

# HIGH COURT TO DETERMINE SCOPE OF CARTEL PROHIBITIONS IN FLIGHT CENTRE CASE

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Legal Briefings - By **Liza Carver** and **Peter Strickland**

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The High Court has granted the ACCC special leave to appeal the Full Court of the Federal Court's decision in *Flight Centre Limited v Australian Competition and Consumer Commission* [2015] FCAFC 104.

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

The ACCC's High Court appeal presents a rare opportunity for the Court to consider what it means for parties to an arrangement to be 'in competition with' each other for the purposes of the Act.

Whichever way the High Court ultimately decides the case, its decision is likely to have significant ramifications for the future application of Australia's criminal cartel laws and for industries that use agency distribution models in particular. The travel, hospitality and finance industries in particular are likely to be affected (see potential implications below).

## BACKGROUND TO THE CASE AT TRIAL AND ON APPEAL IN THE FULL COURT

Flight Centre sells international airfares as agent for and on behalf of airlines. Airlines make certain international airfares available for Flight Centre to sell by loading them onto a Global Distribution System 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 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. This was said to constitute an attempt to induce those airlines to make bilateral arrangements with Flight Centre that fixed, controlled or maintained the price of airfares and the amount of the retail or distribution margin that Flight Centre and the airlines earned on those airfares.

A key issue was whether Flight Centre supplies any relevant services in competition with the airlines (this is a necessary element for any price-fixing contravention).

### **The ACCC succeeded at first instance**

At first instance, the primary judge found that Flight Centre did not supply international air travel services in competition with the airlines, because Flight Centre acts as agent for the airlines in supplying those services.

But the primary judge did find that Flight Centre and the airlines supply substitutable 'booking' services to customers (which are distinct from international air travel services), and substitutable 'distribution' services to airlines (and in that respect, airlines self-supply these distribution services). This finding allowed the primary judge to conclude that Flight Centre had attempted to induce various airlines to make bilateral price-fixing arrangements with Flight Centre.

### **Flight centre successfully appealed to the Full Court**

The Full Court disagreed with the primary judge and held there was no separate market for the supply of booking and distribution services, no market in which Flight Centre and the airlines both independently supplied services, and therefore no relevant competition between them. This was 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, even if there were ancillary services supplied with international air travel (such as 'booking' services), Flight Centre supplied these as agent for the airlines.

The Full Court did, however, acknowledge there is rivalry of a kind between Flight Centre and the airlines. When an airline sells an airfare direct to a passenger, this is a lost sale for Flight Centre, and a lost opportunity to earn a commission. But the Court said this competitive rivalry did not fall within the Act because it occurred in the supply of international air travel, which were services that Flight Centre did not supply (it supplied them only as agent for the airlines).

Although the Full Court's reasoning in this regard was based on the concept of agency, the Court emphasised that the existence of an agency relationship between two parties does not always mean those parties cannot be in competition with each other. But the Full Court left open the circumstances in which that would be the case.

# THE KEY ISSUE TO BE DETERMINED BY THE HIGH COURT

The nub of the issue before the High Court is this: the primary judge found, and the Full Court agreed, that there is rivalry between Flight Centre and the airlines in relation to who sells the airfare, and who earns the retail or distribution margin on that airfare. But when Flight Centre sells the airfares to customers as agent for and on behalf of the airlines, does that rivalry mean Flight Centre and the airlines are in competition with each other for the purposes of the Act?

The Solicitor-General (for the ACCC) put it this way in the special leave hearing: *“if you see agency do you then ignore the rivalry and competition you see in front of you?”*

## POTENTIAL IMPLICATIONS FOR INDUSTRY

Whichever way the High Court ultimately decides the case, the decision is likely to have significant ramifications for industries that use agency distribution models.

For example, if the High Court decides that agency arrangements do not prevent suppliers and their agents being in competition with each other when there is competitive rivalry between them, this could mean that:

- suppliers who use both direct distribution and agency distribution no longer would be able to give pricing instructions to their distributor agents (because it could be price-fixing), and
- distributors who act as agent for their suppliers no longer would be able to discuss and agree pricing matters with their suppliers (because it could be price-fixing).

By contrast, if the High Court decides that agency arrangements can prevent suppliers and their agents from being in competition with each other under the Act, the decision might illuminate the circumstances in which agents can, and cannot, discuss and agree pricing matters with their suppliers (which was left open by the Full Court). For example, the High Court’s decision might clarify whether agents and suppliers can discuss and agree on pricing when:

- the agent also sells other suppliers’ products as principal,
- the agent also sells other suppliers’ products as agent, or

- in either of those situations, the principal also directly sells its products.

## KEY CONTACTS

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



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