HERBERT SMITH FREEHILLS

HIGH COURT RULES THAT PRINCIPAL/AGENT PRICING AGREEMENTS CAN BE ILLEGAL PRICE-FIXING

21 December 2016 | Australia
Legal Briefings – By **Peter Strickland** and **Joshua Wang**

The High Court has upheld the ACCC's appeal in the Flight Centre case, finding that Flight Centre attempted to induce price-fixing arrangements with airlines despite being their agent. This decision has significant ramifications for industries that utilise agency distribution models.

The case concerned ACCC allegations that a travel agent, Flight Centre, attempted to induce various airlines into making bilateral price-fixing arrangements in contravention of the Trade Practices Act 1974 (now the Competition and Consumer Act 2010).

The High Court's decision reversed the Full Federal Court's earlier decision in 2015.

BACKGROUND TO THE CASE AT TRIAL AND ON APPEAL

Flight Centre acts as an agent for and on behalf of airlines in the sale of international airfares. Through the 'Global Distribution System', these airlines make certain international airfares available for Flight Centre to sell at a published price. When Flight Centre sells an airfare, it pays the airline a specified nett amount, and keeps the difference between the nett amount and the published price as commission. Flight Centre is then free to sell the airfare at prices above or below the published price.

The ACCC alleged that Flight Centre was concerned that airlines were undercutting it by selling airfares direct to passengers at prices lower than the published price. It alleged that Flight Centre tried to stop certain airlines from doing so through a series of direct emails, in some cases threatening reputational reprimand to airlines that did not comply with requests to end the discounting of airfares.

Critically, in order to establish a price-fixing contravention the ACCC needed to demonstrate that Flight Centre supplied relevant services *in competition* with the airlines.

The ACCC argued there was relevant competition on two bases

- first, that Flight Centre competed with the airlines in supplying distribution services (for the international airlines) and booking services (for the customers); and
- secondly, that Flight Centre competed with the airlines in the international air travel services market.

At first instance, the trial judge accepted the ACCC's first argument, and ultimately found that Flight Centre had attempted to make price-fixing arrangements with the airlines.

The Full Federal Court reversed this decision on appeal. It held there was no separate market for supplying booking and distribution services, because it was artificial to regard airlines as self-supplying 'distribution' services in competition with travel agents, and artificial to identify a separate 'booking service' that is distinct from the supply of international air travel.

Further, although the Full Court accepted that there is 'rivalry' between Flight Centre and the airlines in the broader market for international air services, it rejected the notion that this was relevant competition because an agency relationship existed between Flight Centre and the airlines. The Full Court reasoned that only the Airlines competed in the international air ticket market, and that Flight Centre merely operated within the market as an agent.

THE HIGH COURT'S DECISION

The High Court agreed with the Full Court that the ACCC's primary case was not reflective of 'commercial reality'. It held that there could not be a separate 'distribution services' market, because this characterisation would require airlines to provide themselves with distribution services in order to sell a direct ticket, when in reality, booking and distribution are 'inseparable concomitants'. This reinforces the proposition that courts are likely to reject artificial and non-commercial characterisations of services and markets.

However, by 4-1 majority, the High Court reversed the Full Court on the agency issue.

The majority found that it was possible for an agent to be in competition with its principal, even where the agent supplies services on behalf of its principal (such as airline tickets). For example Kiefel and Gageler JJ said there was nothing in the Act that was 'inherently inconsistent with the notion of an agent and a principal both being suppliers of contractual rights'.

However the High Court's decision should seen as highly reliant upon the particulars of Flight Centre's contractual relationship with its principal airlines. In particular, Kiefel and Gageler JJ stressed that Flight Centre's authority under the agency agreement extended beyond the decision of merely whether or not to sell tickets. Rather, Flight Centre was free in law to pursue its own marketing strategy of undercutting the prices of not only other travel agents, but also the prices of the airlines whose tickets it sold. In this case, it was only where Flight Centre was free to act in its 'own interests' and set its own price for airline tickets, that it was regarded as relevantly competing with the airlines in supplying airline tickets.

As a result, while this case rejects the notion that an agent can never be in relevant competition with its principal, the decision illustrates that relevant competition can only be founded upon the very specific facts arising from an agency agreement. Consequently, this judgement should not be seen as an indication that principals will be seen as capable of competing with their agents as a matter of general principle.

In practice, this will mean the question of whether an agent is to be regarded as relevantly competing with its principal will turn on matters such as the extent to which the agent may act in its own interest, and whether it has discretion over the price charged to customers.

IMPLICATIONS

This decision has significant implications for industries that utilise agency distribution models. For distributors who act as agent for their suppliers, they cannot discuss and agree upon pricing matters with their suppliers if their agency agreement permits them to act in their own interest and to set their own prices (because it could be price-fixing).

For suppliers, they need to consider the rights and freedom they allow their agent to have. For example, if they allow their agent to have pricing freedom, they will need to carefully consider the competition law implications of any pricing discussion they have with their agent, because the agent could be considered a competitor of the supplier.

KEY CONTACTS

If you have any questions, or would like to know how this might affect your business, phone, or email these key contacts.

LIZA CARVER
PARTNER, SYDNEY

+61 2 9225 5574
Liza.Carver@hsf.com

LEGAL NOTICE