not constrained to act in the interests of any particular airline

[4] *DaimlerChrysler AG v Commission of the European Communities* (2005) ECR II-3319, at [102].
[5] *DaimlerChrysler AG v Commission of the European Communities* (2005) ECR II-3319, at [97].

before it had made a sale. In these circumstances, it considered itself in competition with airlines.[6]

B FLIGHT CENTRE'S SUBMISSION THAT THE ACCC SHOULD NOT BE PERMITTED TO ADVANCE APPEAL GROUND NO. 3

15. Flight Centre submits that the ACCC "should not be permitted to overturn the decision of the Full Court on the ground that Flight Centre was in competition with the airlines in the market for the supply of international air travel services" (RS [60]). This is appeal ground 3 in the ACCC's Notice of Appeal. Leave has already been given, over Flight Centre's objection, in respect of this ground.

16. That submission has four answers. *First*, the matter was fully ventilated on the application for leave. Leave was granted in respect of ground 3 in the Notice of Appeal. There is no occasion to revisit that grant of leave. *Secondly*, the point was run fully at first instance, allowing a comprehensive test of fact and law. Flight Centre was not prevented from adducing evidence in opposition to it (RS [62]): *Suttor v Gundowda Pty Ltd* (1950) 81 CLR 418 at 438, citing *Connecticut Fire Insurance Co. v. Kavanagh (*1892) A.C. 473 at 480. *University of Wollongong v Metwally (No 2)* (1985) 59 ALJR 481 does not affect that conclusion. There, this Court refused an application to *vary an order* made by it after a full hearing. The application was brought on the basis that the applicant wished to agitate a new point not run at the original hearing. The new point was inconsistent with the starting point of the applicant's argument at the original hearing.[7] *Thirdly*, the only possible criticism of the ACCC is that, through a proper attempt to confine the real issues in dispute at the intermediate level, it adopted too narrow a position in light of the approach later adopted by the Full Court. *Fourthly*, identical issues arise in respect of agency on both market definitions. It would be an unsatisfactory result if the Full Court was found to be wrong that the agency relationship in this case precluded competition for the purposes of the Act but Flight Centre nevertheless escaped liability because, and only because, the trial judge had preferred, and the ACCC had pressed on appeal without running its alternative case from first instance, a different analytical tool.

Dated: 19 May 2016

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6 See Appellant's Submissions (AS) [15]-[16] and [42]-[48].

7 *University of Wollongong v Metwally (No 2)* (1985) 59 ALJR 481 at 483.