UPDATE

Cartel laws applying to principal and agent?

The High Court of Australia's Flight Centre decision

BY **JOHN LAND**

THE HIGH COURT OF AUSTRALIA HAS ISSUED AN IMPORTANT decision overturning traditional thinking on whether an agent can be considered to be *"in competition with"* their principal for the purpose of competition law.

The decision is important to a dual distribution model where a business supplies direct to consumers and also though agent distributors. In such a case it will no longer be safe to assume that our cartel laws do not apply just because an agency model is used. This means that arrangements and discussions between a business and its agents on matters such as customer pricing or allocation of customers or territories may now, in some cases, risk breaching the cartel laws.

The question in *ACCC v Flight Centre Ltd* [2016] HCA 49 (14 December 2016) was whether an arrangement between the airline and its agent could amount to price-fixing. That, in turn, depended on whether the airline could be said to be in competition with its agents.

The majority of the High Court held that Flight Centre was in competition with airlines for the supply of international airline tickets, despite the existence of an agency relationship. This was a reversal of the decision of the Full Federal Court [2015] FCAFC 104 (previously commented on in John Land, "Vertical Price Fixing? - The application of price-fixing law to distribution and agency arrangements", *LawTalk* 873, 11 September 2015, page 37).

Two key factors

There were two key factors leading to this finding that Flight Centre was in competition with its airline principals. The first was that Flight Centre had substantial discretion on the terms on which it sold air tickets to consumers and, in particular, on the pricing of such tickets. Secondly, the agency agreements with the airlines did not impose on Flight Centre any duty of loyalty to the airlines requiring Flight Centre to act in the interests of the airlines as principal.

The *Flight Centre* case concerned a travel agency which sold international airline tickets as agent for airlines.

Flight Centre was concerned about airlines offering fares directly to customers at prices less than those that were accessible to Flight Centre as agent.

With the introduction of online sales, customers could make air travel bookings with an airline directly or through agents such as Flight Centre.

Flight Centre had the ability to determine the price at which it sold air tickets to customers. It advertised a *"price beat guarantee"* under which it would better the price of any other airfare shown to it by a customer.

Accordingly, Flight Centre became very concerned when the airlines were offering air tickets at prices lower than those offered by Flight Centre.

In response, Flight Centre attempted to induce the airlines to agree that any fare the airline offered directly to customers would be available to Flight Centre and that air tickets would be sold by the airline at a total price no less than the amount the Flight Centre would be required to remit to the airline if Flight Centre sold the fare plus a commission.

The ACCC argued that this was price fixing.

Establishing price fixing

Under both Australian and New Zealand competition law, to establish price fixing it is necessary to show an arrangement to fix control or maintain prices for goods or services supplied *"in competition"* with at least one of the other parties to the arrangement.

Can an agent be considered to be "in competition with" their principal for the purpose of competition law?

The ACCC alleged that Flight Centre and the airlines were in competition with each other either in a market for the supply of distribution and booking services for international travel, or in a market for the supply of international air travel services.

At first instance the Federal Court accepted the ACCC's argument of price fixing. The Federal Court held that there was a market for distribution and booking services in respect of air travel, distinct from the supply of air travel itself. The Federal Court also held that the airlines and Flight Centre each provided these services in competition with each other.

On appeal, the Full Court held that there was, in fact, no separate market for the supply of distribution and booking services. As a result, Flight Centre and the airlines did not compete in any such market.

The Full Court held that the alleged attempted price-fixing occurred in the market for the supply of air travel. However, the Full Court held that was a market in which Flight Centre was simply an agent for the airlines, and did not relevantly compete with them. Flight Centre did not provide air carriage services. Accordingly, in the Full Court's view the conduct could not amount to price-fixing.

Full Court reversed

The High Court of Australia reversed the Full Court. The High Court considered that the market was better described as a market for the supply of international airline tickets than as a market for international air travel services.

The majority then concluded that Flight Centre and the airlines were in competition with each other in the market for the supply of international airline tickets.

Kiefel and Gageler JJ said there were two considerations critical to this conclusion that Flight Centre as an agent of the airlines could still be considered to be "*in competition with*" the airlines ([2016] HCA 49 at [89] - [90]).

First, under its agency agreements with the airlines, Flight Centre had the authority not just to sell the airline's tickets but to set its own price for the tickets.

Secondly, Flight Centre was legally entitled to act in its own interests in the sale of an airline's tickets to customers. Flight Centre did in fact do that. 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.

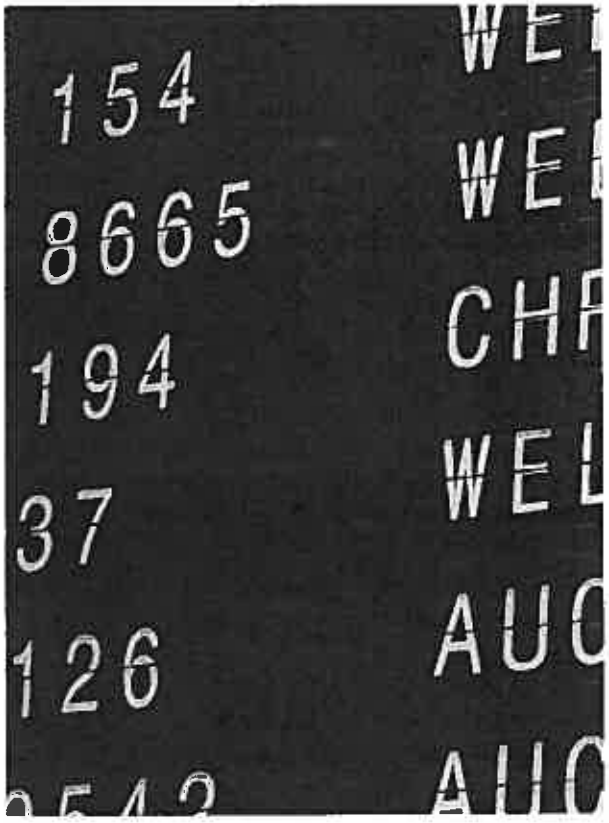
In the absence of these two factors a pure agent is much less likely to be considered to be in competition with its principal.

Kiefel and Gageler JJ noted, "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 would lack both the requisite autonomy and the requisite incentive." (at [84]).

However, as long as an agent is free to act in its own interests the mere existence of an agency relationship will not necessarily preclude the agent from competing with the principal.

Nettle J and Gordon J expressed similar views (per Nettle J at [132] and Gordon J at [177]-[178] and [183]).

Gordon J noted that the question as to whether Flight Centre was properly to be characterised as an agent of the lines was "not the statutory question" (at [185]).



The description of Flight Centre as principal or agent might be legally accurate. However, it masked the proper identification of the rivalrous behaviours that occurred when Flight Centre was dealing with its own customers in its own right without reference to any interests of any airline (at [177]).

French CJ dissented, taking the more traditional view that an agent cannot be seen as being in competition with its principal. In his view "in relation to the supply of contractual rights Flight Centre's conduct is properly to be regarded as that of the airline" (at [23]). Accordingly, he considered that Flight Centre was not in competition in any relevant market with the airlines for which it sold tickets.

Majority views persuasive

The dissenting judgment of French CJ probably reflects the traditional view held by New Zealand competition law practitioners. However, I consider the views of the majority are persuasive and have a strong chance of being followed by our Courts on similar facts.

This makes competition law advice in relation to agency arrangements more challenging.

Businesses who supply directly to end customers, and who also supply through distributors who are agents, can no longer safely assume that the cartel laws do not apply. This is because they can no longer safely assume that their distributor agents cannot be considered competitors.

Instead a factual examination will be need to be conducted in each case.

Where an agent is simply required to sell products or

services at a price fixed by the principal and to act in the interests of the principal then the agent and principal are unlikely to be considered competitors. In that case the cartel laws will not be relevant.

However, in a situation like that with Flight Centre where the agent has a large degree of discretion in how to deal with customers (including full flexibility as to pricing) then the agent and principal may well be considered to be competitors.

A consideration of this question will be important for all businesses that use a dual distribution model involving direct sale by the business as well as sale through agent distributors.

Care needed

Where, applying the approach of the High Court of Australia, the business can be considered to be in competition with its agent then the business and agent will need to be very careful in relation to discussions about matters that might fall within s30 of the Commerce Act 1986.

In particular, this would include discussions about customer pricing and probably also discussions about the allocation of customers or territories. The Commerce (Cartels and Other Matters) Bill currently before Parliament will, when passed, clarify that arrangements between competitors as to the allocation of markets falls within s30. It will also bring within s30 certain arrangements between competitors that restrict output or supply.

In conclusion, the *Flight Centre* decision suggests that where the agent has a significant amount of discretion over the terms of sale of the principal's goods and services the agent may well be considered to be in competition with the principal.

In such a case the principal and agent will be prohibited by s30 from entering certain arrangements with each other, including in relation to price, customer and territorial allocations and (following the passing of the Cartels Bill) arrangements in relation to the restriction of output or supply.

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