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Briefing note January 2017

The High Court's Flight Centre decision signals some turbulence ahead for distributors, agents and online platforms

On 14 December 2016, the High Court majority ruled in favour of the Australian Competition and Consumer Commission (ACCC) in its case against Flight Centre. The High Court agreed with the ACCC that Flight Centre was in competition with its airline suppliers in the market for the supply of airline tickets notwithstanding that Flight Centre existed in that market as agent for each airline.

The decision is important in that it overruled the Full Federal Court's approach to agency and took a horizontal 'per se' approach to an arrangement which has previously been assessed in a 'vertical' context. By doing so, the majority appeared to focus more on the nature of competition than the form of contractual arrangements and commercial practicalities between Flight Centre and the airlines.

Key issues

- The High Court majority's decision in *ACCC v Flight Centre* takes a new approach to agency arrangements and possibly also MFN-type arrangements.
- The decision may have significant implications for the commercial practicalities of businesses in supplier-distributor relationships.
- Businesses should reassess restrictions contained within any agency contracts to ensure competition law compliance under the newly interpreted law.

The decision may have significant implications depending on the approach taken by the ACCC. Businesses that either are, or supply to, distributors, agents or online platforms, should reassess their relationships and take steps to ensure compliance with the new interpretation of the law.

Overview

The long-running *ACCC v Flight Centre* proceedings culminated on 14 December 2016 with the High Court's decision that Flight Centre is in competition with its airline suppliers and its status as 'agent' to the airlines is not sufficient to take it outside the scope of the competition laws (*ACCC v Flight Centre Travel Group Limited* [2016] HCA 49). As such, the High Court by majority agreed with the ACCC that Flight Centre had engaged in cartel conduct in breach of the 'per se' section 45 and 45A of the former *Trade Practices Act 1974* (Cth) (with the relevant prohibitions now contained in Division 1 of Part IV of the *Competition and Consumer Act 2010* (Cth) (**CCA**)) when it had requested that its suppliers not undercut it in their direct sales to consumers.

By taking a stricter approach on parties being in competition with each other, the decision raises practical issues as to how to take into account the consumer benefits and efficiencies associated with agency or similar arrangements and the arguably necessary restrictions imposed in these contexts. For example, it raises issues which are similar to those found in the context of 'most favoured nation' (MFN) clauses, which have been investigated and adjudicated on differently around the world. In fact, the decision also appears to contradict the approach taken by the ACCC itself in relation to MFN arrangements in the online hotel room booking sector.

While the new approach and inconsistency raises some uncertainty as to how the ACCC will treat these MFN-type arrangements going forward, it is hoped that the ACCC will take a pragmatic approach in recognising the benefits of such arrangements to consumers and not force companies into the lengthy authorisation process. Additionally, and in any case, it is expected that the Harper reforms will go some way to limiting the period of uncertainty in this respect.

Another implication of the decision is the need to reconsider the legality of other pricing restrictions, such as RPM, which businesses may have previously understood to be acceptable due to the existence of an agency arrangement. The High Court decision makes clear that parties must look beyond the legal status or nomenclature alone and assess whether, in substance, the agent is effectively part of the same economic entity as the principal (and thereby outside the scope of the competition rules) or, in fact, a separate entity with the authority to pursue its own interests.

The Proceedings – from commencement to the High Court

The proceedings were commenced by the ACCC in March 2012 and alleged that on six occasions between 2005 and 2009, Flight Centre attempted to enter into anti-competitive arrangements with its 'competitors', being Singapore Airlines, Malaysian Airlines and Emirates, by attempting to fix the prices at which the airlines would sell their international airfares on their websites.

Flight Centre advertised a "Price Beat Guarantee" which obliged it to better the price available for the same fare elsewhere (including the airlines' own websites) by A$1 and provide a A$20 voucher if lower than the price advertised by Flight Centre. When the airlines started to increase the number of their direct sales at prices cheaper than those available to Flight Centre, Flight Centre asked the airlines to stop undercutting its prices (which were the prices provided by the airlines to Flight Centre plus an amount equating to Flight Centre's distribution margin or commission).

The first instance judge, Logan J, held that Flight Centre and the airlines were competitors only in the market for the supply of air travel distribution and booking services, and not in relation to the ACCC's alternative market definition of the supply of airfares, and upheld the ACCC's claim on that basis.

This decision was then overturned on appeal in 2015 by the Full Federal Court which held there was no such market for distribution and booking services as these were a necessary ancillary component of the market for the supply of air travel. In relation to this broader market, the Full Court held that Flight Centre was an agent of the airlines and therefore not a competitor.

In the High Court appeal, the majority[1] disagreed with the Full Federal Court that Flight Centre's legal status as an agent of the airlines precluded it from being a 'competitor' of the airlines. The majority held that whether an agent is in competition or not with its supplier depends on the extent to which it has the authority and incentive to act in its own interests over that of its principal. Gordon J went further to state that the point at which Flight Centre deals with its customers in its own interest without reference to the airlines is the point at which Flight Centre stops acting in its 'agency' capacity, and, in any case, the agency nomenclature is irrelevant to an assessment of

whether the competition laws had been breached.

Implications

MFNs

The significance of finding Flight Centre and the airlines to be in competition with each other is that it makes certain pricing discussions between parties, which previously would have been assessed in the context of a 'vertical' relationship and subject to an 'effects' test, automatically deemed to be 'cartel conduct', which is a 'per se' breach of the law. A 'per se' breach is one that is considered to be so obviously anti-competitive that it is deemed to be so, and evidence of the 'effects' in practice is irrelevant to a finding of liability. In addition, under the CCA, cartel conduct does not have an efficiencies defence or retrospective exemption so will be a breach regardless of any pro-competitive effects.

Requests by distributor-type intermediaries that its supplier not undercut it in their own direct sales are commonly facilitated through clauses known as MFN clauses, which have been the subject of many investigations globally. None of the investigations however have previously assessed the clauses as price fixing agreements between competitors and instead have applied either a rule of reason or an effects-type analysis to arrive at a decision made on the basis of the net effect of such clauses, having regard to the commercial practicalities of the industry and situation at hand. As this assessment is undertaken on a case by case basis, different national competition authorities have reached different conclusions. We have previously summarised the differing approaches, including the one taken by the ACCC in relation to the Booking.com Expedia investigation, in our Client Briefing available here.

The decision in Flight Centre, and its inconsistency with the ACCC's approach in Booking.com/Expedia (see here), raises concerns as to how the ACCC may treat MFN-type arrangements going forward. For example, does the newly interpreted law mean that businesses should amend their contracts to remove any MFNs? Do they need to apply for immunity for MFNs which they have previously been employing? Do businesses which are not willing to operate without MFNs need to apply for approval of the MFNs via the authorisation process – and, if they do, are they at risk of drawing attention to the fact that they have hitherto been using MFNs and risk cartel allegations?

The commercial issues reflected in the above questions necessitate that a sensible and practical approach be adopted by the ACCC going forward, regardless of the Flight Centre decision.

That this type of behaviour was not intended to be covered by the cartel provisions is also arguably evident by upcoming Harper Review reforms which expressly exempt from the scope of cartel conduct any restrictions or obligations imposed between a supplier and acquirer in relation to, inter alia, the supplier's supply of the relevant goods or services (section 24, *Competition and Consumer Amendment (Competition Policy Review) Bill 2016*, amending s44ZZRS, CCA). This would appear to include obligations in relation to the price at which the supplier sells the relevant goods or services to other persons.

Agency

Another implication for businesses to consider, and in fact a potentially more significant implication, is that businesses in Australia cannot rely on an agency agreement to exempt pricing restrictions in place between a supplier and its 'agent' from the scope of the CCA.

The High Court decision notes that where an 'agent' has a sufficient level of autonomy and the incentive to pursue its own interests over that of its principal, it is no longer an agent or is an agent with such a diminished duty of loyalty so as to no longer be considered a single economic entity with the supplier.

The High Court's decision was in the context of the cartel provisions however the principle also presumably extends to other CCA provisions such as s45 (anti-competitive agreements generally) and s48 (resale price maintenance). Therefore, if an 'agent' is free to pursue its own marketing strategy even where this is at the expense of the supplier's own sales and carries a level of risk in relation to its business (rather than the principal covering all risk), there is a real possibility that it is to be considered separate from the principal and all pricing or other restrictions imposed between the supplier and agent should be reassessed for compliance.

As emphasised in the decision, each case will need to be assessed on its facts, and there will be supplier-agent relationships that do properly fall outside the scope of the competition laws. For example, what may in some circumstances be resale price maintenance (where the 'agent' has autonomy in other ways) may in other circumstances be a factor leading to the conclusion that the 'agent' lacks

autonomy (as found in the reverse by the High Court in relation to Flight Centre) and is thereby a genuine agent to be considered the same economic entity as its supplier.

Conclusion

Businesses in supplier-distributor relationships should therefore review and obtain advice on the status of any restrictions contained in arrangements to which they are a party should they be in doubt as to the status of their 'agency relationship' under competition law. Pricing restrictions will not necessarily always be unacceptable under competition law and there are steps that businesses can take to ensure compliance including by means such as applying for authorisation from the ACCC for certain restrictions.

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[1] Interestingly, the outgoing Chief Justice, French CJ, dissented from the majority (including incoming Chief Justice, Kiefel J) in one of his last decisions before retirement, finding that there was no competition between Flight Centre and the airlines.

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