HIGH COURT OF AUSTRALIA

FRENCH CJ,
KIEFEL, GAGELER, NETTLE AND GORDON JJ

AUSTRALIAN COMPETITION AND CONSUMER COMMISSION APPELLANT

AND

FLIGHT CENTRE TRAVEL GROUP LIMITED RESPONDENT

Australian Competition and Consumer Commission v Flight Centre Travel Group Limited
[2016] HCA 49
14 December 2016
B15/2016

ORDER

1. *Appeal allowed.*

2. *Set aside the order of the Full Court of the Federal Court of Australia made on 31 July 2015, and in its place order that:*

   (a) the appeal be allowed in part;

   (b) the respondent be granted leave to file its amended notice of cross-appeal dated 3 August 2016;

   (c) the cross-appeal be allowed in part;

   (d) the declaration made by Logan J on 28 March 2014 be varied as follows:

      (i) in paragraph 1, omit the words "distribution and booking services for international passenger air travel" and replace them with the words "international airline tickets";

(ii) in each of paragraphs 1(a), (b), (c), (d), (e) and (f), omit the words "distribution and booking";

(iii) in each of paragraphs 1(a), (b) and (f), omit the words "the retail or distribution margin received by Flight Centre for its booking and distribution services would be maintained" and replace them with the words "the price Flight Centre charged for its supply of international airline tickets would be maintained, and that the price Singapore Airlines charged for its supply of international airline tickets would be fixed, controlled or maintained";

(iv) in each of paragraphs 1(c) and (d), omit the words "the retail or distribution margin received by Flight Centre for its booking and distribution services would be maintained" and replace them with the words "the price Flight Centre charged for its supply of international airline tickets would be maintained, and that the price Emirates charged for its supply of international airline tickets would be fixed, controlled or maintained"; and

(v) in paragraph 1(e), omit the words "the retail or distribution margin received by Flight Centre for its booking and distribution services would be maintained" and replace them with the words "the price Flight Centre charged for its supply of international airline tickets would be maintained, and that the price Malaysia Airlines charged for its supply of international airline tickets would be fixed, controlled or maintained"; and

(e) each party bear its own costs of the proceedings in the Full Court to date.

3. Remit the matter to the Full Court of the Federal Court of Australia for the determination of the appeal and cross-appeal insofar as they relate to penalty.

On appeal from the Federal Court of Australia

Representation

J T Gleeson SC, Solicitor-General of the Commonwealth with M R Hodge and R C A Higgins (instructed by Australian Government Solicitor)

B W Walker SC with M I Borsky for the respondent (instructed by King & Wood Mallesons)

M H O'Bryan QC with N P De Young for the International Air Transport Association, as amicus curiae (instructed by Minter Ellison Lawyers)

CATCHWORDS

Australian Competition and Consumer Commission v Flight Centre Travel Group Limited

Trade practices – Restrictive trade practices – Substantially lessening competition – Price fixing – Where travel agent sold international airline tickets on behalf of airlines – Where travel agent attempted to induce airlines to agree not to discount price at which international airline tickets offered directly to customers – Whether travel agent acting as agent for airlines – Whether travel agent and airlines "in competition" notwithstanding travel agent supplied as agent for airlines – *Trade Practices Act* 1974 (Cth), ss 45(2)(a)(ii), 45(3), 45A.

Trade practices – Restrictive trade practices – Market definition – Relevance of "functional approach" to market definition.

Words and phrases – "agency agreement", "agent", "competition", "functional approach to market definition", "international air carriage", "market", "price fixing", "substantially lessening competition".

Trade Practices Act 1974 (Cth), ss 4E, 45, 45A.

FRENCH CJ.

Introduction

1 There is a considerable demand in Australia for international air travel. International airlines operating in Australia provide air travel services and sell those services principally through travel agents under contractual arrangements. They also sell directly to consumers.

2 This appeal concerns a travel agent which, between August 2005 and May 2009, tried to persuade three airlines whose tickets it sold, under contractual arrangements with them, not to undercut it in their direct sales. The Australian Competition and Consumer Commission ("ACCC") alleged that the agent was a competitor of the airlines in relevant markets and had contravened s 45 of the *Trade Practices Act* 1974 (Cth) ("the Act"), as it stood during the relevant time, by proposing an arrangement or understanding with a view to maintaining or controlling the price of air tickets supplied to consumers. The answer to the question whether the agent contravened the Act turns critically upon whether or not the agent was, in any relevant sense, in competition with the three airlines, which were its principals at the time it made the proposals. I would answer that question in the negative. In that respect I am in disagreement with the other members of the Court and I would dismiss the appeal.

Procedural background

3 Between August 2005 and May 2009, the period relevant to this appeal, Flight Centre Travel Group Ltd ("Flight Centre"), then called Flight Centre Ltd, conducted a travel agency business in Australia and overseas through a distribution network comprising shopfronts, call centres and the internet. It sold international passenger air travel services to consumers pursuant to a standard form Passenger Sales Agency Agreement ("PSAA") between itself and various carriers. The form of agreement had been prepared by the International Air Transport Association ("IATA"). Flight Centre also offered consumers travel advice about possible destinations and available flights on different airlines to those destinations. It received payment from customers for air travel booked through it and remitted the amounts less commission to the airlines. The airlines whose international passenger air travel services Flight Centre sold also sold directly to prospective passengers.

4 In 2012, the ACCC commenced proceedings against Flight Centre, alleging that, between 19 August 2005 and 16 May 2009, it had contravened s 45(2)(a)(ii) of the Act. Flight Centre was said to have proposed to Emirates, Malaysia Airlines and Singapore Airlines an arrangement or understanding containing a provision which had the purpose and/or was likely to have the effect of fixing or controlling or maintaining prices for the supply of the services which it and they were selling. On the premise that Flight Centre, although their agent,

was also in competition with those airlines, it was said that by operation of a deeming provision, s 45A(1) of the Act[1], the proposed arrangement or understanding had the purpose or would have or be likely to have the effect of substantially lessening competition and that by proposing it Flight Centre had contravened s 45. As appears from the provisions of ss 45 and 45A, the characterisation of Flight Centre as a competitor of the airlines, whose services it provided to its customers, was necessary in order to establish the contraventions alleged.

5 The primary judge[2] found that Flight Centre and the airlines were in competition in a market for booking and distribution services and that Flight Centre's conduct reflected in a series of emails to the airlines constituted an attempt to induce each of them to make an arrangement that would have contravened s 45(2)(a)(ii) of the Act by virtue of s 45A of the Act[3]. His Honour rejected the contention that Flight Centre and the airlines were in competition in the market for flights. Only the airlines supplied flights as only they operated aircraft[4].

6 The Full Court[5] held that, to the extent that rivalry existed between Flight Centre and the three airlines, it was in respect of the market for the supply of international passenger air travel services in which it wanted to sell as many flights as it could on behalf of the airlines. The more flights it sold, the more it would receive in the form of commission and other incentive-based payments under "preferred airline agreements" entered into with the three airlines. The more direct sales the airlines effected, the fewer agency sales Flight Centre could make and the less commission it could earn[6]. But, as their Honours correctly held, that rivalrous or competitive behaviour was not in a market in which both Flight Centre and the airlines supplied goods or services in competition with each

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1 Repealed by item 21 of Sched 1 to the *Trade Practices Amendment (Cartel Conduct and Other Measures) Act* 2009 (Cth) with effect from 24 July 2009. Section 45A was superseded by Div 1 of Pt IV of the Act; subs (1) was in effect replaced by the purpose/effect condition in s 44ZZRD(2).

2 *Australian Competition and Consumer Commission v Flight Centre Ltd (No 2)* (2013) 307 ALR 209.

3 (2013) 307 ALR 209 at 261 [197].

4 (2013) 307 ALR 209 at 244 [135].

5 *Flight Centre Ltd v Australian Competition and Consumer Commission* (2015) 234 FCR 367.

6 (2015) 234 FCR 367 at 402 [173]-[174].

other. Only the airlines supplied international passenger air travel services. Flight Centre operated in the market for such services, but only as agent for the airlines[7]. There was no separate market for distribution and booking services[8]. In this respect it was held that the primary judge had erred because he transferred or transplanted the rivalry or competition which he had found existed in a broad sense into that non-existent market.

The ACCC's primary and secondary cases on appeal

7 The primary case advanced by the ACCC, as explained in the joint judgment of Kiefel and Gageler JJ[9], was that Flight Centre competed with each of the airlines in markets for the provision of distribution services to international airlines and for the provision of booking services to customers. Whether or not Flight Centre was in any relevant sense in competition with the airlines, I agree with their Honours that, as the Full Court held, it would be quite artificial to describe an airline selling directly to its customers as providing distribution services to itself in competition with distribution services provided to it by travel agents. As their Honours observe, booking flights, issuing tickets and collecting fares were inseparable elements of the sale of air tickets[10].

8 The ACCC's secondary case, as described in the joint judgment[11], was that Flight Centre sold international air tickets in competition with the airlines in a market for the supply of contractual rights to international air carriage to customers. These reasons are concerned with that secondary case insofar as it depends on the proposition that Flight Centre was acting in competition with the airlines which had appointed it as their agent. The detailed facts are set out in the other judgments but it is necessary to make reference to the contractual arrangements between Flight Centre and the airlines which lie at the heart of their agency relationship.

The Passenger Sales Agency Agreement

9 The appointments of Flight Centre as agent with authority to sell air tickets for Emirates, Malaysia Airlines and Singapore Airlines were effected pursuant to the PSAA, which it had entered into on 28 June 1995. The PSAA

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7 (2015) 234 FCR 367 at 402-403 [175].

8 (2015) 234 FCR 367 at 403 [176].

9 Reasons for judgment of Kiefel and Gageler JJ at [48], [64].

10 Reasons for judgment of Kiefel and Gageler JJ at [73]-[74].

11 Reasons for judgment of Kiefel and Gageler JJ at [50], [61].

was expressed to be made between Flight Centre, described as "the Agent", and "each IATA Member (hereinafter called 'Carrier') which appoints the Agent, represented by the Director General of IATA acting for and on behalf of such IATA Member". The agreement came into effect as between the Agent and any particular carrier upon appointment of the Agent by the Carrier in accordance with Sales Agency Rules in effect in the country of the Agent's location[12]. The appointment of an Agent could be withdrawn by the Carrier by notice in writing and in accordance with the Sales Agency Rules, with effect from the last day of the month following the month in which notice was given[13].

10 The Agent was authorised by the agreement to "sell air passenger transportation on the services of the Carrier" which had appointed it and on the services of other air carriers as authorised by the Carrier[14]. The sale of air passenger transportation encompassed activities necessary to provide a passenger with a valid contract of carriage including the issue of a valid air ticket[15] and the collection of monies for it. The Agent was also authorised to sell ancillary and other services as authorised by the Carrier[16]. All services sold pursuant to the PSAA were to be sold on behalf of the Carrier and in compliance with the Carrier's tariffs, conditions of carriage and written instructions provided to the Agent. The Agent was not permitted to vary or modify the terms and conditions set out in any ticket used for services provided by the Carrier[17]. It was not in dispute, however, that the Agent could, consistently with the PSAA, sell tickets to consumers at a price which it determined.

11 The Agent had no proprietary rights to tickets and the Carrier could at any time require the immediate return of any tickets deposited but not yet issued to customers[18]. The Agent could not issue tickets through a third party automated ticketing system without the authority of the Carrier[19]. The Agent was to be

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12 PSAA, cl 1.

13 PSAA, cl 13.

14 PSAA, cl 3.1.

15 Referred to in the PSAA as a "Traffic Document".

16 PSAA, cl 3.1.

17 PSAA, cl 3.2.

18 PSAA, cl 6.1.

19 PSAA, cl 6.3.

remunerated by the Carrier for each sale of air transportation and ancillary services[20].

12 Under the PSAA, the Agent received "at-source" commission for each ticket sold. The commission comprised a percentage of the published fare, which was a fare fixed by the Carrier for the relevant seat on the particular flight. Agents were informed of published fares through an electronic reservation system called the Global Distribution System[21].

13 The Agent was required to collect the amount payable for the transportation or other service sold by it on behalf of the Carrier and was responsible for payment of the amount to the Carrier. All monies collected by the Agent, including applicable commissions which the Agent was entitled to claim, were the property of the Carrier and held by the Agent in trust for the Carrier until satisfactorily accounted for and settlement made. The Agent would remit to the Carrier the amount of the published fare less the "at-source" commission[22]. As found by the primary judge, the price which each airline paid for the services provided by Flight Centre was the retail or distribution margin which was retained with the airline's permission[23]. If Flight Centre sold a ticket for more than the published fare, it would recover a greater margin comprising the "at-source" commission and the excess over the published fare[24]. At the relevant time, the three airlines sold 80 to 85 per cent of their tickets through travel agents. The remainder were sold directly by the airlines[25].

14 Flight Centre also entered into preferred airline agreements with each of Emirates, Malaysia Airlines and Singapore Airlines during the relevant period. Under those agreements it could earn additional commissions and payments broadly dependent upon sales volume[26].

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20 PSAA, cl 9.

21 (2015) 234 FCR 367 at 370-371 [15].

22 PSAA, cl 7.2.

23 (2013) 307 ALR 209 at 248 [151].

24 (2015) 234 FCR 367 at 371 [17].

25 (2013) 307 ALR 209 at 220 [37].

26 (2015) 234 FCR 367 at 371 [18].

Agents and competition

15 The proposition that an agent and a principal, both selling the services of the principal, compete with each other in a market for the sale of those services does not command ready assent. The word "agent" connotes in law a person who has the authority or capacity to create legal relations between a person who occupies the position of principal and third parties[27]. The legal concept is encapsulated in the maxim quoted in *Petersen v Moloney*[28], "[*q*]*ui facit per alium facit per se*" — he who does an act through another does it himself[29]. That being said, it must be accepted that, in the parlance of trade and commerce, the term "agent" is not confined to the concept of an agent at law[30]. This case, however, is not concerned with competitive conduct in the wider sphere of "commercial agents".

16 For any given principal and agent at law, the incidents of their legal relationship arise at common law and equity subject to the particular terms of any contract between them. There may be a variety of related activities outside the framework of the agency agreement, and permitted by it, which an agent carries on to enhance its marketing position in relation to the principal's services or which are otherwise conducted for profit on its own account. In the conduct of some such extraneous activities an agent might compete with its principal without contravening their contractual relations or any incidents of those relations.

17 The ACCC submitted, and it is correct, that the PSAA did not define the full range of services offered by Flight Centre. Those included travel intermediary services which the airlines themselves offered when engaged in direct selling. But that is beside the point. In this case, the alleged contravening conduct related to an activity by Flight Centre which lay at the heart of an agency relationship, namely the sale by Flight Centre or its airline principals of contractual rights to travel on those airlines. That is the only activity to which the alleged contravening proposals by Flight Centre related. The Full Court

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27 *International Harvester Co of Australia Pty Ltd v Carrigan's Hazeldene Pastoral Co* (1958) 100 CLR 644 at 652; [1958] HCA 16.

28 (1951) 84 CLR 91 at 94; [1951] HCA 57.

29 See also *Motel Marine Pty Ltd v IAC (Finance) Pty Ltd* (1964) 110 CLR 9 at 13; [1964] HCA 7.

30 (1958) 100 CLR 644 at 652 quoting *Kennedy v De Trafford* [1897] AC 180 at 188 per Lord Herschell.

found correctly that this case had nothing to do with the broader range of services supplied by travel agents[31].

18 The ACCC referred to the approach taken in the European Union to vertical pricing arrangements between commercial agents and those on whose behalf they acted. The relevant law is to be found in Art 101(1) of the Treaty on the Functioning of the European Union (formerly Art 81(1) of the Treaty Establishing the European Community). That Article prohibits, inter alia[32]:

> "all agreements between undertakings ... which have as their object or effect the prevention, restriction or distortion of competition within the internal market, and in particular those which:
>
> (a) directly or indirectly fix purchase or selling prices or any other trading conditions".

The term "undertaking" embraces, as the European Court of Justice has held, "every entity engaged in an economic activity, regardless of the legal status of the entity and the way in which it is financed"[33]. A genuine agent is considered to be a part of the same economic unit as its principal, with the result that the two are regarded as a single "undertaking" and conduct between them does not engage the prohibition[34].

19 A finding that one entity is an integral part of another entity's business or undertaking might be sufficient, but plainly is not necessary, to support a conclusion that they cannot be in competition with each other. A principal and its agent in the market for the supply of the principal's goods or services sold by both agent and principal may resemble a single economic unit for some purposes but not for others. An agent at law for a principal pursuant to an agency agreement may well be viewed as acting as one economic unit with its principal when it creates contractual rights as between third parties and the principal. It is

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31 (2015) 234 FCR 367 at 400 [161].

32 Treaty on the Functioning of the European Union, OJ C 202 of 7 June 2016, Art 101(1). Formerly Treaty Establishing the European Community, OJ C 321E of 29 December 2006, Art 81(1).

33 *Höfner and Elser v Macrotron GmbH* [1991] ECR I-1979 at I-2016 [21].

34 *Coöperatieve vereniging "Suiker Unie" UA v Commission of the European Communities* [1975] ECR 1663 at 1998 [480], 2007 [539]; *DaimlerChrysler AG v Commission of the European Communities* [2005] ECR II-3319 at II-3358 [86]; *Confederación Española de Empresarios de Estaciones de Servicio v Compañía Española de Petróleos SA* [2006] ECR I-11987 at I-12033 [40]-[42].

inconsistent with that characterisation of its action according to the law of agency to treat such action as capable of being competitive with its principal in the sense relevant to the operation of the Act. It should be added that if an agent bears some financial risk associated with its activities and does not have an obligation to act generally in the interests of its principal, this does not establish that it is in competition with its principal when it comes to the supply to third parties of contractual rights to the principal's goods or services.

20 There are examples of manufacturers or wholesalers or the originators of services entering into agreements with dealers or "agents" which include provision for "top-down" vertical price controls, ie, controls imposed on the dealers or agents. United States cases on such arrangements have drawn uneasy distinctions between "agents" selling products on consignment at prices specified by their "principals"[35], "dealers" selling products at a specified price under a "coercive" pricing arrangement[36] and "dealers" reselling products under a supply agreement[37]. So far as the *Sherman Act* prohibition on agreements in restraint of trade is concerned[38]:

> "Consignment arrangements, and in fact all agency relations, are agreements. If they happen also to be agreements which restrain trade, they are within the Sherman Act's scope. On the basis of elementary principle, agreements are in restraint of trade if they restrain competition in price in the market between persons who stand in either an actual or a potential competitive relationship."

Relevantly for present purposes, that analysis focuses upon persons who are or are potentially in competition with each other. In that respect the text of s 45, unlike §1 of the *Sherman Act*, is explicit. The present case, however, is not concerned with a price fixing provision in the PSAA itself, nor with any "top-down" conduct of the airlines pursuant to the PSAA. Nor is it concerned with "top-down" price fixing by a principal resulting from upward pressure by travel agents in a network of agents which are in competition with each other.

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35 *United States v General Electric Co* 272 US 476 (1926).

36 *Simpson v Union Oil Co of California* 377 US 13 (1964) in which a coercive pricing arrangement embodied in a dealership agreement for sale on consignment and applied to a very large network of dealers was held to contravene §1 of the *Sherman Act*, 15 USC §§1-7.

37 *Dr Miles Medical Co v John D Park & Sons Co* 220 US 373 (1911).

38 Rahl, "Control of an Agent's Prices: The Simpson Case — A Study in Antitrust Analysis", (1966) 61 *Northwestern University Law Review* 1 at 14.

21 The ACCC argued that the agency relationship between Flight Centre and the airlines did not defeat the proposition that Flight Centre was supplying a service to consumers in competition with the airlines. That latter argument depended, it was said, upon an examination of the conditions under which and the extent to which Flight Centre could be said to be an agent of the airlines. That examination, however, yields the conclusion that what Flight Centre did in selling an air ticket was properly regarded as the action of the airline itself. Further, the market in which Flight Centre and the airlines were selling was the market in which international airlines competed for the sale of their services. There was no "market" for the supply of the tickets of a particular carrier. Flight Centre's expressed concerns and proposals about the pricing practices of its principals did not involve the making of a proposal by one competitor to another in any relevant market.

22 Pursuant to the legally binding authority conferred upon it by each airline, Flight Centre created, with each sale, a contractual relationship between the airline and the customer. The subject matter of that contractual relationship was the right to fly with the airline. It may be accepted that in creating that contractual relationship Flight Centre was strictly "supplying" a service within the definition of the term "supply" as "provide, grant or confer"[39]. The services it was supplying fell within that aspect of the definition of "services" in the Act which referred to "any rights ... that are, or are to be, provided, granted or conferred in trade or commerce"[40].

23 It may also be accepted that the greater the number of consumers who chose to deal with an airline principal directly rather than with Flight Centre, the less the return to Flight Centre. There is no doubt that a differential between the prices offered by the airline and the prices offered by Flight Centre to consumers had the potential to affect Flight Centre's economic interests by creating an economic incentive for consumers to deal with the airline rather than it or vice versa. Its concerns about the effect of the airlines' pricing practices on its economic interests could be seen to be analogous to those of one competitor about the pricing practices of another. Nevertheless, in relation to the supply of contractual rights Flight Centre's conduct is properly to be regarded as that of the airline. Its concerns about pricing are not amenable to characterisation as competitive for the purposes of the Act. That characterisation assumes a concept of competition under the Act which is in tension with that of an agency relationship at law. It opens the door to an operation of the Act which would seem to have little to do with the protection of competition.

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39 Act, s 4(1), definition of "supply".

40 Act, s 4(1), definition of "services".

24 In my opinion, Flight Centre was not in competition, in any relevant market, with the airlines for which it sold tickets. Its proposals with respect to the pricing practices of its principals were not proposals offered by it as their competitor but as their agent. I would dismiss the appeal with costs.

KIEFEL AND GAGELER JJ.

Introduction

25 The substantial question in this appeal is whether Flight Centre Travel Group Limited (previously Flight Centre Limited) was in competition with Singapore Airlines, Malaysia Airlines and Emirates when Flight Centre attempted to induce each of those airlines to agree not to discount the price at which that airline offered international airline tickets directly to customers.

26 The short answer is that Flight Centre was in competition with each airline. The competition was in a market for the supply, to customers, of contractual rights to international air carriage. The competition existed in that market notwithstanding that Flight Centre supplied in that market as agent for each airline.

27 Flight Centre accordingly contravened s 45(2)(a)(ii) of the *Trade Practices Act* 1974 (Cth) as then in force.

Facts

28 Flight Centre carried on the business of a travel agent, in Australia and elsewhere, from shop fronts and call centres, and over the internet. As a travel agent, Flight Centre engaged in conduct which can be described, in practical and commercial terms, as selling international airline tickets to customers.

29 The international airline tickets were contractual rights entitling customers to be provided with international air carriage by airlines which were members of the International Air Transport Association. Those airlines included Singapore Airlines, Malaysia Airlines and Emirates.

30 Flight Centre's authority to sell international airline tickets to customers was conferred by a standard form Passenger Sales Agency Agreement, which Flight Centre had entered into with the International Air Transport Association on behalf of its member airlines. In the Agency Agreement, Flight Centre was referred to as "the Agent", each airline was referred to as "the Carrier", and an international airline ticket was referred to as a "Traffic Document".

31 The Agency Agreement provided:

> "[T]he Agent is authorised to sell air passenger transportation on the services of the Carrier and on the services of other air carriers as authorized 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

> authorized to sell such ancillary and other services as the Carrier may authorize".

The Agency Agreement continued:

> "[A]ll 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".

32 The Agency Agreement further provided that, on the issue of a Traffic Document by the Agent, the Agent was obliged to pay the Carrier a nett amount. The nett amount was in practice calculated as the fare published by the Carrier to travel agents, through an electronic reservation system known as a Global Distribution System, less a percentage of that published fare known as "at-source commission".

33 A Carrier was not constrained by the Agency Agreement from selling international airline tickets through another travel agent or directly to customers.

34 The Agent was free under the Agency Agreement to sell or not to sell an international airline ticket of any Carrier. The Agent was also free under the Agency Agreement to sell any ticket to any customer at any price. The higher the price at which the Agent sold a ticket to a customer relative to the nett amount which the Agent was obliged to pay to the Carrier, the greater the Agent's retail margin on the sale.

35 Part of Flight Centre's marketing strategy was a "price beat guarantee". Flight Centre advertised that it would better the price for an airline ticket quoted by any other Australian travel agent or website, including a website operated by an airline, by $1 and would give the customer a voucher for $20.

36 The price beat guarantee made Flight Centre commercially vulnerable to an airline choosing to offer tickets directly to customers at a discount to the fare which the airline published to travel agents. That is what Singapore Airlines, Malaysia Airlines and Emirates each chose to do.

37 In series of emails sent to Singapore Airlines, Malaysia Airlines and Emirates between 2005 and 2009, Flight Centre tried to get each airline to agree to stop offering international airline tickets directly to customers at prices lower than the fares published to travel agents. Flight Centre went so far as to threaten to stop selling the tickets of each airline if that airline did not agree.

Provisions

38 Section 45(2)(a)(ii) of the Act prohibited a corporation from making a contract or arrangement, or arriving at an understanding, if a provision of the proposed contract, arrangement or understanding had the purpose, or would have or be likely to have the effect, of "substantially lessening competition".

39 Section 45A(1) deemed a provision of a contract, arrangement or understanding to have the purpose, effect or likely effect of substantially lessening competition if, relevantly, two conditions were satisfied. The first was that the provision had the purpose, effect or likely effect of fixing, controlling or maintaining the "price" for "services supplied" by one party to the contract, arrangement or understanding. The second was that the services in relation to which the price was fixed, controlled or maintained were supplied "in competition with" the other party to the contract, arrangement or understanding.

40 Section 45(3) relevantly provided that "competition" for the purposes of ss 45 and 45A meant "competition in any market in which a corporation that is a party to the contract, arrangement or understanding ... supplies ... services".

41 For the purposes of the Act, s 4(1) defined "price" to include "a charge of any description" and defined "services" to include "any rights … benefits, privileges or facilities that are, or are to be, provided, granted or conferred in trade or commerce". The same provision defined "supply", in relation to services, to include "provide, grant or confer" and defined "supplied" to have a corresponding meaning. Section 4C(b) extended the definition of supply, in relation to services, by providing that a reference to supplying services included a reference to agreeing to supply services.

42 For the purposes of the Act, s 4E defined "market" to mean "a market in Australia and, when used in relation to any … services, [to include] a market for those … services and other … services that are substitutable for, or otherwise competitive with, the first-mentioned … services".

43 Finally, for the purposes of the Act, s 84(2) provided that any conduct engaged in on behalf of a body corporate "by a director, servant or agent of the body corporate within the scope of the person's actual or apparent authority" was to be deemed "to have been engaged in also by the body corporate".

44 Sections 76(1)(a)(i) and 76(1)(d) of the Act empowered the Federal Court, if satisfied that a person "attempted to induce" another to contravene a provision of Pt IV "whether by threats or promises or otherwise", to order the person to pay such pecuniary penalty as that Court determined to be appropriate. Section 77 allowed a proceeding for the recovery of pecuniary penalty to be instituted by the

Australian Competition and Consumer Commission ("the ACCC") within six years of a contravention.

Pecuniary penalty proceeding

45 In a proceeding for the recovery of pecuniary penalty commenced in the Federal Court in 2012, the ACCC alleged that, by sending the emails between 2005 and 2009, Flight Centre attempted to induce Singapore Airlines, Malaysia Airlines and Emirates each to make a contract or arrangement, or arrive at an understanding, with Flight Centre, in contravention of s 45(2)(a)(ii) of the Act read in light of s 45A of the Act.

46 Satisfaction of the first condition of s 45A(1) presented little difficulty in the proceeding. The primary judge found that, by sending the emails, Flight Centre attempted to induce each airline to make a contract or arrangement, or arrive at an understanding, with Flight Centre. The proposed contract, arrangement or understanding contained a provision that the airline would stop offering international airline tickets directly to customers at prices lower than the fares the airline published to travel agents. The provision had the purpose and direct effect of fixing, controlling or maintaining the price at which that airline sold international airline tickets directly to customers. The provision had the further purpose and indirect effect of fixing, controlling or maintaining Flight Centre's commission (and therefore its retail margin) on its sales of that airline's tickets to customers[41]. Flight Centre did not contest those findings on appeal.

47 The critical issue in the proceeding concerned satisfaction of the second condition of s 45A(1). The issue was whether a price fixed, controlled or maintained by the proposed provision was in respect of services supplied by Flight Centre and by each airline in competition with each other. Resolution of that issue required: starting with the price that was fixed, controlled or maintained; identifying the services to which that price related; and identifying and defining the market in which those services and the competing services were supplied.

48 The ACCC's primary case concerning satisfaction of the second condition of s 45A(1) started with the fixing, controlling or maintaining of Flight Centre's commission (and therefore its retail margin) on its sales of an airline's tickets. The primary case was that Flight Centre and each airline supplied services in

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41 *Australian Competition and Consumer Commission v Flight Centre Ltd (No 2)* (2013) 307 ALR 209 at 230 [101], 236 [114], 247 [146], 248-249 [151]-[152], 250 [157]-[158], 251-252 [164]-[166], 254 [170]-[171], 256 [177]-[178], 258-259 [187]-[189], 261 [196]-[197].

competition with each other in two complementary markets. One was an "upstream market", identified as a market for "distribution services to international airlines". The other was a "downstream market", identified as a market for "booking services to customers". The services supplied in the market for distribution services to international airlines were services pertaining to the process of selling an airline ticket. They included booking the flight with the airline, issuing the ticket and collecting the fare. Travel agents supplied those services to airlines. Airlines supplied equivalent services to themselves when airlines sold tickets directly to customers. The services supplied in the market for booking services to customers were services pertaining to the process of buying an airline ticket. They included booking the flight for the customer and having the ticket issued to the customer. Travel agents supplied those services to customers, and airlines supplied at least some of those services to customers when selling tickets directly to customers.

49 The sale to, and purchase by, a customer of an international airline ticket, according to the ACCC's primary case, involved the supply of a distribution service to the airline and the supply of a booking service to the customer. That was so when the sale was made by the airline as much as when the sale was made by Flight Centre. Flight Centre's commission on the sale was the single charge that it made, and therefore the single price that it received, for supplying each of those two distinct services.

50 The ACCC's secondary case concerning satisfaction of the second condition of s 45A(1) was considerably less elaborate but also considerably more obscure. It started with the fixing, controlling or maintaining of the price at which an airline sold tickets directly to customers. The secondary case was that the services in respect of which that price was fixed, controlled or maintained were services which the airline supplied in competition with Flight Centre in a market for the supply to customers of "international passenger air travel services".

51 Unfortunately, the ACCC did not identify with precision what it meant by international passenger air travel services and did not identify with precision the market in which those services were supplied. Plainly, the supply to a customer of international passenger air travel proceeded in two stages. The first stage was the sale to the customer of a ticket conferring a contractual right to carriage. The second stage was performance of that contract by actual carriage. Equally plainly, travel agents and airlines each engaged in selling tickets but only airlines engaged in actual carriage.

52 The primary judge rejected the ACCC's secondary case for the simple reason that Flight Centre did not engage in actual carriage[42].

53 The primary judge proceeded nevertheless to accept the essential elements of the ACCC's primary case, save that he saw what the ACCC had proffered as complementary markets for distribution services to international airlines and for booking services to customers as parts of a single market for "distribution and booking services". In that single market, according to the primary judge, travel agents participated "Janus-like" as "travel intermediar[ies]". The international airlines chose to compete with travel agents by supplying services of the same description "in-house", thereby "cutting out the middle man"[43].

54 The primary judge found the second condition of s 45A(1) to have been satisfied on that basis, and accordingly found Flight Centre to have contravened s 45(2)(a)(ii). His Honour made declarations of contravention and ordered that Flight Centre pay pecuniary penalty.

Appeal to the Full Court

55 Flight Centre appealed to the Full Court against the declarations of contravention and on penalty. The ACCC cross-appealed only on penalty. In the result the issues of penalty were not reached. Overturning the critical findings of the primary judge concerning satisfaction of the second condition of s 45A(1), the Full Court allowed Flight Centre's appeal against the declarations of contravention because it rejected the ACCC's primary case as artificial.

56 The Full Court explained that artificiality on a number of bases. Prime amongst them was the unreality of introducing the notion of the supply of another service into a transaction involving nothing more of commercial substance than sale to, and purchase by, a customer of an international airline ticket. What the ACCC chose to describe as booking services were in reality no more than essential and inseparable incidents of selling a ticket to a customer, and an airline selling a ticket directly to a customer could not realistically be described as supplying a distribution service to itself[44].

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42 *Australian Competition and Consumer Commission v Flight Centre Ltd (No 2)* (2013) 307 ALR 209 at 244 [135].

43 *Australian Competition and Consumer Commission v Flight Centre Ltd (No 2)* (2013) 307 ALR 209 at 244 [137]-[138], 245 [142].

44 *Flight Centre Ltd v Australian Competition and Consumer Commission* (2015) 234 FCR 367 at 395 [134], 397-398 [149]-[150].

57 The Full Court accepted that Flight Centre competed with the airlines for the sale of airline tickets to customers. The Full Court described that competition as occurring in a market for "the supply of international passenger air travel services" to customers, as advanced by the ACCC as its secondary case. The Full Court noted that the ACCC had not appealed from the primary judge's rejection of its secondary case[45].

58 The Full Court expressed the view that, in any event, the circumstance that Flight Centre sold airline tickets and provided ancillary and other services to customers as agent for the airlines meant that Flight Centre's sales of tickets and provision of those services to customers were not to be treated as acts of its own but rather as acts for and on behalf of the airlines. The competition between Flight Centre and the airlines was not competition between suppliers who competed in any market as principals, and for that reason was not relevant for the purposes of s 45A of the Act[46].

59 The Full Court summarised its conclusions as follows[47]:

> "The impugned conduct, the agreements proposed in Flight Centre's emails to the airlines, did not occur in a market in which Flight Centre and the airlines both supplied services in competition with each other. It occurred in the market for the supply of international passenger air travel services: a market in which the primary judge correctly found (and the ACCC does not now dispute) Flight Centre was agent for, and did not relevantly compete with, the airlines. To the extent that the conduct involved the fixing of prices, it was not caught by the deeming provision in s 45A because it did not occur in a market in which Flight Centre and the airlines competed in respect of the supply of services, as required by s 45A of the Act. The primary judge erred in concluding otherwise."

60 The Full Court allowed Flight Centre's appeal, set aside the primary judge's orders and dismissed the proceeding.

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45 *Flight Centre Ltd v Australian Competition and Consumer Commission* (2015) 234 FCR 367 at 370 [8], 402-403 [173]-[175].

46 *Flight Centre Ltd v Australian Competition and Consumer Commission* (2015) 234 FCR 367 at 398 [152]-[153], 400 [162]-[163], 403 [181].

47 *Flight Centre Ltd v Australian Competition and Consumer Commission* (2015) 234 FCR 367 at 404 [182].

Appeal to this Court

61 In its appeal by special leave to this Court, the ACCC seizes on the Full Court's recognition of Flight Centre having competed with the airlines for the sale of tickets to customers to re-enliven its secondary case in a somewhat more focussed manner. The circumstance that Flight Centre sold only as agent for each airline, the ACCC argues, did not disqualify Flight Centre's sale of an airline's tickets from having been a supply by Flight Centre in a market in competition with that airline.

62 There can be no doubt as to the jurisdiction of this Court to entertain the ACCC's argument notwithstanding the ACCC's failure to put that argument to the Full Court[48]. Flight Centre protests, but acknowledges that the ACCC's re-enlivened secondary case falls within the scope of the issues joined before the primary judge and points to no forensic prejudice[49].

63 Flight Centre's substantive response is pitched at the level of principle. An agent, it says, does not compete with the agent's principal for the supply of the principal's services. The nature of Flight Centre's competition with each airline for the sale of that airline's tickets to customers, it says, was no different from the nature of the rivalry which might have existed between that airline's own internal sales staff jostling each other to obtain sales commission: the competition related to supplies in a market, but was not competition between suppliers in that market.

64 The ACCC persists in the appeal with its primary case that Flight Centre competed with each airline in markets for distribution services to international airlines and for booking services to customers. The ACCC argues that the rejection of its primary case by the Full Court resulted from a failure to take a sufficiently functional approach to market definition. That separate aspect of the ACCC's argument is best addressed before turning to the question of agency.

Limits of the functional approach

65 The critical condition for the application of s 45A, it will be recalled, was that the services in relation to which a price was fixed, controlled or maintained were supplied by one party to the contract, arrangement or understanding in competition with the other party. Section 45(3) operated with s 4E to require that competition to occur in a market in which the other party supplied either the

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48 *Crampton v The Queen* (2000) 206 CLR 161 at 171-172 [12]-[14], 182-184 [47]-[52], 214 [148]-[150], 216 [155]; [2000] HCA 60.

49 Cf *Suttor v Gundowda Pty Ltd* (1950) 81 CLR 418 at 438-439; [1950] HCA 35.

same services or services that were substitutable for, or otherwise competitive with, those services.

66 A market is a metaphorical description of an area or space (which is not necessarily a place) for the occurrence of transactions. Competition in a market is rivalrous behaviour in respect of those transactions. A market for the supply of services is a market in which those services are supplied and in which other services that are substitutable for, or otherwise competitive with, those services also are actually or potentially supplied.

67 A market is commonly defined by reference to its dimensions. The dimensions of a market are commonly described in terms of product (the types of services supplied), function (the level within a supply chain at which those services are supplied) and geography (the physical area within which those services are supplied). A market might sometimes also usefully be described as having a temporal dimension (referring to the period within which the supplies occur).

68 No issue has been raised in this case about either of the last two of those dimensions of market definition. The controversy has been about the first, and to a lesser extent about the second. Flight Centre and the airlines transact within the chain of supply of what the ACCC chooses to describe as international passenger air travel services to customers. But what, relevantly, do they supply, to whom, and at what price?

69 The question does not necessarily admit of a unique answer. Because "[t]he economy is not divided into an identifiable number of discrete markets into one or other of which all trading activities can be neatly fitted", the identification and definition of a market for particular services will often involve "value judgments about which there is some room for legitimate differences of opinion"[50]. Identifying a market and defining its dimensions is "a focusing process", requiring selection of "what emerges as the clearest picture of the relevant competitive process in the light of commercial reality and the purposes of the law"[51]. The process 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"[52]. "The elaborateness of the

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50 *Queensland Wire Industries Pty Ltd v Broken Hill Proprietary Co Ltd* (1989) 167 CLR 177 at 196; [1989] HCA 6.

51 *Singapore Airlines Ltd v Taprobane Tours WA Pty Ltd* (1991) 33 FCR 158 at 178.

52 *Australian Competition and Consumer Commission v Australia and New Zealand Banking Group Ltd* (2015) 236 FCR 78 at 107 [137].

exercise should be tailored to the conduct at issue and the statutory terms governing breach"[53]. Market definition is in that sense purposive or instrumental or functional.

70 The functional approach to market definition is taken beyond its justification, however, when analysis of competitive processes is used to construct, or deconstruct and reconstruct, the supply of a service in a manner divorced from the commercial context of the putative contravention which precipitates the analysis. *Castlemaine Tooheys Ltd v Williams & Hodgson Transport Pty Ltd*[54] is an illustration. There a brewer supplied beer to retailers, offering retailers the choice of collecting the beer from the brewer's depot for one price or having the beer delivered to the retailer's premises for a higher price. The brewer contracted with a particular haulage contractor to make the deliveries. A rival haulage contractor claimed that the brewer was engaged in the practice of exclusive dealing in contravention of ss 47(1) and 47(6) of the Act, the claimed contravention being constituted by the brewer supplying beer to a retailer on condition that the retailer acquire haulage services from the preferred contractor. The claim failed on the basis that what the brewer supplied and what the retailer acquired was in reality nothing other than delivered beer. Wilson J explained[55]:

> "Here the transactions under scrutiny encompassed no more than the supply of goods. The beer was to be supplied at the premises of the retailer. Each supply was a single transaction which could not be broken up into its several elements of sale and delivery without doing violence to the reality. Delivery to the premises was an essential and therefore inseparable concomitant of the supply of the beer. In different circumstances it might well be appropriate to characterize the delivery of the goods as the supply of a service. But not here. No question of supplying a service arises."

71 The ACCC's primary case encounters essentially the same problem as did the claim in *Castlemaine Tooheys.* The problem is one of economic theory doing violence to commercial reality.

72 The ACCC attempts to map the processes of competition between Flight Centre and the airlines to the second condition of s 45A(1) by advancing as its

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53 Brunt, "'Market Definition' Issues in Australian and New Zealand Trade Practices Litigation", (1990) 18 *Australian Business Law Review* 86 at 127.

54 (1986) 162 CLR 395; [1986] HCA 72.

55 (1986) 162 CLR 395 at 403.

primary case that the price fixed, controlled or maintained was Flight Centre's commission and that the services to which that price related were distribution services to international airlines and booking services to customers. Essential to that case was that Flight Centre supplied at least one of those services in a market in which the airline supplied the same services or services that were substitutable for, or otherwise competitive with, those services.

73 There is no want of realism in describing Flight Centre as having provided distribution services to an airline when selling that airline's ticket to a customer in accordance with the Agency Agreement. It is quite artificial, however, to describe the same airline as having provided those services (or any other services) to the airline itself when selling a ticket directly to a customer. Booking the flight, issuing the ticket and collecting the fare were part and parcel of the airline making the sale. They were inseparable concomitants of that sale.

74 Conversely, what a customer acquired when purchasing an international airline ticket could not realistically be described as more than the ticket. That was so whether the customer purchased from Flight Centre or directly from an airline. No doubt, an element of customer service was involved in making the sale. But that element of service was inseparable from the sale transaction. It was no different in kind, and little different in degree, from the attention to the requirements of the individual customer typically involved in the retail sale of a motor vehicle or of a pair of shoes.

75 Whatever other difficulties the ACCC's primary case might encounter, it was unsustainable because it rested on attributing to Flight Centre and to the airlines the making of supplies of services of a description which did not accord with commercial reality. The Full Court's rejection of the primary case was for that reason correct.

Agency and competition

76 The term "agency" is "used in the law to connote an authority or capacity in one person to create legal relations between a person occupying the position of principal and third parties"[56]. An agent is "a person who is able, by virtue of authority conferred upon him, to create or affect legal rights and duties as between another person, who is called his principal, and third parties"[57].

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56 *International Harvester Co of Australia Pty Ltd v Carrigan's Hazeldene Pastoral Co* (1958) 100 CLR 644 at 652; [1958] HCA 16.

57 *Petersen v Moloney* (1951) 84 CLR 91 at 94; [1951] HCA 57.

77 The relationship of agency is ordinarily created by contract between the principal and agent. Coexisting with the contractual relationship ordinarily is a fiduciary relationship in virtue of which the agent is constrained by a duty of loyalty to exercise the authority conferred by the principal in the interests of the principal, to the exclusion of the interests of the agent.

78 Nevertheless, "it is the contract that regulates the basic rights and liabilities of the parties", with the result that "[t]he fiduciary relationship, if it is to exist at all, must accommodate itself to the terms of the contract so that it is consistent with, and conforms to, them"[58]. Fundamentally, "the rights and duties of the principal and agent are dependent upon the terms of the contract between them, whether expressed or implied", as a consequence of which "[i]t is not possible to say that all agents owe the same duties to their principals: it is always necessary to have regard to the express or implied terms of the contract"[59].

79 The potential for competition to exist between an agent and a principal for the making of supplies in a market needs to be considered against that background of the general law of agency. Consideration of whether the Act admitted of that potential needs to start with how the core function of the agent of creating legal relations between the principal and third parties was characterised within the scheme of the Act.

80 Within the scheme of the Act, a contractual right met the definition of a service and the conferral of a contractual right met the definition of a supply. The Act also specifically spelt out that supplying a service included agreeing to a supply of a service. Sufficiently on the first basis, but additionally on the second, making a contract conferring a right to a supply of a service was itself a supply of a service. That was so whether making the contract was conduct of a principal or an agent.

81 Section 84(2) of the Act, the terms of which have been noted, deemed conduct engaged in by an agent of a corporate principal within the scope of the agent's authority to have been engaged in for the purposes of the Act also by the corporate principal. Importantly, the provision did not deem the conduct not to have been engaged in by the agent. The provision resulted instead in the conduct of the agent becoming for the purposes of the Act conduct of the principal as well as conduct of the agent.

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58 *Hospital Products Ltd v United States Surgical Corporation* (1984) 156 CLR 41 at 97; [1984] HCA 64.

59 *Kelly v Cooper* [1993] AC 205 at 213-214.

82 The Act therefore contained nothing inherently inconsistent with the notion of an agent and a principal both being suppliers of contractual rights against the principal. Nor did it contain anything inconsistent with the notion of an agent supplying contractual rights against the principal in competition with the principal supplying contractual rights directly against itself.

83 Whether an agent had legal capacity to compete with a principal was left to the general law, which in turn left the existence of that capacity to the contract between the principal and the agent: to the scope of the authority conferred on the agent by the principal; and to the extent, if at all, to which the agent was constrained in the exercise of that authority by a duty of loyalty. An agent lacking authority to negotiate with third parties would lack the means of engaging in competition. An agent constrained by a contractual or fiduciary obligation to act only in the interests of the principal would lack both the requisite autonomy and the requisite incentive.

84 To the extent that an agent might be free to act, and to act in the agent's own interests, the mere existence of the agency relationship did not in law preclude the agent from competing with the principal for the supply of contractual rights against the principal. Whether or not competition might exist in fact then depended on the competitive forces at play.

85 That position is broadly consistent with the approach taken in *DaimlerChrysler AG v Commission of the European Communities*[60]. The European Court of First Instance there held that prohibitions against agreements restricting competition[61] had no application "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 ... with which he forms an economic unit"[62]. The contrast drawn was between an agent who "works for the benefit of his principal" and "who must carry out his principal's instructions" and an agent allowed by the terms of the agreement with the principal "to perform duties which from an economic point of view are approximately the same as those carried out by an independent dealer"[63].

86 The position in the United States concerning the relevance of agency to agreements in restraint of trade is more complex. The prevailing view has been

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60 [2005] ECR II-3319.

61 Article 81(1) of the Treaty Establishing the European Community.

62 [2005] ECR II-3319 at II-3359 [88].

63 [2005] ECR II-3319 at II-3358 [86]-[87].

to see the relationship of principal and agent as an exception to the *per se* rule against price fixing[64]. But the exception has come to be seen to have no application where "the agent is really a dealer". The line between agent on the one hand, and dealer or distributor or reseller on the other hand, has been acknowledged to be "indistinct" and to lie somewhere on a "continuum bounded at one end by the manufacturer's full-time employees and at the other by vast, autonomous distribution enterprises". The appropriate inquiry has in those circumstances been said to necessitate a multifactorial objective determination of "whether the agency relationship has a function other than to circumvent the rule against price fixing"[65].

87 Adopting that approach, the United States Court of Appeals for the Seventh Circuit held, in *Illinois Corporate Travel Inc v American Airlines Inc*[66], that a travel agent was an agent of an airline as distinct from a reseller of the airline's tickets, with the result that the airline did not contravene the *per se* rule against price fixing in refusing to allow a travel agent to rebate part of the travel agent's commission to purchasers of the airline's tickets. Important to the analysis in that case were the market circumstances that airlines established and publicised the prices of tickets, thereby setting and bearing the risk associated with their own marketing strategies, and that travel agents were exposed to no financial risk in making sales other than the potential loss of commission on a refunded ticket[67].

88 The circumstances of this case are not the same as *Illinois Corporate Travel*. And the inquiry undertaken in that case is not the same as that required for the purposes of the Act.

89 Critical to the outcome of the ultimate question of whether Flight Centre sold international airline tickets to customers in a market in competition with the airlines are two considerations. The first is that Flight Centre's authority under the Agency Agreement extended not only to deciding whether or not to sell an airline's tickets but also to setting its own price for those tickets. The second is that there is no suggestion that Flight Centre was constrained in the exercise of that authority to prefer the interests of the airlines to its own.

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64 *United States v General Electric Co* 272 US 476 (1926).

65 *Morrison v Murray Biscuit Co* 797 F 2d 1430 at 1436-1438 (1986).

66 806 F 2d 722 (1986).

67 806 F 2d 722 at 725-726 (1986). See also *Illinois Corporate Travel Inc v American Airlines Inc* 889 F 2d 751 at 753 (1989).

90 Flight Centre was free in law to act in its own interests in the sale of an airline's tickets to customers. That is what Flight Centre did in fact: it set and pursued its own marketing strategy, which involved undercutting the prices not only of other travel agents but of the airlines whose tickets it sold. When Flight Centre sold an international airline ticket to a customer, the airline whose ticket was sold did not.

91 The competition which the Full Court accepted to have occurred in fact was not, as Flight Centre seeks to put it, merely competition in relation to supplies in a market. It was competition between suppliers in a market.

92 The outcome of the appeal does not turn on the precise dimensions of that market. The ACCC's persistence in describing it as a market for international passenger air travel services nevertheless tends to blur the product and functional dimensions of the market in a way which obscures the point that the supplies for which Flight Centre and the airlines competed were not supplies of carriage services but rather supplies of contractual rights to carriage services. The market is better identified as having been a market for the supply of contractual rights to international air carriage to customers or, in short, as a market for international airline tickets.

Conclusion and orders

93 The appeal should be allowed. The primary judge's declarations of contravention of s 45(2)(a)(ii) should stand, with adjustments to reflect the ACCC's success in establishing its secondary case as distinct from its primary case concerning satisfaction of the second condition of s 45A(1). In recognition of its failure to pursue that secondary case in the Full Court, the ACCC should not have its costs of the appeal to this Court and should not have its costs to date of the appeal to the Full Court.

94 The following orders should be made:

1. Appeal allowed.

2. Set aside the order of the Full Court of the Federal Court of Australia made on 31 July 2015, and in its place order that:

   (a) the appeal be allowed in part;

   (b) the respondent be granted leave to file its amended notice of cross-appeal dated 3 August 2016;

   (c) the cross-appeal be allowed in part;

(d) the declaration made by Logan J on 28 March 2014 be varied as follows:

(i) in paragraph 1, omit the words "distribution and booking services for international passenger air travel" and replace them with the words "international airline tickets";

(ii) in each of paragraphs 1(a), (b), (c), (d), (e) and (f), omit the words "distribution and booking";

(iii) in each of paragraphs 1(a), (b) and (f), omit the words "the retail or distribution margin received by Flight Centre for its booking and distribution services would be maintained" and replace them with the words "the price Flight Centre charged for its supply of international airline tickets would be maintained, and that the price Singapore Airlines charged for its supply of international airline tickets would be fixed, controlled or maintained";

(iv) in each of paragraphs 1(c) and (d), omit the words "the retail or distribution margin received by Flight Centre for its booking and distribution services would be maintained" and replace them with the words "the price Flight Centre charged for its supply of international airline tickets would be maintained, and that the price Emirates charged for its supply of international airline tickets would be fixed, controlled or maintained"; and

(v) in paragraph 1(e), omit the words "the retail or distribution margin received by Flight Centre for its booking and distribution services would be maintained" and replace them with the words "the price Flight Centre charged for its supply of international airline tickets would be maintained, and that the price Malaysia Airlines charged for its supply of international airline tickets would be fixed, controlled or maintained"; and

(e) each party bear its own costs of the proceedings in the Full Court to date.

3. Remit the matter to the Full Court of the Federal Court of Australia for the determination of the appeal and cross-appeal insofar as they relate to penalty.

95 NETTLE J. This is an appeal from a decision of the Full Court of the Federal Court of Australia (Allsop CJ, Davies and Wigney JJ) that, for the purposes of the *Trade Practices Act* 1974 (Cth) (now the *Competition and Consumer Act* 2010 (Cth)), the respondent ("Flight Centre") was not relevantly in competition with airlines for which it sold airline tickets as an agent, and thus had not engaged in anti-competitive conduct contrary to s 45(2)(a)(ii) of the *Trade Practices Act*.

96 Before this Court, the appellant ("the ACCC") advanced two theories as to the competition between Flight Centre and certain airlines[68]. Its primary case was that Flight Centre and the airlines were in competition with each other in either or both of a market for the supply of distribution services to airlines or a market for the supply of booking services to customers. The alternative case, as finally propounded, was that Flight Centre and the airlines were in competition with each other in a market for the sale of airline tickets to customers. It was not in dispute that if the Court found that Flight Centre was in competition with the airlines in one of the supposed markets Flight Centre would have engaged in anti-competitive conduct contrary to s 45(2)(a)(ii) of the *Trade Practices Act*. For the reasons which follow, the alternative case should be accepted and the appeal should be allowed.

The facts

(i) Flight Centre's business

97 Flight Centre operated a travel agency business in Australia and overseas comprised of a large network of shopfronts and call centres, as well as an internet presence. Its employees included "travel consultants" who dealt directly with potential customers. One of Flight Centre's main areas of business was the sale of international passenger air travel services to customers on behalf of airlines. Flight Centre did not operate any aircraft.

98 Flight Centre offered customers travel advice and facilitation services that included advice about particular overseas destinations and the availability of flights offered by different airlines to those destinations, the booking of international air travel on behalf of customers and the receipt of payment from customers for that air travel ("booking services"). Flight Centre provided booking services via direct contact with customers in its shops and by telephone. The booking of international air travel with Flight Centre was not available via the internet.

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68 The relevant airlines in this case were Emirates, Malaysia Airlines and Singapore Airlines ("the airlines").

99 Simultaneously, Flight Centre provided distribution services to the airlines, by disseminating to the public information about the availability of each airline's flights and by dealing with potential passengers in relation to ticketing ("distribution services"). Cumulatively, Flight Centre performed the role of an intermediary by contracting with a customer for carriage on a particular flight on behalf of the airline concerned, but in doing so acted on behalf of the customer concerned.

(ii) Flight Centre's relationship with the airlines

100 Airlines used the distribution network of third parties, like Flight Centre, to make the availability of their air travel services known to potential passengers. At the same time, as an alternative to dealing through an intermediary, airlines offered tickets for sale directly to the public (a process described as "disintermediation"). Potential passengers could therefore book a flight either through an intermediary, like Flight Centre, or directly with an airline.

101 Flight Centre's reward for securing a customer's booking on behalf of an airline, and similarly an airline's reward for securing that booking directly, was an amount of money (described as the "retail or distribution margin"), which was part of the grossed-up fare paid by the passenger for the airline ticket. Sometimes, travel agents, including Flight Centre, also charged customers a separate "service fee".

102 At relevant times, international airlines used several different Global Distribution Systems ("GDS") to make flights available for sale by travel agents. Relevantly, each airline did that by loading the airline's "published fare" onto the GDS. An airline's published fare was the price determined by the airline for a particular airline ticket. It included an amount of "at-source commission" and so enabled the calculation of the "nett fare" that the travel agent was required to remit to the airline on sale of the ticket.

103 Flight Centre was party to a standard form Passenger Sales Agency Agreement ("the PSAA") made between individual travel agents and the International Air Transport Association ("IATA") on behalf of its members. Each of the airlines was a member of IATA and, therefore, party to the PSAA with Flight Centre. Under that agreement, Flight Centre was free to promote and sell any of the airlines' flights, but whenever Flight Centre entered into a transaction with a customer by issuing a ticket for a flight on a particular airline, Flight Centre did so as agent for that airline. On receipt of the fare from the customer, Flight Centre was bound forthwith to remit the fare, less at-source commission, to the airline.

(iii) Rivalry and competition between Flight Centre and the airlines

104 Under the PSAA, Flight Centre was free to sell an airline ticket at any price it chose. But, regardless of the price at which it sold an airline ticket, Flight Centre remained bound to remit the nett fare to the airline. Consequently, if Flight Centre sold an airline ticket at a price above the published fare, Flight Centre received a margin greater than the at-source commission included in the published fare; if it sold an airline ticket at a price below the published fare, it received a margin less than the at-source commission; and, if it sold an airline ticket at a price below the nett fare, it made a loss on the sale. Flight Centre was, however, also free to set and impose additional service fees.

105 As part of its marketing strategy, Flight Centre advertised that it would better the price for an airline ticket quoted by any other Australian travel agent or website, including websites operated by airlines, by $1, and that it would give the potential customer a voucher for $20 ("the Price Beat Guarantee"). As a result of customers being able to cite a lower fare available directly from an airline's website, the financial cost to Flight Centre of honouring the Price Beat Guarantee became of enduring and increasing commercial concern to Flight Centre and a key threat to Flight Centre's business. There was also a separate but related concern that Flight Centre was losing sales to the airlines as a result of customers dealing directly with airlines via their websites.

106 During the relevant period, there was a discernible trend of airlines bypassing intermediaries, like Flight Centre, by making greater use of the internet to offer airline tickets for sale directly to customers at prices less than the published fares available on the GDS. Flight Centre referred in its internal documents to such direct sales as "External Threats" and "Industry or Market Driving Forces", and recorded that direct sales created two particular problems for its business. The first was the risk of losing sales to the airlines when potential customers chose to deal directly with an airline via its website in light of the lower fares there available. The second was Flight Centre needing to better fares offered directly by the airlines in order to secure sales, particularly under the Price Beat Guarantee, and therefore making a loss on those sales. Flight Centre thus recognised that it was in competition with airlines offering direct sales to customers.

107 At trial, there was also evidence from two other market participants, Mr Clarke, the Chairman of Webjet Ltd, an online travel agency, and Ms Schwass, the operator of Travel by Tracey, a travel agency shopfront business. They deposed that they regarded themselves as being in competition with airlines which made direct sales to customers. Their evidence was consistent with the evidence of the only expert called at trial, an economist named Dr FitzGerald. Dr FitzGerald stated that in his opinion:

> "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*". (emphasis in original, footnote omitted)

108 Dr FitzGerald identified a single overarching market for international travel and ancillary products with downstream and upstream levels. He said that booking services were supplied downwards by travel agents and airlines (selling directly) to customers, and distribution services were supplied upwards by travel agents to the airlines and by airlines to themselves (through "self-supply", which eliminated the need to use a third party). In Dr FitzGerald's opinion, the relevant market was best identified as the downstream or distribution functional level of the single overarching market in which travel agents compete with airlines for the supply of booking and distribution services. Dr FitzGerald's opinion was consistent with the ACCC's primary case but, of course, that is not determinative. Expert evidence may provide a measure of assistance in appreciating the applicable economic principles but, ultimately, it is for the court to discern and define the relevant market as a question of fact[69].

(iv) The impugned conduct

109 Between 19 August 2005 and 16 May 2009, Flight Centre sent six series of emails to the airlines evidencing the rivalry or competition between Flight Centre and the airlines in relation to the sale of tickets and attempting to persuade the airlines not to engage in further direct sales to customers at discounted prices ("the emails"). It is that conduct which the ACCC alleged was contrary to s 45(2)(a)(ii) of the *Trade Practices Act*.

Relevant legislation

110 At relevant times, s 45 of the *Trade Practices Act* provided, so far as is relevant, as follows:

> "(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

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69 *Trade Practices Commission v Australia Meat Holdings Pty Ltd* (1988) 83 ALR 299 at 316.

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

111 Section 45A provided, so far as is relevant, that:

"(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."

112 "Market" was defined in s 4E as follows:

"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."

113 "Services" were defined in s 4(1), as far as is relevant, as follows:

"***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 ...

...

but does not include rights or benefits being the supply of goods or the performance of work under a contract of service."

114 "Supply" was defined in s 4(1) as follows:

"***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 ..."

The proceeding at first instance

115 At first instance, the ACCC put its case in two alternative ways. The ACCC's primary case was that Flight Centre and the airlines were in competition with each other in the market for intermediary booking and distribution services and that Flight Centre's conduct in sending the emails was an attempt to induce the airlines to enter into a contract, arrangement or understanding with Flight Centre that would prevent the airlines from undercutting Flight Centre through direct sales, thus protecting Flight Centre's retail or distribution margin in the market for the provision of one or other of those services. The ACCC's alternative case was that Flight Centre and the airlines were in competition with each other in the market for the provision of international air travel services and that Flight Centre's conduct in sending the emails was an attempt to induce the airlines to enter into a contract, arrangement or understanding with Flight Centre that would prevent the airlines from undercutting Flight Centre through direct sales, thereby protecting Flight Centre's retail or distribution margin in the market for the supply of international air travel services. In either event, it was contended, Flight Centre's conduct was an attempt to induce a contravention of s 45, as read with s 45A, of the *Trade Practices Act*.

116 The primary judge found that Flight Centre and the airlines were in competition with each other in the market for intermediary booking and distribution services and that Flight Centre's conduct in sending the emails constituted "a concerted pattern of reactive corporate conduct"[70] amounting to an attempt to induce each airline to enter into a contract, arrangement or understanding with Flight Centre that would prevent the airline from undercutting Flight Centre through direct sales and thereby protect Flight Centre's retail or distribution margin in respect of booking and distribution services[71]. On that basis, his Honour held that Flight Centre's conduct was an attempt to induce a contravention of s 45, as read with s 45A, of the *Trade Practices Act*.

The appeal to the Full Court

117 The Full Court were critical of the primary judge's finding that the relevant market in which Flight Centre's impugned conduct had occurred was one for booking and distribution services. Their Honours stated that a market so defined did not correspond to any of the markets pleaded, lacked precision and clarity, and was in any event artificial[72]. In the Full Court's view, the affixation of labels such as "intermediary services" or "booking and distribution services" tended to obscure, or at least did not significantly assist in, the proper consideration of the relevant supplies and the relevant market[73]. In reality, the Full Court held, an airline's conduct in selling an airline ticket directly to a customer (including the ancillary conduct of making the flight known to the customer and booking the flight) could not sensibly be regarded as the provision by the airline of a service to itself[74]. It "was in fact an artificial construct that did not truly reflect the commercial reality of the relevant commercial relationship and dealings"[75]. The Full Court considered that the primary judge's conclusion was also fraught because it required that distribution services supplied by airlines

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70 *Australian Competition and Consumer Commission v Flight Centre Ltd (No 2)* (2013) 307 ALR 209 at 225-226 [82].

71 *Flight Centre (No 2)* (2013) 307 ALR 209 at 261 [197].

72 *Flight Centre Ltd v Australian Competition and Consumer Commission* (2015) 234 FCR 367 at 393 [126]-[127], 395 [134].

73 *Flight Centre* (2015) 234 FCR 367 at 394 [129].

74 *Flight Centre* (2015) 234 FCR 367 at 395-396 [134]-[137].

75 *Flight Centre* (2015) 234 FCR 367 at 403 [176].

"in-house" be substitutable for the intermediary services supplied by Flight Centre and other agents; and they were not[76].

118 Although the ACCC did not persist with its alternative case before the Full Court, the Full Court recognised that there was rivalry between Flight Centre and the airlines "in respect of the market for the supply of international passenger air travel services"[77], but held that it was not rivalry that existed "in a market in which both Flight Centre and the airlines supplied goods or services in competition with each other"[78]. Their Honours reasoned that was so because only the airlines supplied international passenger air travel services and "Flight Centre operated in the market for such services, but only as an agent for the airlines"[79]. The Full Court therefore concluded that[80]:

> "The impugned conduct, the agreements proposed in Flight Centre's emails to the airlines, did not occur in a market in which Flight Centre and the airlines both supplied services in competition with each other. It occurred in the market for the supply of international passenger air travel services: a market in which the primary judge correctly found (and the ACCC does not now dispute) Flight Centre was agent for, and did not relevantly compete with, the airlines. To the extent that the conduct involved the fixing of prices, it was not caught by the deeming provision in s 45A because it did not occur in a market in which Flight Centre and the airlines competed in respect of the supply of services, as required by s 45A of the Act. The primary judge erred in concluding otherwise."

The appeal to this Court

119 Before this Court, the ACCC once again sought to put its case on both the primary and alternative bases advanced at first instance. That course was opposed. Counsel for Flight Centre contended that, because the ACCC had put its case before the Full Court only on the primary basis of the supposed market for booking and distribution services and did not argue on the alternative basis of a market for the sale of airline tickets, the ACCC could not now be heard to say that the Full Court erred in failing to decide the case in favour of the ACCC on the alternative basis, which was not in issue before the Full Court.

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76 *Flight Centre* (2015) 234 FCR 367 at 396 [138].

77 *Flight Centre* (2015) 234 FCR 367 at 402 [173].

78 *Flight Centre* (2015) 234 FCR 367 at 402-403 [175].

79 *Flight Centre* (2015) 234 FCR 367 at 403 [175].

80 *Flight Centre* (2015) 234 FCR 367 at 404 [182].

120 That contention should be rejected. Inasmuch as the ACCC put its case at first instance on both bases, Flight Centre had every opportunity to contest the argument that there was a market for the sale of airline tickets in which it and the airlines competed and to adduce evidence in opposition to that argument. It chose not to do so. Consequently, this is not a case where a respondent has been deprived of an opportunity properly to meet a case which is put against it for the first time on appeal[81].

121 Further, although when the matter was before the Full Court the ACCC did not press the argument that the primary judge's conclusion could be upheld on the alternative basis of a market for the sale of airline tickets, the issue as to Flight Centre's agency for the airlines in the supposed market for the supply of booking and distribution services was in essential respects identical to the agency issue in relation to the market for the sale of airline tickets. It is apparent from the Full Court's reasons that their Honours actively considered the possibility of upholding the primary judge's conclusion on the alternative basis of the market for the sale of airline tickets but rejected it for the sole reason that Flight Centre acted as each airline's agent in the sale of that airline's tickets[82]. That was also the only substantive basis on which Flight Centre sought to counter the ACCC's alternative case in this Court. Accordingly, this is not a case where this Court has been deprived of the advantage of the court below's consideration of the response to an argument. In substance, the position is as if the ACCC had persisted with its alternative argument before the Full Court and the Full Court had rejected it for the reason which in fact they gave.

122 In those circumstances, it would be illogical and would ill-accord with a just disposition of this appeal to eschew consideration of the effect of Flight Centre's conduct on competition in the market for the sale of airline tickets. For the sake of good order, however, during the course of the hearing of this appeal, the ACCC sought leave *nunc pro tunc* to file an amended notice of cross-appeal to the Full Court and an amended notice of appeal to this Court, copies of which have since been provided to the Court. In order finally to regularise the position, leave was granted in respect of the amended notice of appeal to this Court and I agree with Kiefel and Gageler JJ that leave to file the amended notice of cross-appeal to the Full Court should now be granted.

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81 Cf *Suttor v Gundowda Pty Ltd* (1950) 81 CLR 418 at 437-439; [1950] HCA 35; *Coulton v Holcombe* (1986) 162 CLR 1 at 7-8 per Gibbs CJ, Wilson, Brennan and Dawson JJ; [1986] HCA 33.

82 *Flight Centre* (2015) 234 FCR 367 at 402-403 [173]-[176].

The market for booking and distribution services

123 For the reasons which the Full Court gave, and for the reasons which Kiefel and Gageler JJ give, the Full Court were correct to hold that the supposed market for the provision of booking and distribution services was an artificial construct that does not truly engage the commercial reality of the relevant commercial relationship and dealings, and thus that Flight Centre and the airlines were not in competition with each other in any such market.

The market for the sale of airline tickets

124 The Full Court were incorrect, however, to find that Flight Centre and the airlines were not in competition with each other in the market for the provision of international air travel services or, more precisely, for the sale of international airline tickets. It is true, as the Full Court found, that only the airlines operated aircraft and, in that sense, only the airlines were capable of supplying the service of carrying passengers by air from one international destination to another. Flight Centre neither operated aircraft, nor undertook to carry passengers by air, whether by itself or through any agent. But, as was earlier recorded, "services" were expansively defined in s 4(1) of the *Trade Practices Act* as including "any rights ... benefits, privileges or facilities that are, or are to be, provided, granted or conferred in trade or commerce", and "supply" also was expansively defined as including, in relation to services, "provide, grant or confer". It requires no extension of the natural and ordinary meaning of those words as defined to characterise the sale of an airline ticket by a travel agent, like Flight Centre, to a customer as a supply to that customer of the right, enforceable against the relevant airline, to be carried by that airline on the flight to which the ticket relates.

125 It is also true, as the Full Court found[83], that whenever Flight Centre sold an airline ticket to a customer it did so as agent for the relevant airline. But, as will be seen, on the facts of this case, to say that Flight Centre acted as the agent of the airline means no more than that Flight Centre was endowed by the relevant airline with authority to create in favour of the customer the right to be carried by the airline on the flight for which the airline ticket was provided.

126 As defined in s 4E of the *Trade Practices Act*, a market for goods or services means 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". Ultimately, therefore, the existence of a market for goods or services is determined by the extent of their substitutability. Substitutability is, however, a matter of degree. The greater the degree of substitutability between

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83 *Flight Centre* (2015) 234 FCR 367 at 394 [131].

goods or services, the greater the degree of competition between suppliers of those goods or services, and vice versa[84]. A market for goods or services within the meaning of s 4E is taken to exist where there is such a degree of substitutability between the goods or services of suppliers in the same or a related geographic area, and thus such competition between them, that the market power of each is significantly constrained[85].

127 From the point of view of a prospective customer, an airline ticket sold by Flight Centre on behalf of an airline would be in most respects functionally identical to an airline ticket sold directly by the airline. Apart, perhaps, from the prospective customer's perception of extra sales service and purchasing convenience, the only difference between the two offerings would be price. Consequently, from the point of view of the prospective customer, the airline ticket sold by Flight Centre on behalf of an airline would be close to perfectly substitutable for the airline ticket sold directly by the airline; and, in terms of generally accepted competition principles[86], that means that the cross-price elasticity of demand as between an airline ticket sold by Flight Centre and an airline ticket sold directly by the airline would approach positive infinity. Other things being equal, that connotes a high degree of competition between airline tickets sold by Flight Centre on behalf of airlines and airline tickets sold directly by each airline[87] and, therefore, the existence of a market for the sale of airline tickets in which both Flight Centre and the airlines competed.

128 When dealing with the ACCC's primary contention that Flight Centre was in competition with the airlines in the market for the supply of booking and distribution services, the Full Court observed, correctly, that one of the difficulties with the argument was that, because each airline sold only its own tickets, a market for booking services could only exist in relation to the airline tickets of a particular airline[88]. That difficulty does not arise, however, in

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84 *Arnotts Ltd v Trade Practices Commission* (1990) 24 FCR 313 at 331-332.

85 *Queensland Wire Industries Pty Ltd v Broken Hill Proprietary Co Ltd* (1989) 167 CLR 177 at 187-189 per Mason CJ and Wilson J, 196 per Deane J; [1989] HCA 6; *Singapore Airlines Ltd v Taprobane Tours WA Pty Ltd* (1991) 33 FCR 158 at 178 per French J, citing Areeda and Kaplow, *Antitrust Analysis*, 4th ed (1988) at 572; *Monroe Topple & Associates Pty Ltd v Institute of Chartered Accountants in Australia* (2002) 122 FCR 110 at 144 [135]-[136] per Tamberlin J.

86 Ruffin, *Modern Price Theory*, (1988) at 114-115; Call and Holahan, *Microeconomics*, 2nd ed (1983) at 67.

87 Ruffin, *Modern Price Theory*, (1988) at 114-115. See also Wold, *Demand Analysis*, (1953).

88 *Flight Centre* (2015) 234 FCR 367 at 400-401 [164].

relation to the market for the sale of airline tickets. Although each airline sold only its own tickets, each airline was in competition with each other airline for the sale of airline tickets and Flight Centre sold all of the airlines' tickets. Possibly, the degree of substitutability between the different airlines' tickets was not as complete as that between an airline's ticket sold by Flight Centre on behalf of the airline and an airline's ticket sold by that airline directly. There might have been sufficient actual or perceived differences in terms of quality and convenience that the choice between the offerings of different airlines was not entirely dependent on price. But it was never suggested that such differences resulted in there being other than a very high level of price competition between the airlines for the sale of their respective tickets. To the contrary, the evidence of Flight Centre's appreciation of the difficulties posed by the airlines' conduct in selling tickets directly, and the evidence of Mr Clarke and Ms Schwass as to the economic pressures to which their businesses were subject, left no doubt that Flight Centre's ability to sell one airline's tickets at prices satisfactory to Flight Centre was constrained almost as much by prices set by other airlines for the sale of their competing tickets as it was by the prices set by the subject airline for the sale of its tickets directly to customers[89]. The market in which Flight Centre was in competition with each of the airlines was, therefore, the market for airline tickets in respect of all airlines.

Sales as agent

129 The Full Court took the view that, because Flight Centre sold airline tickets as the agent of the airlines, only the airlines – and not Flight Centre – were in competition with each other for the sale of airline tickets[90]. Before this Court, counsel for Flight Centre argued in support of that view that, because every sale made by Flight Centre as agent for an airline increased the airline's sales generally, it was illogical to speak of the airlines being in competition with Flight Centre. The reality, counsel submitted, was that it was inevitably to the advantage of the airline for Flight Centre to sell as many of the airline's tickets as possible, at whatever price Flight Centre chose.

130 That submission should be rejected. It overlooks the fact that, although the airline's interest in Flight Centre selling the airline's tickets as an agent was to some extent informed by the number of tickets sold by Flight Centre, it was also

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89 See and compare *Rural Press Ltd v Australian Competition and Consumer Commission* (2003) 216 CLR 53 at 72-73 [45] per Gummow, Hayne and Heydon JJ; [2003] HCA 75; *Boral Besser Masonry Ltd v Australian Competition and Consumer Commission* (2003) 215 CLR 374 at 457 [257] per McHugh J; [2003] HCA 5; *Arnotts* (1990) 24 FCR 313 at 334.

90 *Flight Centre* (2015) 234 FCR 367 at 404 [182].

affected by the amount of the commission which Flight Centre was paid for its services as agent. Contrary to Flight Centre's submissions, it may be inferred from the fact that the airlines commenced to sell tickets directly to customers that, to the extent that each airline was able to sell tickets directly to customers rather than through Flight Centre as its agent, the airline preferred to do so because it avoided the need to pay commission on those sales. Some self-serving correspondence sent by the airlines to Flight Centre at the time of the impugned conduct does not significantly detract from the strength of that inference. Plainly enough, Flight Centre and the airlines were in competition for the sale of airline tickets, with the result that an arrangement between Flight Centre and the airlines to fix the prices at which the airlines were prepared to sell when dealing directly with customers would have had or been likely to have had the effect of reducing the level of competition between Flight Centre and the airlines in that market.

131 Counsel for Flight Centre contended that, because Flight Centre sold an airline's tickets as agent for that airline, Flight Centre's position vis-à-vis the airline was relevantly no different from the position of an in-house, captive, commission-based salesperson. In counsel's submission, it would be nonsense to suppose that, when such a salesperson attempts to influence his or her principal to raise prices in order to increase the amount of the salesperson's commission, he or she thereby engages in anti-competitive conduct. Rather, such events are properly to be regarded as the principal being supplied with information by the in-house salesperson as to the best price able to be charged by the principal without prejudicing staff relations with the salesperson. Counsel argued that it was the same when Flight Centre supplied information to the airlines as to the best price which could be set by the airlines for direct sales while maintaining a satisfactory relationship with Flight Centre as its commission-based agent.

132 That submission should also be rejected. The supposed analogy between an in-house, captive, commission-based salesperson and Flight Centre is inapt. *Ex hypothesi*, in the case of the salesperson, the principal retains contractual power to determine the level of prices at which the salesperson is permitted to sell the principal's products. For that reason, the salesperson is incapable of putting downward competitive pressure on those prices[91]. By contrast, Flight Centre had an unimpeded contractual right to determine the prices at which it sold an airline's tickets to customers and, consequently, a contractually unimpeded power to put downward competitive pressure on the prices charged by the airline for its tickets in direct sales. It follows that for Flight Centre to propose to the airlines that the airlines increase their prices for the purpose of direct sales was necessarily to propose a lessening of downward competitive

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91 *United States v General Electric Co* 272 US 476 at 488 (1926); *Illinois Corporate Travel Inc v American Airlines Inc* 806 F 2d 722 at 724-725 (7th Cir 1986).

pressure on prices and, consequently, a reduction in the level of competition between Flight Centre and the airlines for the sale of airline tickets.

133 Counsel for Flight Centre called in aid a number of judgments from courts in the United States of America which he submitted showed that it ought not be considered anti-competitive conduct for a manufacturer to set the prices at which it requires its dealers and distributors to sell its goods. He instanced in particular the decisions of the Supreme Court of the United States in *United States v General Electric Co*[92] and *Simpson v Union Oil Co of California*[93] and the decisions of the United States Court of Appeals in *Morrison v Murray Biscuit Company*[94] and *Illinois Corporate Travel Inc v American Airlines Inc*[95]. Those decisions, however, are either distinguishable or, properly understood, opposed to Flight Centre's contentions.

134 It is convenient to begin with *Murray Biscuit*. Murray Biscuit Company ("Murray Biscuit") was a manufacturer of biscuits that distributed its products through brokers and wholesale distributors. Brokers were commission-based agents who took orders from grocery stores in assigned territories for the purchase of Murray Biscuit products at prices set by Murray Biscuit. Each broker was required to forward all orders to Murray Biscuit, which would then fill each order directly by sending the ordered goods to the purchasing grocery store and invoicing and receiving payment from that store. Thereafter, Murray Biscuit remitted a commission of five per cent of the invoiced price to the broker "as compensation for [the broker's] services"[96]. In contrast, distributors were independent wholesalers to whom Murray Biscuit sold and delivered its products at wholesale prices, which were eight per cent below the price offered to grocery stores in brokered sales[97]. Once a distributor had so bought and paid for Murray Biscuit products, the distributor was free to re-sell the products to grocery stores at whatever prices the distributor chose. Morrison was one of Murray Biscuit's distributors. After some time and correspondence, Murray Biscuit terminated Morrison's distribution agreement on the basis of complaints by one of Murray Biscuit's brokers that Morrison was operating in the broker's territory and undercutting the broker's invoiced prices[98]. Morrison brought an action against

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92 272 US 476 (1926).

93 377 US 13 (1964).

94 797 F 2d 1430 (7th Cir 1986).

95 806 F 2d 722 (7th Cir 1986).

96 *Murray Biscuit* 797 F 2d 1430 at 1434 (7th Cir 1986).

97 *Murray Biscuit* 797 F 2d 1430 at 1434-1435 (7th Cir 1986).

Murray Biscuit alleging a conspiracy between Murray Biscuit and the broker to suppress price competition, contrary to the *Sherman Anti-Trust Act*[99].

135 Morrison's action against Murray Biscuit failed because it was held that there was insufficient evidence of Murray Biscuit having agreed with either Morrison or the broker as to the prices to be charged for its products[100]. Although it was recognised that the broker's complaints suggested the existence of a price-fixing agreement to which Morrison was party, it was considered equally possible that the real substance of the broker's complaint was that Murray Biscuit had failed to bind Morrison to an agreement as to a price floor, or simply that Morrison had entered the broker's territory and undercut the broker's prices by increasing supply[101]. Thus, to a very large extent, the decision in *Murray Biscuit* turned on its own facts.

136 Counsel for Flight Centre contended that the real significance of *Murray Biscuit* was, however, the Court of Appeals' observations concerning the apparent tension between the Supreme Court's reasoning in *General Electric* and later in *Union Oil*.

137 In *General Electric*, it was held that it was not a contravention of the *Sherman Anti-Trust Act* for a supplier to fix the prices to be charged by its agents for sale of the supplier's goods[102]. By contrast, in *Union Oil*, it was held that it was a contravention of the *Sherman Anti-Trust Act* for an oil company to fix the prices at which its retail dealers were permitted to sell gasoline to the public, even though the retail dealers were, at law, the oil company's consignment agents, who received the gasoline on consignment from the oil company and sold it as agents for the company[103]. As the Court of Appeals stated in *Murray Biscuit*, given that the Supreme Court in *Union Oil* expressly declined[104] to

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98 *Murray Biscuit* 797 F 2d 1430 at 1435 (7th Cir 1986).

99 1890 (15 USC §§1-7), as amended by the *Clayton Act* 1914 (15 USC §§12-27), on which many of the anti-competition prohibitions of the *Trade Practices Act* were to some extent based: *Melway Publishing Pty Ltd v Robert Hicks Pty Ltd* (2001) 205 CLR 1 at 36-37 [91] per Kirby J; [2001] HCA 13.

100 *Murray Biscuit* 797 F 2d 1430 at 1435-1436 (7th Cir 1986).

101 *Murray Biscuit* 797 F 2d 1430 at 1435-1436 (7th Cir 1986).

102 *General Electric* 272 US 476 at 490, 493-494 (1926).

103 *Union Oil* 377 US 13 at 20-21 (1964).

104 *Union Oil* 377 US 13 at 22-23 (1964).

overrule *General Electric*, it was not immediately apparent how the differences between the two decisions should be resolved[105]. The discrimen appeared to the Court in *Murray Biscuit*[106] to be that in *Union Oil*, notwithstanding the legal position of the retail dealers as consignment agents, the "so-called retail dealer 'consignment' agreement" was a "clever manipulation of words"[107], having no function other than to circumvent the rule against price-fixing. In contradistinction to the position in *General Electric*, the oil company and the retail dealers were not "a unified economic consciousness incapable of conspiring with itself"[108].

138 Applying those observations to this case, counsel for Flight Centre submitted that, because the agency arrangement between Flight Centre and the airlines was not in any sense a contrivance devoid of purpose other than to circumvent the law against price-fixing, but was rather a longstanding method of airlines selling tickets to customers, the reasoning in *General Electric* showed that the airlines and Flight Centre were properly to be regarded as a unified economic consciousness that was incapable of agreeing with itself to maintain certain prices.

139 That submission is not persuasive. To the extent that the reasoning in *General Electric* is capable of translation to the context of s 45A of the *Trade Practices Act*, it may be seen to support the relatively unremarkable proposition that, without more, the appointment by a manufacturer of an agent to sell its goods at prices determined by the manufacturer does not contravene the prohibition against price-fixing. In order to engage the operation of s 45A, the parties to a contract, arrangement or understanding to fix the price of goods or services which they supply must be in competition with each other for the supply of those goods or services. Of itself, the appointment by a manufacturer of an agent to sell its goods on its behalf does not mean that the manufacturer and the agent are in competition with each other for the sale of those goods to the public. But, equally, in the circumstances of a given case, it may be that the manufacturer and the agent are in competition with each other. So much indeed is confirmed by the decision of the United States Court of Appeals in *American Airlines*.

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105 *Murray Biscuit* 797 F 2d 1430 at 1436-1437 (7th Cir 1986).

106 *Murray Biscuit* 797 F 2d 1430 at 1436-1437 (7th Cir 1986).

107 *Union Oil* 377 US 13 at 14, 22, 24 (1964).

108 *Pink Supply Corp v Hiebert Inc* 788 F 2d 1313 at 1317 (8th Cir 1986), quoted in *Murray Biscuit* 797 F 2d 1430 at 1436 (7th Cir 1986).

140 In *American Airlines*, a travel agent sought a preliminary injunction to restrain what it alleged was unlawful price maintenance comprised of American Airlines' refusal to allow the travel agent to sell tickets on behalf of American Airlines below the prices set by the airline. The application for a preliminary injunction was refused on several bases, although principally because the relationship between American Airlines and travel agents was considered to be one of "*genuine* agency"[109] attracting the operation of the rule in *General Electric*. It followed that the applicant was unable to establish the kind of per se contravention of the *Sherman Anti-Trust Act* that was necessary to ground preliminary relief. But, as the Court of Appeals remarked, that did not necessarily exclude the possibility that the applicant would be able at trial to establish that American Airlines' market power was such that its maintenance of higher prices was not productive of sufficient non-price benefits to make the price effects of the restraint "worth the price"[110] from the perspective of consumers.

141 Evidently, the idea that the maintenance of prices might not generate sufficient non-price benefits to make the price effects of the restraint "worth the price" imports a body of anti-trust jurisprudence and a range of considerations which differ from those that apply to s 45A of the *Trade Practices Act*. The *Sherman Anti-Trust Act*'s conception of competition appears to be less "atomistic"[111] than that which applies under the *Trade Practices Act*. Even so, *American Airlines* is relevant for present purposes in confirming that, despite the rule in *General Electric*, it is accepted that price-fixing arrangements between principal and agent are capable of having a substantially anti-competitive effect for the purpose of the *Sherman Anti-Trust Act* depending on the circumstances.

142 Counsel for Flight Centre also placed reliance on a decision of the European Court of First Instance in *DaimlerChrysler AG v Commission of the European Communities*[112] that the relationship between Mercedes-Benz and its sales agents in Germany was such that the sales agents should be regarded as in effect employees of Mercedes-Benz and therefore as forming a "single economic unit"[113] with Mercedes-Benz. That was considered to be so notwithstanding that the sales agents were authorised to grant discounts out of their commission in such amounts as they should determine and were required to bear the costs of

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109 *American Airlines* 806 F 2d 722 at 729 (7th Cir 1986) (emphasis in original).

110 *American Airlines* 806 F 2d 722 at 727 (7th Cir 1986).

111 *American Airlines* 806 F 2d 722 at 727 (7th Cir 1986).

112 [2005] ECR II-3319.

113 *DaimlerChrysler* [2005] ECR II-3319 at II-3358 [86], see also at II-3363 [102].

purchasing demonstration vehicles (which could prove difficult to re-sell at a profit), carry out all work under the Mercedes-Benz warranty and acquire and stock spare parts at their own economic risk[114]. It was held[115] that the agreements between Mercedes-Benz and the sales agents, which included sales territory restraints, were not in breach of the applicable prohibition on anti-competitive conduct[116].

143 Flight Centre's reliance on the decision in *DaimlerChrysler* is misplaced. As has been seen, that case was concerned with whether exclusive territorial arrangements were anti-competitive, not with whether they amounted to price-fixing, and it was decided under legislation that is substantially different from ss 45 and 45A of the *Trade Practices Act*. Moreover, the reasoning does not assist in the circumstances of a case like this where, as a result of a longstanding practice of airlines selling tickets through travel agents at prices determined by the travel agents and the airlines subsequently adopting a practice of offering sales directly to customers as an alternative to sales through travel agents, there arises a degree of competition between airlines and travel agents with the result that travel agents attempt to maintain levels of sales by undercutting the prices offered by the airlines. Nothing said in the reasoning in *DaimlerChrysler* is opposed to the conclusion that, in the circumstances of this case, the making of an agreement or arrangement between an airline and a travel agent for the airline to raise its prices when selling directly to customers, so as to permit the travel agent to maintain its sales volume while increasing prices, would be anti-competitive.

144 Counsel for Flight Centre next referred to the decision of this Court in *Castlemaine Tooheys Ltd v Williams & Hodgson Transport Pty Ltd*[117], in which it was held that it was not exclusive dealing by means of third line forcing, contrary to s 47(6) of the *Trade Practices Act*, for Castlemaine Tooheys to sell beer on terms and at a price that included delivery to the purchaser's premises by a third party carrier acting as an agent[118]. Although not entirely clear, the point of counsel's submission seemed to be that, if Castlemaine Tooheys and the third party carrier were properly to be regarded as one entity for the purposes of

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114 *DaimlerChrysler* [2005] ECR II-3319 at II-3331-II-3332 [13]-[16].

115 *DaimlerChrysler* [2005] ECR II-3319 at II-3369 [122].

116 Treaty Establishing the European Community, Art 81(1).

117 (1986) 162 CLR 395; [1986] HCA 72.

118 *Castlemaine Tooheys* (1986) 162 CLR 395 at 402 per Gibbs CJ (Dawson J agreeing at 406), 403 per Wilson J (Dawson J agreeing at 406), 405-406 per Brennan J (Deane J agreeing at 406).

delivering beer to the purchaser, the airlines and Flight Centre should properly be regarded as one entity for the purposes of selling airline tickets to customers.

145 If so, that submission should also be rejected. The difficulty with it is that, in *Castlemaine Tooheys*, it followed, from the fact that the arrangement for the carriage of the beer to the purchaser's premises was an arrangement between Castlemaine Tooheys and the carrier to which the purchaser was not party, that the carrier's services were supplied to Castlemaine Tooheys and not to the purchaser. That being so, it could not be said that Castlemaine Tooheys had required the purchaser to acquire carriage services from the carrier, either as a condition of purchasing the beer or at all, and, consequently, there was no exclusive dealing by means of third line forcing. By contrast here, Flight Centre was party to the sales of airline tickets which it made to customers, albeit as agent on behalf of the airlines, just as the airlines were party to the sales which they made directly. When Flight Centre prevailed on the airlines to increase the prices at which they sold airline tickets directly, it did so on its own behalf and not on behalf of the airlines. For that reason, its conduct can be seen as having the purpose or having, or being likely to have, the effect of substantially lessening competition in the market for the sale of international airline tickets. The decisions of the Federal Court in *Paul Dainty Corporation Pty Ltd v The National Tennis Centre Trust*[119] and *Australian Automotive Repairers' Association (Political Action Committee) Inc v Insurance Australia Ltd (formerly NRMA Insurance Ltd) (No 6)*[120], to which counsel also made reference, are distinguishable on the same basis.

146 Counsel for Flight Centre sought in passing to distinguish a finding of Drummond J at first instance in *Australian Competition and Consumer Commission v IMB Group Pty Ltd (in liq)*[121] that, where investors in an investment scheme were required as a term of the scheme to take out an insurance policy from the particular insurer nominated by IMB, that policy was supplied by the nominated insurer to the investors and acquired by the investors from the nominated insurer. That holding is consistent with the ACCC's contention in this case that, although Flight Centre sold airline tickets as agent for the airlines, Flight Centre supplied the airline tickets to the customer and the customer dealing with Flight Centre acquired the airline tickets from Flight Centre. Counsel for Flight Centre contended, however, that the finding was problematic and that, significantly, it was not expressly endorsed by the Full

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119 (1990) 22 FCR 495.

120 [2004] FCA 700.

121 (2002) ATPR (Digest) ¶46-221; [2002] FCA 402.

Court in that case[122]. In counsel's submission, the better view is that which was expressed by the Full Court in this case, that, where an agent has power and authority to sell for and on behalf of a principal, it is less likely that the agent can be considered to compete with the principal in relation to the supply of goods or services within the scope of the agency[123].

147 Generally speaking, it may be correct that, where an agent has authority to sell for and on behalf of the agent's principal, it is less likely than in other circumstances that the agent and the principal compete with each other for the sale of the goods or services in question. But so to observe in the present case really takes the matter no further. As Drummond J's holding in *IMB Group* helps to illustrate, the question of whether an agent, as opposed to an agent's principal, should be regarded as supplying the principal's goods or services depends as much as anything on the nature, history and state of relations between the principal and the agent so far as they relate to the supply of the goods or services. As has been seen, in a case like *Castlemaine Tooheys*, where the agent never had any dealings with the purchaser and thus the agent acted in fact and law solely on behalf of the principal, what was supplied to the purchaser was supplied by the principal, albeit through the agency of another. But where, as here, there had developed over time a practice of the agent having the principal's authority to supply customers with the principal's services at prices determined by the agent, the factual reality and legal substance of the matter was that it was the agent that supplied the services to the customer, albeit as the agent of the principal.

Conclusion and orders

148 In the result, it should be held that Flight Centre's conduct in attempting to persuade the airlines to increase the prices at which they sold airline tickets directly to customers was an attempt to enter into a contract, arrangement or understanding which had or was likely to have the effect of fixing, controlling or maintaining the price for airline tickets in the market for the sale of airline tickets in which both Flight Centre and the airlines competed. The conduct thus contravened s 45 of the *Trade Practices Act*. On that basis, I agree with the orders proposed by Kiefel and Gageler JJ.

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122 *Australian Competition and Consumer Commission v IMB Group Pty Ltd* [2003] FCAFC 17.

123 *Flight Centre* (2015) 234 FCR 367 at 400 [163].

149 GORDON J. Flight Centre sent emails, or a series of emails, to Singapore Airlines, Malaysia Airlines and Emirates proposing that each airline not sell its online airfares at prices lower than those determined by that airline and published to Flight Centre through a Global Distribution System ("the GDS"). Did Flight Centre engage in price fixing contrary to s 45(2)(a)(ii) of the *Trade Practices Act* 1974 (Cth) ("the TPA")? The answer is "yes".

150 The analysis of the decisions below, the bases of the appeal to this Court and the limits of the functional approach in defining a market are set out in the reasons of Kiefel and Gageler JJ and I gratefully adopt them.

151 The appeal should be allowed. I agree with the orders proposed by Kiefel and Gageler JJ. The primary judge's declarations of contravention of s 45(2)(a)(ii) of the TPA should stand adjusted in the manner proposed by Kiefel and Gageler JJ. However, I would reach the same conclusion – that Flight Centre engaged in price fixing contrary to s 45(2)(a)(ii) of the TPA – for different reasons.

152 Flight Centre's principal contention was that, because it was the "agent" of each airline, it was not, and could not be, "in competition with" each airline for the purposes of s 45A(1) of the TPA. That contention fails at the first hurdle. At the point at which Flight Centre was dealing with its own customers in its own right without reference to any interests of any airline, the description of Flight Centre as "agent" is wrong factually. Flight Centre, in its own right, was competing against all sellers of tickets, which included the airlines and other travel agents. Flight Centre was not acting as agent.

153 Further, the description of Flight Centre as "agent" is irrelevant for the purposes of the applicable provisions of the TPA. Section 45A is concerned with proscribing various practices in respect of pricing that are "restrictive". It is concerned with competition. Whether Flight Centre was, at some stage of the transaction, to be labelled or characterised as "agent" of the airlines was not the statutory question and does not resolve the appeal.

154 These reasons will summarise the facts, address the applicable statutory provisions and, applying those provisions to the facts, conclude that Flight Centre contravened s 45(2)(a)(ii) of the TPA.

Facts

155 Flight Centre sells international airline tickets to customers.

156 Flight Centre was a party to a Passenger Sales Agency Agreement ("the PSAA"), entered into between the International Air Transport Association ("the IATA"), on behalf of its airline members, and individual travel agents. Each of Singapore Airlines, Malaysia Airlines and Emirates was a member of the IATA and therefore each was party to the PSAA.

157 Clause 3 of the PSAA authorised Flight Centre, as the "Agent", to sell international airline tickets, referred to as "air passenger transportation on the services" of an airline, on behalf of the airline, being an IATA member. That clause also defined the "sale of air passenger transportation" to mean "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".

158 Flight Centre received an "at-source commission" for each sale. The commission was calculated as a percentage of the "published fare" for the relevant seat on the particular flight. The published fare was determined by the airlines and published to Flight Centre through the GDS.

159 Flight Centre also entered into "preferred airline agreements" with certain airlines and, through those agreements, derived from those airlines additional incentive-based commissions and other payments, including payments to Flight Centre for promotional activities on behalf of those airlines. Flight Centre entered into preferred airline agreements with each of Singapore Airlines, Malaysia Airlines and Emirates.

160 When Flight Centre made a sale on behalf of an airline, it held the customer's money on trust for the relevant airline until Flight Centre remitted the "nett amount" (the published fare less the at-source commission) to that airline and retained the balance as commission.

161 The PSAA did not oblige Flight Centre to sell tickets on behalf of any particular airline, or to sell tickets at the published fare. Flight Centre could sell a ticket for less than the nett amount and make a loss in respect of that sale.

162 Equally, the PSAA did not oblige the airlines to sell tickets exclusively through Flight Centre, or to sell any tickets sold directly to customers at the published fare. The airlines did not make all seats on their flights available through the GDS, and sold tickets directly to customers via the internet and telephone, often at prices less than the published fare.

163 The ability of the airlines to sell directly to customers at prices less than the published fare was problematic for Flight Centre for two reasons. First, Flight Centre had its own "price beat guarantee", where it advertised that if a customer produced a quote from an airline or another agent for a ticket that was available and able to be booked, it would better that fare by $1 and give the potential customer a $20 voucher, while still being bound by the PSAA to remit the nett amount to the relevant airline. Second, if an airline sold a ticket directly to the customer at a price less than the published fare, Flight Centre would be unable to sell the customer a ticket with that airline and earn commission pursuant to the PSAA, making it less likely to meet sales targets and receive

incentive-based commissions and other payments under the preferred airline agreements.

Flight Centre's conduct

164 Presumably in an attempt to resolve those problems, between August 2005 and May 2009, Flight Centre sent the following six emails or series of emails to the following airlines:

(1) On 19 August 2005, Flight Centre sent an email to Singapore Airlines "formally express[ing] [Flight Centre's] opposition & concern" at Singapore Airlines' discounted online fares, which had caused Flight Centre to be "faced with being uncompetitive" and to incur "significant" losses. The email also asked Singapore Airlines why it "would go out of [its] way to undercut travel agents in general by such a large amount".

(2) On 17 March 2006, Flight Centre sent a further email to Singapore Airlines saying that "there must be acknowledgement that [its discounted online fares] eat into the available market" and "[t]he less margin, the less likely a consultant will want to sell [Singapore Airlines' tickets]".

(3) On 30 May 2008, Flight Centre sent an email to Emirates stating that "if a customer only wants a ticket" it would be "a difficult sell" for Flight Centre when Emirates is offering bonus points through its website, and that Emirates' discounted online fares "serve to undermine [Flight Centre's] ability to drive the [preferred airline agreement]".

(4) On 31 December 2008, Flight Centre sent a further email to Emirates stating that in many instances, due to the discounted fares offered by Emirates when booking online, Flight Centre was only able to earn 3% on each ticket sold, rather than 7%. Flight Centre also expressed its concern that Emirates' additional online offers were "continuing to cause great difficulties for [Flight Centre] in retaining customers" and that Flight Centre consultants would likely "steer future clients away from [Emirates] ... for fear that they will lose the client direct". Flight Centre expressed a desire to work "proactively together to drive the [Emirates] product", but only in the event that, among others, the online discount related "issues" were addressed.

(5) Between February and March 2009, Flight Centre sent a series of emails to Malaysia Airlines stating that the discounted online fares were "clearly now hurting [Flight Centre's] brand" and assuring

> Malaysia Airlines that if it "change[d] [its] pricing policies ... 2009 could be a relatively good year for [it] in Australia", but that unless that happened "now, the damage that [would] be done to the [Malaysia Airlines] brand, certainly within Flight Centre, [would] take some time to repair". Flight Centre also stated that if Malaysia Airlines really wanted Flight Centre's help promoting its offers, then the discounting of online fares "MUST stop".

(6) In May 2009, Flight Centre sent a series of emails to Singapore Airlines to the effect that, if Singapore Airlines did not agree to a number of matters, including that it would not "undercut" Flight Centre in relation to online ticket sales, it would be best for Flight Centre and Singapore Airlines to "go [their] separate ways". Flight Centre sought agreement from Singapore Airlines that its online fares would be the same as those published through the GDS.

Contravention of s 45(2)(a)(ii) of the TPA

165 During the relevant period, s 45(2)(a)(ii) of the TPA provided that a corporation shall not make a contract or arrangement, or arrive at an understanding, if 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.

166 For the purposes of s 45, s 45A(1) deemed a provision of an actual or proposed contract, arrangement or understanding to have the purpose or to have or to be likely to have the effect prohibited by s 45 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 … goods or services 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*." (emphasis added)

167 A key requirement of s 45A(1) was that the parties be "in competition with each other". Section 45(3) provided that "competition", for the purposes of ss 45 and 45A:

> "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 ... supplies or acquires, or is likely to supply or acquire, goods or services or would, but for the provision, supply or acquire, or be likely to supply or acquire, goods or services." (emphasis added)

Market

168 The effect of s 45(3) was that, for s 45A to operate, there must be a "market" in which there is "competition". And, relevantly, s 45(3) also required that in that "market", at least one of the parties to the contract, arrangement or understanding "supplies ... goods or services". "[M]arket" was defined in s 4E of the TPA to mean "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".

169 Here, the relevant market in Australia is the market in which Flight Centre, every other travel agent and every IATA member airline compete to sell to a customer a "valid contract of carriage" on an airline – a ticket. A ticket is a contractual "right", enforceable by customers against an airline, "provided, granted or conferred in trade or commerce", and thus falls within the statutory definition of "services"[124].

170 If a travel agent or an airline sells a ticket, the others do not. Flight Centre and the airlines are supplying the same service – a ticket entitling the named holder to travel at a scheduled time on a scheduled date on an identified airline between identified places. The tickets supplied by the airlines and by Flight Centre were substitutable: in response to changing prices over a period of time, the tickets supplied by Flight Centre were substitutable for those supplied by the airlines when customers were given a sufficient price incentive[125]. That is not surprising. They were supplying the same service – a ticket entitling the named holder to travel at a scheduled time on a scheduled date on an identified airline between identified places.

171 For the purposes of the TPA, Flight Centre, each other travel agent and each airline "supply" a service as they relevantly *provide, grant or confer* the ticket to a customer[126].

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124 s 4(1) of the TPA.

125 See *Re Queensland Co-operative Milling Association Ltd – Proposed Merger* (1976) 8 ALR 481 at 517 cited in *Queensland Wire Industries Pty Ltd v Broken Hill Proprietary Co Ltd* (1989) 167 CLR 177 at 188; [1989] HCA 6.

126 See par (b) of the definition of "supply" in s 4(1) of the TPA.

172 The matter may be tested this way. For the purposes of the TPA, "supply" and "acquire" are words of wide import[127] that are inter-related or symmetrical[128]. "Supply" is the counterpart of "acquire". In relation to services, "acquire" is defined as including "accept"[129]. Even without that inclusive statutory language, "acquire" in its ordinary and natural meaning would include the receipt or acceptance of a service[130], here a ticket. From the perspective of the customer, who acquires the service by "accepting" the ticket, it is the fact that Flight Centre is to *provide, grant or confer* the ticket that is important, not whether it does so as the so-called "agent" for an airline.

Competition

173 Section 45A(1) required that the parties to the contract, arrangement or understanding be "in competition with each other". The area of competition and rivalry between Flight Centre and each airline was close. The emails showed Flight Centre's obvious concern that when an airline offered discounted prices for tickets, Flight Centre's customers would stop buying tickets from Flight Centre and instead buy tickets from the airline. The emails indicated that, in circumstances where an airline was selling discounted tickets, Flight Centre (a) saw itself as "faced with being uncompetitive"; (b) considered those tickets as "eat[ing] into the available market"; (c) regarded the airline as undercutting it and damaging its brand; and (d) experienced difficulties in retaining, and feared it would lose, its customers, who would move to buying a ticket directly from an airline.

174 Flight Centre contended that there was and could be no competition between it and each of the airlines for the purposes of s 45A(1) of the TPA because of the terms of the PSAA. In short, it contended that a principal cannot be in competition with its "agent" because, under the law of agency, the "agent" supplies the good or service on behalf of the "principal".

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127 See ss 4(1) and 4C of the TPA. cf *The Commonwealth v Sterling Nicholas Duty Free Pty Ltd* (1972) 126 CLR 297 at 309; [1972] HCA 19.

128 See *Cook v Pasminco Ltd* (2000) 99 FCR 548 at 552 [26].

129 par (b) of the definition of "acquire" in s 4(1) of the TPA.

130 cf *Castlemaine Tooheys Ltd v Williams & Hodgson Transport Pty Ltd* (1985) 7 FCR 509 at 531 and on appeal in *Castlemaine Tooheys Ltd v Williams & Hodgson Transport Pty Ltd* (1986) 162 CLR 395 at 404-405; [1986] HCA 72.

175 "Agent" is one of the most "commonly and constantly abused" words[131]. Flight Centre's focus on the fact that it is identified as the "Agent" in the PSAA is too narrow. That focus seeks to put two important facts out of consideration. First, in its dealings with customers, Flight Centre began by acting as principal – just like each airline and each other travel agent. It acted as principal in telling the customer that "I will get you a deal", "I will sell you a ticket at the best price". At that point, Flight Centre and each airline were in direct competition – to sell a ticket.

176 Second, under the PSAA, Flight Centre is the agent for more than one airline, and it is the rivalry between Flight Centre and its many principals that creates one aspect of the market and the competition.

177 The description of Flight Centre as "principal" or "agent" at various stages of the transaction of selling a ticket to a customer may be legally accurate, but it masks the proper identification of the rivalrous behaviours that occur at the point at which Flight Centre is dealing with its own customers in its own right without reference to any interests of any airline. At that point, the description of Flight Centre as "agent" is simply wrong. At that point, Flight Centre in its own right was competing against all sellers of tickets, which includes the airlines and other travel agents. Flight Centre was not acting as agent.

178 For those reasons, Flight Centre was in competition with each airline for the purposes of s 45A(1) of the TPA.

Purpose of the proposed contract, arrangement or understanding

179 The words "contract", "arrangement" and "understanding" were not defined in the TPA. The case was rightly conducted on the basis that there was not, in fact, a contract, arrangement or understanding that contravened s 45(2)(a)(ii)[132]. None of the airlines could be said to have agreed to anything of that kind.

180 Rather, the case against Flight Centre was that, by its conduct contained in the emails or series of emails sent to the airlines, it had "attempted to induce, a person, whether by threats or promises or otherwise", to contravene

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131 See *Colonial Mutual Life Assurance Society Ltd v Producers and Citizens Co-operative Assurance Co of Australia Ltd* (1931) 46 CLR 41 at 50; [1931] HCA 53 quoting *Kennedy v De Trafford* [1897] AC 180 at 188.

132 See *Australian Competition and Consumer Commission v Flight Centre Ltd (No 2)* (2013) 307 ALR 209 at 211 [7], 249 [153].

s 45(2)(a)(ii)[133]. That is, Flight Centre had attempted to induce the airlines to enter into a contract, arrangement or understanding that had the purpose of substantially lessening competition.

181 Whether the proposed contract, arrangement or understanding had the prohibited purpose of fixing, controlling or maintaining the price for a ticket is to be determined subjectively, having regard to the "end [the parties] had in view"[134]. Flight Centre's conduct shows that its end view was for the airlines to stop selling tickets online at prices less than those published to Flight Centre through the GDS. Although Flight Centre could sell the ticket at whatever price it chose, the airlines set the price of the ticket by publishing the fare through the GDS. The published fare was essentially a recommended retail price. The purpose of Flight Centre's proposed contract, arrangement or understanding was to fix the price of the airlines' online tickets so that they were at least the same as the recommended retail prices published through the GDS.

182 As Heerey J said in *Trade Practices Commission v Service Station Association Ltd*[135], "[o]f course if traders agree between themselves that each will follow published recommended prices, that may well amount to a fixing, controlling or maintaining of prices". That, in substance, was what Flight Centre was proposing, contrary to s 45(2)(a)(ii).

183 Absent the proposed contract, arrangement or understanding, Flight Centre would have continued to compete with the airlines in the market for the sale of tickets to customers, with neither party constrained as to the prices at which they could offer to sell a ticket. Conversely, if the airlines were to implement Flight Centre's proposal, the airlines would no longer be free to fix and charge their own prices independently of Flight Centre, and there would be no or at least less competition or rivalry between Flight Centre and the airlines for the sale of tickets to customers. Accordingly, the future state of competition in the market for the sale of tickets would have been substantially lessened if Flight Centre's proposed contract, arrangement or understanding had been implemented.

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133 s 76(1)(a)(i) and (1)(d) of the TPA; *Australian Competition and Consumer Commission v Flight Centre Ltd (No 2)* (2013) 307 ALR 209 at 211 [5].

134 *News Ltd v South Sydney District Rugby League Football Club Ltd* (2003) 215 CLR 563 at 573 [18]; [2003] HCA 45.

135 (1992) 109 ALR 465 at 485 affirmed on appeal in *Trade Practices Commission v Service Station Association Ltd* (1993) 44 FCR 206 at 229.

184 Provisions such as s 45A "manifest legislative concern with the injury to competition by *practices* apt to keep up prices"[136] (emphasis added). The provision is concerned with proscribing various practices in respect of pricing that are "restrictive". It is concerned with competition. Flight Centre's proposal, if implemented, would have substantially lessened competition by keeping up prices.

185 Whether Flight Centre was, at some stage of the transaction, properly to be characterised as an agent of the airlines is not the statutory question and does not resolve the appeal.

Conclusion

186 The two conditions in s 45A(1) were satisfied. The parties to the proposed contract, arrangement or understanding were "in competition with each other" in a market, and the purpose of the proposed contract, arrangement or understanding was to fix, control or maintain the price of services in that market. The proposed contract, arrangement or understanding therefore had the purpose of substantially lessening competition and contravened s 45(2)(a)(ii).

Orders

187 The appeal should be allowed. I agree with the orders proposed by Kiefel and Gageler JJ. The primary judge's declarations of contravention of s 45(2)(a)(ii) of the TPA should stand adjusted in the manner proposed by Kiefel and Gageler JJ.

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136 *Boral Besser Masonry Ltd v Australian Competition and Consumer Commission* (2003) 215 CLR 374 at 428 [158]; [2003] HCA 5.