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FULL COURT CLARIFIES WHEN A MARKET IS 'IN AUSTRALIA' UNDER THE COMPETITION AND CONSUMER ACT

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On 21 March 2016, the Full Court of the Federal Court allowed the ACCC's appeal by a 2:1 majority in *Australian Competition and Consumer Commission v P T Garuda Indonesia Ltd* [2016] FCAFC 42.

This case concerned allegations that P.T. Garuda Indonesia Ltd and Air New Zealand Ltd were party to certain price-fixing arrangements or understandings with other airlines concerning air cargo services from Hong Kong, Singapore and Indonesia to ports in Australia.

Although the ACCC established relevant price-fixing arrangements at first instance, it lost because it failed to persuade Perram J that Garuda and Air New Zealand supplied the relevant air cargo services in a market *in Australia.* This was an essential element that the ACCC had to establish for the purposes of the price-fixing contravention under the former *Trade Practices Act 1974* (Cth). But the Full Court now has overturned this decision, concluding that air cargo services from Hong Kong, Singapore and Indonesia to ports in Australia are supplied in a market *in Australia*.

The cartel offences under the *Competition and Consumer Act 2010* (Cth) no longer require that goods or services the subject of a cartel provision be supplied or acquired in a market in Australia. But the Full Court's decision still has significant implications for the prohibitions on anti-competitive mergers and acquisitions, exclusive dealing and anti-competitive contracts, arrangements or understandings, because these prohibitions remain expressly limited to markets in Australia.

This decision potentially expands the reach of these competition law prohibitions in respect of goods or services supplied into or out of Australia. Businesses operating in telecommunications, transport, tourism, media, e-commerce or online in particular may be significantly affected.

It is possible that Garuda or Air New Zealand could seek special leave to appeal the Full Court's decision to the High Court of Australia. Whether they will do so is not known at this stage.

BACKGROUND AND THE DECISION AT FIRST INSTANCE

The proceedings against Garuda and Air New Zealand arose out of the ACCC's investigations into an alleged 'air cargo cartel'. The ACCC also took action against 13 other airlines, but those airlines ultimately conceded liability, and to date the Federal Court has imposed pecuniary penalties totalling almost $100m. The case against Garuda and Air New Zealand is the set of only proceedings that remain on foot.

The ACCC alleged that Garuda and Air New Zealand were party to arrangements or understandings with other airlines containing provisions with the purpose or effect of fixing, controlling or maintaining fuel (and other) surcharges and fees on the carriage of air cargo from Hong Kong, Singapore and Indonesia to ports in Australia in contravention of sections 45 (read with section 45A) of the Trade Practices Act. In particular:

- in Hong Kong, it was alleged that a published index of fuel surcharges (the Lufthansa Index) was used as a basis for making joint applications to the Civil Aviation Department (which was the government department responsible for approving surcharges on outbound flights from Hong Kong) and that the airlines had reached understandings in relation to these applications which constituted price fixing,
- in Singapore, it was alleged that Air New Zealand was party to a number of understandings reached amongst airlines to fix or control fuel surcharges and to exchange communications in relation to future pricing intentions, and
- in Indonesia, it was alleged that Garuda used the Lufthansa Index as a basis for determining surcharges and custom fees at meetings with other airlines.

At first instance, although Perram J held that Garuda and Air New Zealand were party to the alleged arrangements or understandings, his Honour dismissed the case because the relevant air cargo services were not supplied in a market in Australia.[1] This was a necessary element, because sections 45 and 45A require that competition between the parties be in a 'market', and section 4E provides that 'market' means a market 'in Australia'.

In considering whether the relevant air cargo services were supplied in a market in Australia, Perram J considered the following questions:

- whether competition between airlines in Australia in carriage through Australian airspace, ground handling and enquiry services was sufficient to locate the markets in Australia,
- whether the fact that some demand for the services was ultimately sourced in Australia was sufficient to locate the markets in Australia,
- whether the markets in Hong Kong, Singapore and Indonesia were constrained by the abilities of importers in downstream markets to switch to alternate sources of supply, and
- whether, in light of these matters, the market was in Australia.[2]

Perram J concluded that, when asking whether there is a market in Australia, the relevant inquiry assesses *where* the relevant substitutable services are provided to consumers of those services. That is, the place where substitution decisions are given effect to, as opposed to the place where substitution decisions may be made or where the services are performed.

In circumstances where there was no evidence that any downstream substitution took place in Australia which constrained the upstream market, and no evidence of supply side substitution, Perram J held that the market was not in Australia, because the only place where substitution could take place was in Hong Kong (or Singapore or Indonesia).[3]

THE FULL COURT'S DECISION: WHEN IS A MARKET 'IN AUSTRALIA'?

By a 2:1 majority, the Full Court overturned Perram J's decision and held that the relevant air cargo services from Hong Kong, Singapore and Indonesia were supplied in a market 'in Australia' (and therefore contravened the Trade Practices Act).

The majority (Dowsett and Edelman JJ) said that assessing whether a market is 'in Australia' involves two related analyses:

- defining the relevant market (a question which was not in dispute on appeal), and
- characterising whether that identified market was in Australia.[4]

On the characterisation issue, the majority said that to focus the inquiry narrowly on the location of substitution, or the location of the supplier of the relevant services, would fail to give proper consideration to the purpose of the legislation, which relevantly is to enhance the welfare of Australians through the promotion of competition.[5]

Instead, the majority held that a market is a 'field of transactions' that includes both the agreement to buy and sell, and the performance of the transaction. It is the 'space' in which the competitive process takes place, and in that sense, includes all of the economic activities embodied in the concept of competition. Accordingly, while the geographic dimension of a market may in many cases determine whether a market is in Australia, regard must be had to *all* dimensions of the market, namely its product, geographic, functional and time dimensions.[6]

This means the analysis of whether there is a market 'in Australia' must evaluate many factors. In this case, the majority identified seven overlapping reasons for determining that the relevant air cargo services were supplied in a market 'in Australia':

1. a market can be 'in Australia' even if it is also in another country,

2. any relevant factor may be considered, and the text of the Trade Practices Act does not preclude consideration of factors such as the presence of customers in Australia to whom services are located and where those services are performed,

3. a significant part of the operation of the 'suite of services' provided by the airlines was in Australia,

4. the 'suite of services' provided by the airlines were subject to barriers to entry in Australia (including licences to operate, permission to use facilities and the availability of landing slots),

5. the services were marketed in Australia to customers of the airlines, which indicated the airlines competed for business in Australia,

6. the purpose of section 4E, and object of the legislation (relevantly to enhance the welfare of Australians through the promotion of competition), supports a finding that the market is in Australia when there is marketing to persons in Australia who as a matters of economic reality are customers, and performance of part of the services in Australia, and

7. the conclusion is consistent with the decisions reached in other jurisdictions.[7]

Yates J dissented and held that the primary judge had not erred. His Honour reasoned that the location of a market focusses on the geographic area in which the suite of services is bought and sold, and over which the substitution between buyers and sellers takes place. Yates J drew a distinction between the physical location in which the services are provided and the location of the 'field of transactions' or exchanges between buyers and sellers of those services.[8] Accordingly, this dissenting view holds that the market is located where the opportunities for substitution and switching are to be found.[9]

IMPLICATIONS

These proceedings were brought under the former Trade Practices Act, which required that at least two parties to a price-fixing arrangement be in competition with each other in a market in Australia. But this no longer applies, because the cartel offences under the Competition and Consumer Act do not require that goods or services the subject of a cartel provision be supplied or acquired in a market in Australia. That was established in *Norcast v Bradken*.[10]

It is also unlikely that the market 'in Australia' requirement will be reinstated for the cartel offences, because the Harper Review recommended that conduct constituting an offence should be confined to cartel conduct "involving persons who compete to supply goods or services to, or acquire goods or services from, persons resident in or carrying on a business within Australia", as opposed to markets in Australia. Accordingly, the decision on the market issue does not have ongoing implications for cartel offences.

But the majority decision on the market issue does have wider implications for the 'competition tested' prohibitions in the Competition and Consumer Act.

In particular, the prohibitions against anti-competitive mergers and acquisitions (section 50), exclusive dealing (section 47) and anti-competitive contracts, arrangements or understandings (section 45) are affected. This is because these prohibitions require an effect or likely effect (or, in the case of sections 45 and 47, a purpose) of substantially lessening competition in a market *in Australia*.

For example, the majority's broad approach to analysing when a market is 'in Australia' requires that all economic activities in the competitive process must be taken into account. This means that markets in which international suppliers of services – such as telecommunications, transport, or media content providers, and to a lesser extent, international suppliers of goods – operate could be caught when it comes to mergers, exclusive dealing and anti-competitive arrangements.

In mergers, this may expand the scope of ACCC merger reviews in relation to trans-national supply or acquisition of goods or services.

This also may be particularly relevant in the context of online sales, where elements of the competitive process may take place both in Australia (for example, the delivery of the relevant goods or services, or decisions regarding substitution) and in an overseas jurisdiction.

ENDNOTES

1. *Australian Competition and Consumer Commission v Air New Zealand* [2014] FCA 1157.
2. Ibid, at [702]-[704].
3. Ibid, at [329]-[334].
4. *Australian Competition and Consumer Commission v P T Garuda Indonesia Ltd* [2016] FCAFC 42, at [89].
5. bid, at [107].
6. bid, at [90].
7. Ibid, at [161]-[170].
8. Ibid, at [637].
9. Ibid, at [653].
10. *Norcast S.ar.L v Bradken Ltd* (No 2) [2013] FCA 235.
11. Commonwealth of Australia (2015), 'Competition Policy Review – Final Report', March 2015, page 59.

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