



The intersection between agency and competition law: What are the implications of the High Court's decision in *Australian Competition and Consumer Commission v Flight Centre Travel Group Ltd*?

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*The decision of the High Court in **Australian Competition and Consumer Commission v Flight Centre Travel Group Ltd** has redefined the way in which Australia's competition law applies to bona fide agency relationships in circumstances where both the principal and its agent offer goods or services to the public.*

In so doing, the Court has treated as an attempt at price fixing dealings between a principal and a sales agent which are analogous to other types of distribution arrangements that are traditionally characterised as 'vertical'. We contend that the Competition and Consumer Act should not strictly prohibit such arrangements, but rather deem them illegal only where they have the purpose, or are likely to have the effect, of substantially lessening competition. This would align more closely with the approach taken in assessing vertical restraints, under both the Australian Act and the law in other jurisdictions.

Introduction

In December 2016 the High Court handed down its judgment in *Australian Competition and Consumer Commission v Flight Centre Travel Group Ltd*,¹ allowing the Australian Competition and Consumer Commission's ('ACCC') appeal and reinstating the finding that a travel agent, Flight Centre, had attempted to engage in price fixing with three of its airline principals.

While the High Court articulated some guiding principles for the application of cartel laws to agency relationships, the outcome of this case begs the more fundamental question of whether (or at least when) it is appropriate for price agreements, restrictions or restraints between a principal and an agent as part of an otherwise bona fide agency relationship to be judged as per se offences.

A difficulty arises because the agent has no independent or autonomous capacity to compete, except to the extent permitted by the principal. The existence of 'competition' is itself rooted in the arrangements between the parties and, more particularly, on the status conferred by the principal on the

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¹ (2016) 339 ALR 242 ('ACCC v Flight Centre').

agent. The principal can thwart ‘competition’ from its agent, simply by terminating the agency in accordance with its terms, amending its scope or importantly, by not entering into it in the first place. That is a different, dependent kind of competition to that which exists between principals — such as airlines — who typically have independent capacity to compete autonomously from one another.

We contend that such arrangements, arising in the context of common and otherwise perfectly legitimate agency distribution arrangements, are not so unequivocally bad for economic welfare in most cases so as to justify per se cartel treatment by the law. Instead, such arrangements — like many vertical restrictions on resupply — should be prohibited only after testing through the lens of a rule of reason or competition test to see whether they are in fact likely to harm competition.

The *Competition and Consumer Act 2010* (‘CCA’), as applied in *Flight Centre*, does not focus on the question of whether a restricted agency arrangement would be good or bad for competition, but rather the narrower question of whether the parties are competitors at all, even in the ‘dependent’ sense described above. In the context of agency arrangements, we contend that this is not the optimal approach. On the law as it stands after *Flight Centre*, detailed factual enquiries will be required in agency situations. We contend, however, that the questions which the High Court has found are posed by the legislation are not the right ones.

The intersection between agency and competition law

Bowstead and Reynolds describe the agency relationship in the following terms:

The mature law recognises that a person need not always do things that change his or her legal relations himself: he may utilise the services of another to change them, or to do something during the course of which they may be changed. Thus, where one person, the principal, requests or authorises another, the agent, to act on his behalf, and the other agrees or does so, the law recognises that the agent has the power to affect the principal’s legal position by acts which, though performed by the agent, are to be treated in certain respects as if they were acts of the principal.²

Importantly, Bowstead and Reynolds also recognise that a principal may still give to its agent ‘a general authority to act according to his own discretion within certain limits’.³ But in a situation where both principal and agent deal with customers, what are the consequences if the agent, while still recognisable as an agent in law, is allowed such freedom in relation to matters such as pricing that the principal and agent appear, from the customer standpoint at least, to be rivals? In a case where the law treats the acts of the agent as acts of the principal, is it really possible for the agent and principal to supply a product in competition with each other, or is this not a case where the principal is, in effect, competing with itself?

These were some of the issues tested in the litigation between the ACCC and Flight Centre.

² Francis M B Reynolds (ed), *Bowstead and Reynolds on Agency* (Sweet and Maxwell, 18th ed, 2006) [1-005].

³ *Ibid.*

The proceedings between the ACCC and Flight Centre

Background

A summary of the relevant facts and the course of the litigation between the ACCC and Flight Centre is crucial in order to understand how the competition law now treats agency relationships in a situation where both the principal and agent offer goods or services to customers.

Flight Centre is Australia's largest travel agent. It is accredited as a travel agent by the International Air Transport Association ('IATA'), and is a party to the IATA Passenger Sales Agency Agreement ('PSAA'). The PSAA is a standard form agreement entered into by IATA on behalf of its member airlines. Central to the ACCC's case were cls 3.1 and 3.2, under which travel agents are authorised to:

- sell the international passenger air services of each airline as an agent for the airline;⁴
- create legal relations between each airline and passengers; and
- undertake all necessary activities to sell the services of the airline (promoting the availability of the services and booking, ticketing and collecting monies for the services).⁵

Flight Centre did not, however, purchase seats for resale or hold inventory of seats for sale, and bore no risk of seats being unfilled.

The ACCC's case against Flight Centre was the result of a series of communications, between 2005 and 2009, between Flight Centre and three airlines (Emirates, Singapore Airlines and Malaysia Airlines) who had each authorised Flight Centre to sell their fares under the PSAA.

The ACCC alleged that Flight Centre had demanded that each airline cease offering fares direct to customers which were lower than the fares made available for sale by Flight Centre for the same carriage by the airline. Flight Centre had informed the airlines that their future relationship would be imperilled should this practice not cease. The ACCC alleged that this was an attempt by Flight Centre to make or arrive at a contract, arrangement or understanding which violated s 45 of the *Trade Practices Act 1974* ('TPA') by reason of s 45A. Because of the ACCC's reliance on s 45A, no proof of anti-competitive effect or purpose was required. Because none of the airlines acquiesced to Flight Centre's demands, this was an attempt case only. No proceedings were brought against the airlines.

⁴ *Australian Competition and Consumer Commission v Flight Centre Ltd [No 2]* (2013) 307 ALR 209, 217 [21] ('ACCC v Flight Centre [No 2]'); *Flight Centre Ltd v Australian Competition and Consumer Commission* (2015) 234 FCR 367, 394 [131].

⁵ Clause 7.2 of the PSAA further provided that all monies collected by Flight Centre for passenger air travel and ancillary services sold under the agreement are the property of the airline and are held by Flight Centre on trust for the airline until satisfactorily accounted for and settlement made: see *Stephens Travel Service International Pty Ltd v Qantas Airways Ltd* (1988) 13 NSWLR 331, 344D (Hope JA, with whom Kirby P and Priestly JA agreed); *Peter Cox Investments Pty Ltd (in liq) v International Air Transport Association* (1999) 161 ALR 105, 118 [50] (O'Loughlin J).

The ACCC's case at trial

The ACCC's case was heard in the Federal Court before Logan J, who found in favour of the ACCC⁶ and imposed a pecuniary penalty on Flight Centre of \$11 million.⁷

Logan J found that both the travel agent and the airlines provided, in competition with each other, a service which his Honour described, variously, as a 'distribution and booking' service, or the services of a 'travel intermediary'. The price for this distribution and booking service was, in the case of Flight Centre, its commission and, in the case of the airlines, their 'retail or distribution margin'. Flight Centre, by demanding the agreement of the airlines not to offer fares to customers that were less than the fares that it could offer, had attempted to reach an agreement that would have the effect of maintaining its commission (that is, the 'price' for its distribution and booking service).

The agency relationship between Flight Centre and the airlines did not bear upon the conclusions of the trial judge. While his Honour found that such a relationship existed, it related to the supply of air travel. His Honour found that airlines and travel agents do not compete to supply air travel (indeed, travel agents do not supply air travel at all). Nor was it argued that Flight Centre supplied a 'distribution and booking' service as an agent for the airlines.

At the time this judgment was handed down, there was a measure of debate created by the decision in *Australian Competition and Consumer Commission v Australia and New Zealand Banking Group Ltd*,⁸ another decision of the Federal Court (constituted by Dowsett J), handed down just a few weeks before the decision of Logan J in *Flight Centre*. In the ANZ case, the ACCC had challenged a 'no discounting' clause in an agency agreement between a bank and its mortgage brokers. The Court found that there was no service supplied by the bank in competition with the mortgage brokers. As a consequence, the ACCC's case failed. However, for the purpose of this article it is important to note that it was not suggested, in the ANZ judgment, that the absence of competition between the bank and the mortgage brokers was due to any agency relationship that may have existed between them.

Both judgments were appealed to the Full Federal Court, constituted in each case by Allsop CJ, Davies and Wigney JJ.

Flight Centre's appeal to the Full Federal Court

In a unanimous joint judgment, the Full Federal Court set aside the decision of Logan J and ordered that the ACCC's case be dismissed.⁹ The same day the

6 *ACCC v Flight Centre [No 2]* (2015) 234 FCR 367.

7 *Australian Competition and Consumer Commission v Flight Centre Ltd [No 3]* (2014) 234 FCR 325.

8 [2013] FCA 1206 (18 November 2013).

9 *Flight Centre Ltd v Australian Competition and Consumer Commission* (2015) 234 FCR 367.

Full Court handed down its judgment dismissing the ACCC's appeal against the judgment of Dowsett J in the ANZ case.¹⁰

In allowing Flight Centre's appeal, the Full Court found that it was artificial to say that an airline, in supplying air travel to a consumer, was also supplying a distribution and booking service to the consumer or to itself. There was certainly commercial rivalry between Flight Centre and the airlines, but this related to the terms on which Flight Centre would be able to sell air travel as the agent for the airline, not any separate service that Flight Centre supplied in competition with the airline.¹¹

The Full Court also found that the PSAA created a relationship of agency between the airlines and the travel agents in relation to the sale of air travel and ancillary services, and that this agency relationship meant that the parties were not in competition with each other in relation to the supply of these services.¹² The Full Court recognised that each case must be considered on its own facts, and that the existence of an agency relationship between two parties does not always mean that the parties cannot be in competition with each other. However there was no competition in a case, such as this one, where the agent had the power and authority (and accompanying legal and equitable duties) to sell the product for and on behalf of the principal.¹³

Appeal to the High Court

The ACCC, by special leave, appealed to the High Court against the decision of the Full Federal Court. In a 4–1 judgment, the High Court allowed the ACCC's appeal and found that Flight Centre had attempted to engage in price fixing, but for reasons which differed from those given at first instance.¹⁴

The Court delivered four separate judgments, with Kiefel J (as she then was) and Gageler J delivering a joint judgment in favour of the ACCC. Nettle J delivered a separate judgment in favour of the ACCC for reasons which were similar to those of Kiefel and Gageler JJ (but with a least one significant difference).

Gordon J delivered a separate judgment in favour of the ACCC, but for different reasons to those of Kiefel, Gageler and Nettle JJ, while French CJ delivered a dissenting judgment in favour of Flight Centre.

While the different approaches taken by the majority judges leave room for debate about the principles to be drawn from the decision, several propositions can be derived, both from the whole of the Court and in particular from the judgments of Kiefel, Gageler and Nettle JJ, who form a working majority in that regard.

10 *Australian Competition and Consumer Commission v Australia and New Zealand Banking Group Ltd* (2015) 236 FCR 78.

11 See *ibid* 107 [134]–[137], 113–14 [173].

12 See *ibid* 106 [131], 108 [142], 109–10 [152]–[154], 111 [160], 111–12 [163]–[164], 114 [175], 115 [182].

13 See *ibid* 111 [163].

14 *ACCC v Flight Centre* (2016) 339 ALR 242.

Is there a separate 'distribution and booking' service?

The Court was unanimous in finding that it was artificial to separate the distribution and booking of air travel from the supply of air travel (that is, there is no separate 'distribution and booking' service).¹⁵

Kiefel and Gageler JJ recognised that market definition is a purposive, instrumental or functional exercise, but found that this approach to market definition is taken beyond its justification:

when analysis of competitive processes is used to construct, or deconstruct and reconstruct, the supply of a service in a manner divorced from the commercial context of the putative contravention which precipitates the analysis. *Castlemaine Tooheys Ltd v Williams & Hodgson Transport Pty Ltd* is an illustration.¹⁶

and going on to state:

The ACCC's primary case encounters essentially the same problem as did the claim in *Castlemaine Tooheys*. The problem is one of economic theory doing violence to commercial reality.¹⁷

However, the Court was also unanimous in finding that the sale of the contractual right to travel by air (that is, the ticket) involves the supply of a service that is separate from the delivery of the air travel itself.¹⁸ The Court found that while travel agents do not supply air travel, airlines and travel agents can potentially compete in the supply of tickets (that is, both the agent and the principal can supply contractual rights against the principal in competition with each other).¹⁹

The relevance and effect of the agency relationship

French CJ, in dissent, was alone in finding that the agency relationship precluded competition between Flight Centre and the airlines. His Honour found that the impugned conduct related to an activity by Flight Centre which 'lay at the heart' of an agency relationship, namely, the sale by Flight Centre of the right to travel on those airlines.²⁰ The Chief Justice stated:

in relation to the supply of contractual rights Flight Centre's conduct is properly to be regarded as that of the airline. Its concerns about pricing are not amenable to characterisation as competitive for the purposes of the Act. That characterisation assumes a concept of competition under the Act which is in tension with that of an agency relationship at law. It opens the door to an operation of the Act which would seem to have little to do with the protection of competition.²¹

15 Ibid 246–7 [7] (French CJ), 258–9 [70]–[75] (Kiefel and Gageler JJ), 270 [123] (Nettle J), 278 [150] (Gordon J).

16 Ibid 258 [70].

17 Ibid 259 [71].

18 Ibid 251 [22] (French CJ), 255 [51] (Kiefel and Gageler JJ), 270 [124] (Nettle J), 281 [169] (Gordon J).

19 Ibid 260 [82] (Kiefel and Gageler JJ).

20 Ibid 249 [17].

21 Ibid 251 [23].

Kiefel, Gageler and Nettle JJ found that the supply of a product pursuant to an agency agreement *may* mean that there is no competition between the principal and the agent, but does not *necessarily* produce this result.²²

Kiefel and Gageler JJ found that the rights, duties and liabilities of the parties to an agency relationship are dependent on the terms of the agreement between them.²³ Their Honours stated:

Critical to the outcome of the ultimate question of whether Flight Centre sold international airline tickets to customers in a market in competition with the airlines are two considerations. The first is that Flight Centre's authority under the Agency Agreement extended not only to deciding whether or not to sell an airline's tickets but also to setting its own price for those tickets. The second is that there is no suggestion that Flight Centre was constrained in the exercise of that authority to prefer the interests of the airlines to its own.

Flight Centre was free in law to act in its own interests in the sale of an airline's tickets to customers. That is what Flight Centre did in fact: 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. When Flight Centre sold an international airline ticket to a customer, the airline whose ticket was sold did not.²⁴

Nettle J found that whether the agent competes with the principal depends on the 'nature, history and state of relations' between them, stating:

Generally speaking, it may be correct that, where an agent has authority to sell for and on behalf of the agent's principal, it is less likely than in other circumstances that the agent and the principal compete with each other for the sale of the goods or services in question. But so to observe in the present case really takes the matter no further. As Drummond J's holding in *IMB Group* helps to illustrate, the question of whether an agent, as opposed to an agent's principal, should be regarded as supplying the principal's goods or services depends as much as anything on the nature, history and state of relations between the principal and the agent so far as they relate to the supply of the goods or services. As has been seen, in a case like *Castlemaine Tooheys*, where the agent never had any dealings with the purchaser and thus the agent acted in fact and law solely on behalf of the principal, what was supplied to the purchaser was supplied by the principal, albeit through the agency of another. But where, as here, there had developed over time a practice of the agent having the principal's authority to supply customers with the principal's services at prices determined by the agent, the factual reality and legal substance of the matter was that it was the agent that supplied the services to the customer, albeit as the agent of the principal.²⁵

The agent's ticket pricing discretion was apparently a crucial factor for Nettle J (as it was for Kiefel and Gageler JJ) with Nettle J stating:

The supposed analogy between an in-house, captive, commission-based salesperson and Flight Centre is inapt. *Ex hypothesi*, in the case of the salesperson, the principal retains contractual power to determine the level of prices at which the salesperson is permitted to sell the principal's products. For that reason, the salesperson is incapable of putting downward competitive pressure on those prices. By contrast,

22 Ibid 260 [79]–[84] (Kiefel and Gageler JJ), 275 [139] (Nettle J). Given the facts of this case, it is arguable that French CJ could also be cited in support of this proposition.

23 Ibid 259–60 [78].

24 Ibid 261–2 [89]–[90].

25 Ibid 277–8 [147].

Flight Centre had an unimpeded contractual right to determine the prices at which it sold an airline's tickets to customers and, consequently, a contractually unimpeded power to put downward competitive pressure on the prices charged by the airline for its tickets in direct sales.²⁶

This is a notable passage for at least two reasons. First the PSAA, under which each airline appointed Flight Centre as agent included, in cl 3.2, a provision that *'all services sold pursuant to this Agreement shall be sold on behalf of the Carrier and in compliance with Carrier's tariffs, conditions of carriage and the written instructions of the Carrier as provided to the Agent'*. Given the power to issue binding written instructions concerning the sale of tickets on behalf the airline, can the agent's right to determine ticket sales price truly be said to be 'contractually unimpeded'? Second, an unimpeded contractual right is still just a contractual right and it can be taken away in accordance with the terms of the contract. Indeed, the consent of the principal to the entire arrangement in the first place is foundational of the existence of any of the economic activity by which the agent is said to be competitive with the principal. We discuss this point in further detail below.

Gordon J was also in the majority, but for reasons which differed from Kiefel, Gageler and Nettle JJ. Her Honour found that, notwithstanding the PSAA, Flight Centre was not an agent of the airlines at the relevant point in time (that is, when it sold tickets), stating:

The description of Flight Centre as 'principal' or 'agent' at various stages of the transaction of selling a ticket to a customer may be legally accurate, but it masks the proper identification of the rivalrous behaviours that occur at the point at which Flight Centre is dealing with its own customers in its own right without reference to any interests of any airline. At that point, the description of Flight Centre as 'agent' is simply wrong. At that point, Flight Centre in its own right was competing against all sellers of tickets, which includes the airlines and other travel agents. Flight Centre was not acting as agent.²⁷

Gordon J found, in any event, that the existence of an agency relationship would be irrelevant to the application of s 45A of the TPA, stating:

the description of Flight Centre as 'agent' is irrelevant for the purposes of the applicable provisions of the TPA. Section 45A is concerned with proscribing various practices in respect of pricing that are 'restrictive'. It is concerned with competition. Whether Flight Centre was, at some stage of the transaction, to be labelled or characterised as 'agent' of the airlines was not the statutory question and does not resolve the appeal.²⁸

In this important respect, Gordon J's approach is a material departure from the approach taken by the remainder of the Court, who each found that the existence of an agency relationship *could*, depending on its terms (or the nature, history or state of the relationship) lead to the conclusion that the parties are not competitors. Gordon J, on the other hand, treated as irrelevant the characterisation of the relationship as one of agency.

Like Kiefel, Gageler and Nettle JJ, Gordon J based her decision chiefly

²⁶ Ibid 272–3 [132].

²⁷ Ibid 278 [153].

²⁸ Ibid 283 [177].

upon an analysis of the facts, emphasising Flight Centre's apparently rivalrous behaviour. It is, however, interesting to consider how these different approaches would be applied in a case where the terms of a bona fide agency relationship were more restrictive (for example, where, under the terms of the agency agreement, the agent was expressly constrained to sell a product only at the price specified by the principal).

The approach taken by Kiefel and Gageler JJ would suggest there would be no competition between the principal and the agent in such a case, while Nettle J's approach would invite consideration of the nature, history and state of the relationship. In most cases, one would expect the same outcome. The nature and state of the agency relationship would certainly indicate that the agent has no ability to compete with the principal.

However, Gordon J's approach would suggest that, even in this narrow case, the existence of the agency relationship is irrelevant. The difficulty with such an approach is that it is only by dint of the agency relationship that the 'agent' is, on the one hand, given the ability to supply the principal's product but, on the other, denied the freedom to compete on price.

Undoubtedly, the mere existence of a relationship which is labelled as an 'agency' does not, without more, lead to a finding that the parties do not compete. However, it is equally true that where parties are properly characterised as principal and agent, the existence of such a relationship is a fact which must be considered by the court in deciding whether those parties are, in truth, competitors. This was the approach taken by the remainder of the High Court (as well as the Full Federal Court).

Whether a party is an agent is certainly not the statutory question, but it is a fact that is relevant to how the statutory question (that is, are the parties competitors in the relevant sense) is to be answered. To the extent Gordon J's judgment might be said to support the proposition that agency is entirely irrelevant, it is respectfully suggested that this approach departs from that of the balance of the majority in this case.

Agency and competition law in other jurisdictions

Before the High Court, the ACCC, Flight Centre and IATA (which intervened in the appeal as an *amicus curiae*) argued that the Court should be guided by the treatment of agency relationships under competition laws in the United States and the European Union. We outline below the treatment of agency relationships in these jurisdictions, before turning to the High Court's consideration of these cases.

United States

In the United States, courts have focussed chiefly on whether the relationship between parties, however described, is a *genuine* agency, or a contrivance designed to circumvent antitrust prohibitions.

In the 1926 case of *US v General Electric Co*,²⁹ the US Supreme Court decided that the *per se* prohibition against resale price maintenance did not apply in a case where there was a genuine relationship of principal and

²⁹ 272 US 476 (1926) ('*General Electric*').

agent.³⁰ However in the 1964 decision in *Simpson v Union Oil Co*,³¹ the Court held that *General Electric* was not applicable in a case of a consignment sales arrangement which was found by the court to be a 'device'.³²

The US Court of Appeals for the 7th Circuit considered these two cases in the 1986 decision in *Morrison v Murray Biscuit Co*,³³ noting that *General Electric* and *Union Oil* shared similar facts. The Court reconciled the two decisions by asking whether the agency relationship has a function other than to circumvent the rule against price fixing. The Court recognised that the goal of antitrust law — economic efficiency — would not be promoted by a rule that forbade principals from telling their agents the price at which the principal's product was to be sold, but this principle was not applicable in a case where a seller just constitutes its competitor a sales agent, or where the so-called agent is really a dealer.³⁴

In the same year, the Court of Appeals for the 7th Circuit followed *Morrison* in *Illinois Corporate Travel Inc v American Airlines Inc*.³⁵ This case concerned whether American Airlines engaged in resale price maintenance by refusing to allow a travel agent to discount the price of American Airlines' flights. The Court concluded that there was no resale price maintenance. In response to an argument that the principle stated in *General Electric* had not survived *Union Oil*, Judge Easterbrook stated:

General Electric is healthy. Employment relations do not violate the antitrust laws; Sears may tell the managers of its stores at what price to sell lawn mowers. *Morrison* held that genuine agency relations should be treated like employment relations.³⁶

Judge Easterbrook found that the travel agent was a genuine agent and did not resell air travel; in part because the travel agent did not purchase seats for resale, did not hold an inventory of seats for sale and bore no risk of unfilled seats.³⁷

European Union

The European Court of First Instance considered the interaction between agency and competition law in the 2005 case of *DaimlerChrysler AG v Commission of the European Communities*.³⁸ *DaimlerChrysler* concerned the application of art 81(1) of the *EC Treaty*³⁹ to a series of agreements between Mercedes Benz and its agents which included a territorial restraint. Mercedes Benz argued that the sales restrictions effected through its agency agreements

30 Ibid 488.

31 377 US 13 (1964) ('*Union Oil*').

32 Ibid 21, 24.

33 797 F 2d 1430 (1986) ('*Morrison*').

34 Ibid 1437.

35 806 F 2d 722 (1986) ('*Illinois Corporate Travel*').

36 Ibid 724–5.

37 Ibid 725.

38 (T-325/01) [2005] ECR II-3319 ('*DaimlerChrysler*').

39 Now article 101(1) of the *Treaty on the Functioning of the European Union*. Article 81(1) prohibited agreements between undertakings and concerted practices which have as their object or effect the prevention, restriction or distortion of competition within the common market.

were not subject to the prohibition in art 81(1) because the agents were integrated into the Mercedes Benz organisation and had the same legal relationship as its employees.

The European Court found that art 81(1) was concerned with conduct that is coordinated bilaterally or multilaterally between undertakings. The Court stated:

in competition law the term ‘undertaking’ must be understood as designating an economic unit for the purpose of the subject matter of the agreement in question, even if in law that agreement consists of several persons, natural or legal.⁴⁰

The Court concluded that Mercedes Benz’s agents were part of a single ‘economic unit’ and that, as a consequence, art 81(1) did not apply to the restrictions under the relevant agreements.

The European Commission’s (EC) 2010 *Guidelines on Vertical Restraints* state that certain agency agreements fall outside art 101(1) on the basis that the functions of the agent form part of the activities of the principal.⁴¹ In defining an agency agreement for this purpose, the guidelines identify as the key criteria whether the agent bears any financial or commercial risks in relation to the contracts negotiated on behalf of the principal and the activities which the agent is required to undertake.⁴²

Are travel agents a special category?

It has been observed that a travel agent often acts for multiple principals, and may carry on business in competition with those principals. Indeed, it has been questioned whether a travel agent is, in truth, an agent at all.⁴³

In this context, *Illinois Corporate Travel* returned to the Court of Appeal for the 7th Circuit in 1989.⁴⁴ In the course of once again dismissing the travel agent’s complaint, Judge Easterbrook observed:

When the case was here in 1986, we thought it tolerably clear that travel service operators are the air carriers’ agents. They carry no inventory and can book space only by requesting it from the carrier’s computer; air carriers set the price for each ticket (sometimes changing the allocation of seats among price and travel-date-restriction categories by the hour), produce the service, deliver it direct to travellers, and take the risk of unsold seats. Although each travel service operator (conventionally called a ‘travel agent’, a telling phrase) works with many airlines, hotel chains, and other suppliers of travel services, this is a common form of organization. Real estate agents work for many clients, and multiple-listing services allow many agents access to the same properties; auction houses sell works of art furnished by hundreds of owners at a single sitting.⁴⁵

40 *DaimlerChrysler* (T-325/01) [2005] ECR II-3319 [85].

41 European Commission, *Guidelines on Vertical Restraints* (2010) [18].

42 *Ibid* [15].

43 *Eg*, see Dal Pont, *Law of Agency* (LexisNexis Butterworths, 2nd ed, 2008) [12.51].

44 *Illinois Corporate Travel Inc v American Airlines Inc*, 889 F 2d 751 (1989).

45 *Ibid* 752–3. The US Supreme Court denied cert in respect of the 1989 decision (495 US 919 (1990)).

In a similar vein, the EC's *Guidelines on Vertical Restraints*, referring to the principles articulated in *DaimlerChrysler*, state that it is not material whether the agent acts for one or several principals.⁴⁶

The High Court's consideration of the law in other jurisdictions

While Kiefel, Gageler and Nettle JJ considered the jurisprudence in the European Union and United States, none were persuaded that these decisions aided Flight Centre.

Kiefel and Gageler JJ considered their approach to be broadly consistent with the approach taken by the European Court in *DaimlerChrysler*,⁴⁷ in that both draw a distinction between an agent who is bound to work for the benefit of its principal, and an agent which is allowed, by the terms of its agreement, to perform duties which, from an economic point of view, approximate those that would be carried out by an independent dealer.

In relation to the US position, Kiefel and Gageler JJ found that the facts in *Illinois Corporate Travel* were materially different to those in Flight Centre, in that the US airline set and publicised prices, with the agent bearing no financial risk on lost sales, and that the US cases focussed on whether the agency relationship had a function other than to circumvent the rule against price fixing, which is not the question under the *TPA*.⁴⁸

Nettle J placed greater emphasis on distinguishing *DaimlerChrysler*, noting that the European case was concerned with territorial restraints rather than price fixing, and was decided under legislation that was substantially different.⁴⁹ Nettle J also emphasised that *DaimlerChrysler* is not applicable in a case, such as Flight Centre, where there was a degree of price competition resulting from the longstanding practices of airlines and travel agents.

Nettle J undertook a lengthy examination of the US cases cited in support of Flight Centre's case, concluding that, in so far as the reasoning in *General Electric* (which asks whether the 'agency' has a function other than to circumvent the rule against price fixing) is relevant to the application of s 45A, it stands only for the proposition that the act of a principal appointing an agent to sell its products at a price determined by the principal, without more, does not constitute price fixing. It is still necessary to show that the principal and agent are competitors.⁵⁰

His Honour also noted that in *Illinois Corporate Travel*, the Court of Appeal left open the possibility that, at trial, the plaintiff might be able to establish that the airline's market power was such that its maintenance of higher prices through its price restraints did not produce sufficient non-price benefits to be worthwhile. His Honour considered this approach reflective of a body of jurisprudence not applicable to s 45A.

46 See European Commission, above n 40.

47 *ACCC v Flight Centre* (2016) 339 ALR 242, 260–1 [84]–[85].

48 *Ibid* 261 [86]–[88].

49 *Ibid* 276 [143].

50 *Ibid* 274 [137]–[139].

Australian law following *Flight Centre*

The question now posed by the judgment in *Flight Centre* is whether the competition condition in s 44ZZRD(4) of the *CCA* (or the requirement for competition in s 4D) would be satisfied in a case where the parties to the alleged cartel or exclusionary provision were in an agency relationship? Several principles can be derived from the judgment.

First, the mere fact that a relationship is described as an ‘agency’ does not preclude competition between the parties.

Second, if, under the agency relationship, the agent has the requisite degree of freedom to compete with the principal — a freedom which may be revealed by the agent’s pricing discretion and/or its ability to prefer its own interests to those of the principal — the parties will be competitors for the purposes of the *CCA*.

Third (and in contrast to the first two points) if the relationship is a bona fide relationship of agency, on terms which deny the agent the freedom to compete with the principal, it is unlikely that the parties will be characterised as competitors for the purposes of the *CCA*.

Whether the approach taken by Nettle J would produce a different outcome to that of Kiefel and Gageler JJ will depend on the facts. Kiefel and Gageler JJ focus on the terms of the agency agreement, while Nettle J’s judgment invites consideration of the nature, history and state of the relationship. In many (perhaps most) cases, the result arrived at by applying either approach would be the same.

Would the principal and agent compete ‘but for’ the agency agreement?

Applying the principles above, a manufacturer establishing a network of agents for the first time would need only concern itself with the terms of the agency relationship and the degree of freedom it wished to allow its agents. But what if a principal, who had previously allowed its agents the freedom to compete, decided to amend the terms of the relationship to curtail that freedom and impose stricter controls over price? The removal of this freedom to compete is necessarily consensual, in the sense that the principal may be giving effect to rights, under an existing contract, to modify its terms or to issue binding instructions, or the agent has agreed to continue to operate under the more restrictive terms.

How is that to be reconciled with s 44ZZRD(4) of the *CCA* (the ‘competition condition’) which is satisfied if ‘*but for any contract, arrangement or understanding*’ the parties would be, or would be likely to be, in competition with each other?⁵¹

If it is only by dint of the terms of the agency agreement that the principal and agent cease to be competitors, does it not follow, pursuant to s 44ZZRD(4), that the principal and agent would be competitors ‘but for’ those limiting terms? Normally, when two competitors agree to a provision that has the purpose of directly or indirectly preventing, limiting or restricting

⁵¹ While a similar condition was to be found in s 45A(8) of the former *TPA*, this question was not canvassed in the *Flight Centre* appeal.

the capacity of one of them to supply services in competition with the other, they have agreed to an illegal cartel provision.

However, in the scenario outlined above, the question of whether the principal and agent would be competitors, but for the restrictions in the agency agreement, is one of fact.⁵² One cannot simply strike out the restrictions imposed on the agent under the agency agreement (either initially or as a result of a variation to its terms) and assume that the remainder of the agreement (which would now give the agent the freedom to compete) would remain intact. The relevant enquiry, in such a case, would be whether the principal would be likely to appoint the agent at all (or maintain that appointment) if it could not do so on terms that restricted the ability of the agent to compete.

Consider, for example, the case of a manufacturer who has previously allowed its agents some freedom to engage in rivalrous behaviour, but who seeks to amend its agency terms to take that freedom away. If the newly imposed restrictions were to be struck out as illegal restraints, would the manufacturer allow the previous relationship to continue (in which case the parties would be likely to compete) or would it disband its agency relationship entirely? This would ultimately be a question of fact for a court.

Is this the best way to regulate restrictions in an agency relationship?

The complexity which attends the preceding analysis illustrates an inherent difficulty in applying per se prohibitions to restrictions between a principal and its agent after a factual enquiry only as to whether they are in competition with each other.

It is our contention that there is necessarily a difference in the nature of the ‘competition’ between principals, and the ‘competition’ between a principal and its sales agent.

In the former situation the principals (typically) have the independent capacity to compete autonomously with one another. In the latter situation, the ability to compete is itself rooted in the arrangements between the parties and, more particularly, on the status conferred by the principal on the agent. The principal can therefore thwart the competition from its agent, simply by terminating the agency in accordance with its terms, amending its scope or (importantly for competition) by not entering into it in the first place. In the context of this more limited (or what might be termed ‘dependent’) form of competition, it makes little sense to apply per se cartel rules. As with exclusive dealing, where certain restrictions entered as part of a permissive or facilitative supply relationship between competitors are not considered per se offences, restrictions within distribution arrangements based on agency (which is itself permissive or facilitative of competition) should not be prohibited without regard to their effect on competition.

In that sense, the agency relationship is analogous to a distribution agreement under which one party supplies a product to another, who is then in a position to resell in competition with the first party. As with the agency distribution situation, ‘competition’ between the supplier and the reseller

⁵² *Norcast SarL v Bradken Ltd [No 2]* (2013) 219 FCR 14, 77 [259].

acquirer can be thwarted by the supplier terminating the arrangement or not supplying the reseller in the first place, or limited by restrictions on the resupply of the product (except as to price). Section 47 of the *CCA* proscribes certain non-price limits on resupply, but only when they have the purpose, effect or likely effect of lessening competition. Such supply conditions — which might otherwise constitute market sharing when agreed or implemented by competitors — are removed from the purview of the per se cartel offences by the ‘anti-overlap’ provisions.⁵³

So called ‘vertical’ relationships have always been, to varying degrees, judged differently to cartels, not just in Australia but in other parts of the world.⁵⁴ In other jurisdictions, resale price maintenance is often (although not always) prohibited per se.⁵⁵ However non-price restrictions (for example, geographic limitations, tying, *solus* agreements) have almost always been subject to a competition test or rule of reason analysis.

It has been widely accepted, both in Australia and other jurisdictions, that conduct should be prohibited per se only where it is unequivocally bad for economic welfare. For example, the report of the Dawson Review stated that:

[t]he rationale behind per se prohibition is that the conduct prohibited is so likely to be detrimental to economic welfare, and so unlikely to be beneficial, that it should be proscribed without further inquiry about its impact on competition.⁵⁶

More recently, the report of the Harper Review found that the objectives of competition law are met if, among other things, ‘conduct is only prohibited per se if it is anti-competitive in most circumstances’, other conduct being prohibited only where it can be shown that it has the purpose, effect or likely effect, of substantially lessening competition.⁵⁷

Unlike cartels, ‘vertical’ arrangements for sale and distribution have been found to often enhance competition. For example in *Leegin Creative Leather Products Inc v PSKS Inc*, the majority stated:

The justifications for vertical price restraints are similar to those for other vertical restraints. Minimum resale price maintenance can stimulate interbrand competition — the competition among manufacturers selling different brands of the same type of product — by reducing intrabrand competition — the competition among retailers selling the same brand. The promotion of interbrand competition is important

53 *Competition and Consumer Act 2010* (‘CCA’) ss 44ZZRS, 45(6).

54 While the High Court has cautioned against seeking to distinguish between ‘vertical’ and ‘horizontal’ conduct (*Visy Paper Pty Ltd v Australian Competition and Consumer Commission* (2003) 216 CLR 1, 10–11 [23]–[27]), in discussing the application of the *CCA* to everyday commercial dealings, this is often a useful ready reckoning framework through which to investigate the question (so often posed by economists) of ‘what’s really going on here?’.

55 In *Leegin Creative Leather Products Inc v PSKS Inc*, 551 US 877 (2007) the Supreme Court held that resale price maintenance should no longer be prohibited per se in the United States. While resale price maintenance remains subject to a per se prohibition under s 48 of the *CCA*, the Harper Review recommended that the Act be amended to permit immunity for such conduct to be obtainable through notification, in recognition that it can be pro-competitive.

56 Commonwealth of Australia, *Final Report of the Review of the Competition Provisions of the Trade Practices Act* (January 2003) 123 (‘Dawson Review’).

57 Competition Policy Review, *Final Report of the Competition Policy Review* (March 2015) 307.

because 'the primary purpose of the antitrust laws is to protect [this type of] competition.' A single manufacturer's use of vertical price restraints tends to eliminate intrabrand price competition; this in turn encourages retailers to invest in tangible or intangible services or promotional efforts that aid the manufacturer's position as against rival manufacturers. Resale price maintenance also has the potential to give consumers more options so that they can choose among low-price, low-service brands; high-price, high-service brands; and brands that fall in between.⁵⁸

It is, of course, widely recognised that vertical restraints, both price and non-price, *can* have an adverse impact on competition. However, apart from resale price maintenance (where treatment varies between jurisdictions), it is normally accepted that such restraints are not so unequivocally harmful to competition that they should be prohibited per se, that is, without considering their effect on competition.

We contend that bona fide agency agreements fall into the same category. Obviously there are differences, both legally and commercially, between a distribution model based on supply and resale and a model based on agency, but in substance both are methods by which one person, who creates or has the ability sell a product, arms another with the ability to do so. Both are vehicles through which interbrand competition can be promoted, and (subject to per se laws against resale price maintenance) both should be assessed for their competition impact on a case by case basis.

An arrangement under which an agent agrees to market a principal's product, but only if the principal agrees to restrictions on its own pricing, could certainly harm competition if it limited intrabrand rivalry, or if the agent was the 'hub' in a cartel, but it could also preserve an avenue by which the principal can get its product to market.

Would the perceived harm to competition, which presumably founded the ACCC's concerns in *Flight Centre*, have been different if the travel agent had made its demands not to established carriers, but to a new entrant seeking penetration, through the agent, into a highly competitive Australian aviation market? What if the travel agent refused to sell the carrier's tickets on terms which allowed the carrier to undercut it on price? What would cause the greater harm to competition: a limitation on the ability of the airline and travel agent to undercut each other on price, or the loss of an avenue by which the airline could penetrate the Australian market at all?

One outcome of the reasoning of the majority of the High Court is to require a case-by-case factual analysis of the nature, history and state of relations between agent and principal to determine if they are in competition with each other for the purposes of the per se cartel offence. In our view this produces a misallocation of the forensic energies of advisors, the regulator and courts alike. It focusses on factual enquiries about whether the parties are competing rather than an enquiry as to whether the restricted agency arrangement is good or bad for competition. As Professor Frank Easterbrook wrote (before his appointment to the US Court of Appeals for the 7th Circuit):

Our economy has many ways of assembling and distributing products. The more routes to market, the broader the consumers' choice. The broader their choice, the

⁵⁸ *Leegin*, 551 US 877 (2007) (citations omitted).

better off they are. Cartels restrict rather than increase the range of choice. We should welcome restricted dealing as a benefit to consumers and not lump it with cartels, with which it has nothing in common.⁵⁹

If an agent has agreed to distribute a principal's product, but will do so only with price controls on the principal's own distribution (as was the situation in *Flight Centre*) might that not preserve an additional route to market for the principal's products? Should this not be the focus of a forensic enquiry into such an arrangement? The application of a competition test to such arrangements would permit a proper accounting for the potentially pro-competitive benefits of an agency arrangement which is not otherwise called for by the law as it stands. While the High Court's approach to the Act mandates a detailed case by case analysis to determine whether the principal and the agent are 'competing', we contend that the correct question under the Act should be whether the arrangements between the principal and agent are pro or anti-competitive.

Conclusion

The observation that hard facts make bad law is trite, but nonetheless pertinent when the courts are asked to apply cartel prohibitions to an arrangement which would normally be viewed as a type of vertical restraint.

In the *Flight Centre* proceedings, there were similarities in the approach to the treatment of agency outlined by the Full Federal Court was not, in principle, very different to the approach taken by Kiefel, Gageler and Nettle JJ. Despite this, different conclusions were reached by the High Court, informed heavily by the majority's consideration of facts ventilated at a trial at which very different conclusions again were reached. Inevitably, the application of the majority's reasoning becomes more difficult once it is applied to different factual scenarios.

The concept of agency predates Australia's competition law by several centuries. It is well-established and well-understood. While the Chief Justice was alone in his dissent in *Flight Centre*, it could be argued that his judgment is the one which gave due weight to the importance of agency in commercial dealings and the need to assess the effect of such relationships on competition before finding them illegal. Kiefel, Gageler and Nettle JJ certainly recognised that agency is relevant. However their approach to dealing with the agency relationship in this case, relying as it did on the particular terms of the agency agreement and their practical operation, begs many questions as well as answers. It is possible that definitive answers to some of these questions will be provided only through further litigation.

Ultimately, it is the regulator which is principally responsible for the enforcement of our cartel laws in light of this decision. No doubt the ACCC's pursuit of *Flight Centre* was driven by the belief that the conduct in question was, in substance, harmful to competition. Nevertheless, the ACCC chose to pursue this case as a per se contravention, rather than subjecting these facts to a competition analysis. While the ACCC has, in the case of *Flight Centre*,

⁵⁹ Frank H Easterbrook, 'Vertical Arrangements and the Rule of Reason' (1984) 53 *Antitrust Law Journal* 135, 135.

succeeded in bringing the relationship between a principal and agent into the realm of cartel conduct, the principles established by this decision are capable of applying more broadly, and in cases where the competition impacts may be equivocal.

The prospect of any clarification through legislative amendment remains, at the time of writing, fluid. An exemption for vertical supply agreements from cartel liability was recommended by the Harper Review and was included in early exposure draft legislation in September 2016.⁶⁰ That exemption would potentially have excluded cartel liability in a situation such as that considered in Flight Centre. The exemption, however, was removed from the version introduced to Parliament on 30 March 2017 as the Competition and Consumer Amendment (Competition Policy Review) Bill 2017.

While it may not be realistic to expect the CCA to be amended, the ACCC, through its selection and prosecution of cases, as well as guidance provided more broadly, will have a powerful influence on the way in which businesses apply this judgment to their existing and future distribution arrangements. It is to be hoped that the ACCC will recognise the potential for this decision to discourage the use of long standing distribution channels (which often operate to the benefit of competition and consumers) and help foster an environment where our cartel laws are used only to deter and disrupt such arrangements where they unequivocally have an adverse impact on competition.

⁶⁰ Competition and Consumer Amendment (Competition Policy Review) Bill 2016.