IN THE HIGH COURT OF AUSTRALIA
BRISBANE REGISTRY

No B15 of 2016

Between

Australian Competition and Consumer Commission

Appellant

And

Flight Centre Travel Group Ltd (ACN 003 377 188)

Respondent

RESPONDENT'S SUBMISSIONS

PART I: Certification

1 These submissions are in a form suitable for publication on the internet.

PART II: Issues

2 Did the respondent travel agent (**Flight Centre**) supply services in competition with its principals, international airlines, in a market for distribution and booking services or alternatively in the market for international passenger air travel services (ie flights)?

PART III: Notice under sec 78B of the *Judiciary Act 1903* (Cth)

3 Consideration has been given to the question whether notice pursuant to sec 78B of the *Judiciary Act 1903* (Cth) should be given with the conclusion that this is not necessary.

PART IV: Facts

4 Flight Centre accepts the facts as stated by the appellant (**ACCC**) in Part V of the ACCC's Submissions dated 15th April 2016 (**AS**) with the following qualifications and additions.

5 AS [12] correctly notes that each of Singapore Airlines, Malaysia Airlines and Emirates (**airlines**) was a member of the International Airline Transport Association (**IATA**) and that each of those airlines was accordingly a party to the Passenger Sales Agency Agreement entered into with Flight Centre by IATA on behalf of its members (**PSAA**)[1] {Reasons of the Full Court dated 31st July 2015 (**FC**) [13]}.[2] However, the references to the provisions of the PSAA in AS [12] are incomplete. The following provisions of the PSAA are relevant:

5.1 Flight Centre was authorised under the PSAA to sell air passenger transportation services of the airlines. That included all activities necessary to provide a passenger with a valid contract

[1] A copy of the PSAA was behind Tab A11 of Exhibit 1 at trial (FC Appeal Book Tab 31.7).

[2] *Flight Centre Ltd v ACCC* (2015) 234 FCR 367.

Filed on behalf of the respondent
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of carriage with the airlines (including booking, ticketing and other ancillary services) {FC [14]; PSAA, cl 3.1}.

5.2 All services sold by Flight Centre pursuant to the PSAA were to be sold on behalf of the airlines and in compliance with their tariffs, conditions of carriage and written instructions. Flight Centre was not permitted to vary any of the conditions of the services provided by the airlines {FC [14]; PSAA, cl 3.2}.

5.3 The airlines indemnified Flight Centre against liability for any loss, injury or damage arising in the course of the transportation or ancillary services provided by the airlines pursuant to a sale made by Flight Centre or arising from their failure to provide services {PSAA, cl 15.1}.

5.4 Flight Centre had no proprietary rights to tickets or identification plates[3] deposited with it by the airlines, and the airlines could at any time require the immediate return of the plates and any tickets deposited but not yet issued to customers {PSAA, cl 6.1}. Flight Centre was not permitted to issue tickets through a third party automated ticketing system without obtaining confirmation from the airlines that the system conformed with standards acceptable to the airlines, and the airlines could at any time withdraw Flight Centre's authority to issue tickets on their behalf through an automated ticketing system {PSAA, cl 6.3, 6.4}.

5.5 Flight Centre was to be remunerated by the airlines for its sale under the PSAA of air transportation and ancillary services {PSAA, cl 9}.

5.6 Flight Centre was responsible for collecting the fare from a passenger to whom it had sold a transportation service on behalf of an airline. All monies so collected by Flight Centre were the property of the airline held on trust by Flight Centre for the airline {FC [16]; PSAA, cl 7.2}.

6 The non-exhaustive definition of booking service in AS [9] does not accord with the service characterisation found by the primary judge (and rejected by the Full Court). The Full Court noted that other travel-related services on occasion provided by agents like Flight Centre—such as the provision of advice about overseas destinations and the making of bookings for tours and accommodation, ground transport and travel insurance—were not in issue {FC [21], [161]}. The primary judge identified the services which were relevantly supplied by Flight Centre in competition with the airlines as international air travel (distribution and) booking services {Reasons of the primary judge dated 6th December 2013 (**J**) [137]}.[4] The price the airlines paid for those services, which his Honour found Flight Centre attempted to maintain, was the retail or distribution margin retained by Flight Centre with the airlines' permission {J [151]}. The primary

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[3] Before the introduction of electronic ticketing, airlines had identification plates (each with its own three letter code, identifying the airline), allowing travel agents to issue printed tickets on their behalf.

[4] *ACCC v Flight Centre Ltd (No 2)* [2013] FCA 1313; (2013) 307 ALR 209.

judge explained the services in terms of providing would-be passengers with details of the availability of flights and fares and making bookings for them (**booking services**) {J [138]; see also J [112], [142] and FC [147]}. Services other than those were referred to by his Honour as "other services", which might have been provided "in conjunction with" booking services {J [138]}, but were not part of the booking services as relevantly defined.

7 The scope of the agency found went beyond the mere issuing of tickets {cf AS [20]; see similarly AS [9]}. The scope of the agency was found to have encompassed the sale of international passenger air travel services more broadly (including booking, ticketing and any other ancillary services to consumers) {FC [12], [153]-[154], [175]; J [21]}, ie including "any services that could realistically be described as booking services" {FC [154]}.

8 The cost to Flight Centre of honouring its Price Beat Guarantee policy arising from lower fares available from airlines directly was not found to have been "a key threat to Flight Centre's business". J [117], cited in support of that proposition in AS [11], does not say that it was. The evidence demonstrated that the amounts Flight Centre paid to customers under its Price Beat Guarantee policy (fluctuated but) represented a tiny proportion of its revenue and that an even smaller proportion of those amounts were paid in response to prices offered by the airlines directly (as opposed to prices offered by other travel agents).[5]

9 Contrary to AS [17], the Full Court did not conclude in FC [28] (or elsewhere) that the emails referred to in AS [17] evidenced rivalry or competition between Flight Centre and the airlines in the statutory sense. Such a conclusion was expressly rejected in FC [171]-[176].

10 The ACCC did not in the Full Court file any notice of contention that the primary judge erred in the finding {AS [19]} that only the airlines supplied international passenger air travel services and that Flight Centre accordingly did not compete in the market for the supply of those services {FC [80]}. Indeed, the ACCC explicitly conceded the correctness of the finding, submitting to the Full Court that Flight Centre and the airlines "did not compete to supply international air travel, because only the airlines supplied international air travel to consumers".[6]

PART V: Legislation

11 The ACCC's statement of applicable legislative provisions is accepted.

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[5] See Affidavit of Gregory Ian Parker affirmed 17 December 2013 at [9]-[29] (FC Appeal Book Tab 25). In the vicinity of 80 to 85% of the flights sold by the airlines during the relevant period were sold through travel agents {FC [23]; J [21], [37]}.

[6] ACCC written submissions to the Full Court dated 26 September 2014 at [17]. See similarly ACCC oral submissions to the Full Court on 20 November 2014 at T47.30-32 ("Flight Centre doesn't supply air traffic [sic]. All it provides is ... an advisory service ... A booking service and a distribution service") and at T48.4-11 ("it can't be a competitor for the provision of air travel, because Flight Centre doesn't provide that ... the question that the court must decide is whether his Honour was wrong in accepting that evidence in concluding that there's a separate market for booking services").

PART VI: Argument in answer to the appeal

12 This appeal concerns the construction and application of subsec 45A(1) of the *Trade Practices Act 1974* (Cth) as was in force until 24 July 2009 (**Act**). That provision deemed "per se" contraventions of the penalty provision[7] in sec 45 of the Act in specified circumstances.

13 The Full Court held that there were no services supplied by Flight Centre in competition with the airlines (the price for which was attempted to be fixed, controlled or maintained), within the meaning of sec 45A and sec 45 of the Act {FC [8], [168]-[176]}. No error of construction or application to the facts of this case affected that conclusion.

14 Consideration of the plain and ordinary meaning of the statutory text, as well as its context including the legislative history,[8] demonstrates that the deeming provision in subsec 45A(1), read with sec 45, should have had no application in this case.

The per se prohibition upon price-fixing

15 Competition is an economic device for controlling the disposition of society's resources, requiring independent rivalry in all dimensions of the price-product-service packages offered to consumers: *Re Queensland Co-operative Milling Association Ltd* (1976) 25 FLR 169 (***QCMA***) at 187-189. Competition takes place in markets within which substitution can occur between products or services, and sources of supply, in response to changing prices or other economic incentives: *Australian Gas Light Company v ACCC (No 3)* (2003) 137 FCR 317 at 426-427 [379] per French J (as his Honour then was), citing *QCMA* at 190 and *Re Tooth & Co Ltd* (1979) 39 FLR 1. In well-functioning markets, the process of competition enables efficient producers to displace less efficient producers by profitably providing services to consumers at lower prices: *Re Telstra Corporation Ltd (No. 3)* [2007] ACompT 3; (2007) 242 ALR 482 at 509 [98] (see also at 508 [97], citing *QCMA* at 189).

16 Price fixing between competitors is antithetical to these principles, and is for that reason prohibited per se by the operation of sec 45A of the Act (deeming a substantial lessening of

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[7] Section 45 was a civil penalty provision: subsec 76(1) of the Act. Section 45A, read with sec 45, has been succeeded by civil and criminal penalty provisions, in relevantly the same form. A corporation now contravenes sec 44ZZRJ of the *Competition and Consumer Act 2010* (Cth), a civil penalty provision, if it makes a contract or arrangement, or arrives at an understanding, containing a "cartel provision". A corporation commits an offence under sec 44ZZRF if it does so with knowledge or belief that the contract, arrangement or understanding contains a "cartel provision". The definition of "cartel provision" provided in subsec 44ZZRD(2) and (4)(a)-(e) is relevantly to the same effect as subsec 45A(1) read with sec 45 of the Act.

[8] See, eg *Tabcorp Holdings Limited v Victoria* [2016] HCA 4; (2016) 328 ALR 375 at 378 [8] per French CJ, Kiefel, Bell, Keane and Gordon JJ. See similarly: *North Australian Aboriginal Justice Agency Limited v Northern Territory* [2015] HCA 41; (2015) 326 ALR 16 at 19 [11] per French CJ, Kiefel and Bell JJ; *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue* (2009) 239 CLR 27 (***Alcan***) at 46-47 [47] per Hayne, Heydon, Crennan and Kiefel JJ; *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at 381 [69] per McHugh, Gummow, Kirby and Hayne JJ.

competition for the purposes of sec 45).[9]

17 The statutory provisions in issue—subsec 45A(1), 45(2) and 45(3) of the Act—were during the period relevant to this appeal in force in the form in which they were originally enacted. They were enacted by sec 25 of the *Trade Practices Amendment Act 1977 (Act No. 81 of 1977)* (Cth), in response to a Report to the Minister for Business and Consumer Affairs (the Honourable John Howard MP) by the Trade Practices Act Review Committee dated 20th August 1976 (**Swanson Report**). The Swanson Report expressed the view that competition could not be successfully defined within a set of strict legal rules, but cited the principles analysed in *QCMA* as an appropriate explanation of the concept of competition {[4.0]}. Regarding price-fixing, the Swanson Report noted that the Committee could not agree to a suggestion that all matters within subsec 45(3) (as was then in force) be absolutely prohibited and considered that the treatment of matters within subsec 45(3) should be differentiated {[4.58]}. The recommendation was that, subject to (presently irrelevant) exceptions {[4.59]}:

> there should be an absolute prohibition of agreements between competitors, having the purpose or effect, or likely to have the effect, of fixing or controlling, or providing for the fixing or controlling of the price for, or any discount, allowance, or rebate, in relation to, any goods or services supplied by the parties, or any of them, in competition with each other, to persons not being parties to the agreement. They should be incapable of authorisation. The Committee considers that these price agreements between competitors are at the very heart of anti-competitive behaviour and should be clearly prohibited. It is our firm belief that such agreements will so rarely be in the public interest that the costs in time and money, both for industry and Government, involved in allowing attempts to justify such agreements far outweigh the social benefits which might flow from the possibility of an occasional successful justification in terms of the de minimis exception stated in the present sub-section 45(3).[10]

18 That is why the statutory text requires the "competition" necessary to satisfy the deeming provision in sec 45A to be competition between the parties to a contract, arrangement or understanding (**agreement**) for the particular supply of the (good or) service the price of which is said to have been fixed, controlled or maintained. The principles referred to in *QCMA* and above are inapposite, and the per se prohibition has no application, in circumstances not involving producers or suppliers who are independent[11] rivals or competitors.

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[9] The per se prohibition is applicable to what have been described as "horizontal price-fixing arrangements between competitors": see, eg *Boral Besser Masonry Ltd v ACCC* (2003) 215 CLR 374 at 428 [158]; cf *Visy Paper Pty Ltd v ACCC* (2003) 216 CLR 1 at 10-11 [23]-[26].

[10] See similarly the Explanatory Memorandum circulated by the Minister, the Honourable John Howard MP in 1977 (following the Swanson Report) which likewise noted {[6]} that price-fixing between competitors would, subject to (presently irrelevant) exceptions, be absolutely prohibited by the introduction of the new sec 45A deeming contracts, arrangements or understandings between competitors having the purpose or effect of fixing, controlling or maintaining the price of goods or services to have the purpose or effect of substantially lessening competition in a market.

[11] In the sense of the "independent rivalry" referred to in *QCMA* at 189, cited in para 15 above.

19 The ACCC was accordingly required in this case to establish that Flight Centre and the airlines were in competition with each other in a market[12] for the supply of services, the price for which would have been fixed by (provisions in) the agreements attempted to be induced.

The services and competition alleged

20 The Full Court reasoning was faithful to the statutory text, correctly holding that it was necessary to identify the relevant services, and the relevant market, to determine whether the deeming provision in sec 45A was engaged to give sec 45 a per se operation {FC [112]}. The principles it applied were orthodox and largely not in dispute {FC [113]-[122]; see also FC [129], [138]-[139], [167]}. The Full Court appreciated that the resolution of the appeal before it hinged on the correctness of the primary judge's characterisation of services supplied by Flight Centre and the airlines allegedly in competition for the purposes of secs 45A and 45 of the Act {FC [6], [112]}. It described the questions of market and service characterisation as "critical" {FC [74]}.[13]

21 The case for the ACCC in the Full Court below was that the primary judge was correct to find that Flight Centre and the airlines competed in a market for the supply of distribution and booking services {FC [110]}. The analysis of the Full Court demonstrated that the parties did not compete in that supposed market because the airlines did not supply distribution services to themselves in competition with Flight Centre and because Flight Centre did not supply booking services to consumers in competition with the airlines {FC [8], [168]}. The correctness of that analysis is addressed in paras 49 to 59 below.

22 The ACCC now seeks to establish that Flight Centre attempted to induce the airlines to enter into an arrangement that would have contravened the Act by fixing, controlling or maintaining the price for international air travel services said to have been supplied by the airlines and by Flight Centre {AS [73]-[78]; Notice of Appeal [3]}.

23 The ACCC should not be permitted to advance this contention because it is one which the ACCC expressly disavowed below (as to which see paras 60 to 65 below).

24 If this Court were nevertheless minded to permit the ACCC now to advance it,[14] the contention should be rejected because Flight Centre did not supply international air travel services (or flights) to consumers. As was recognised by all judges below: Flight Centre did not own or operate aircraft and was not an air carrier in its own right; when Flight Centre sold flights

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[12] Competition is defined by reference to "market" in subsec 45(3) (for the purposes of both sec 45 and sec 45A).

[13] The primary judge similarly acknowledged that "[c]haracterisation of exactly what Flight Centre and the airlines 'supply' and to whom and in what market are key issues in this case" {J [21]}.

[14] Cf *University of Wollongong v Metwally (No 2)* (1985) 59 ALJR 481 at 483 per Gibbs CJ, Mason, Wilson, Brennan, Deane and Dawson JJ; *Coulton v Holcombe* (1986) 162 CLR 1 at 7-11 per Gibbs CJ, Wilson, Brennan and Dawson JJ.

to consumers, it did so on behalf of and as agent for the airlines; and the procuration or facilitation by Flight Centre of the services provided by its principal, the airline, was not also a supply of that service by Flight Centre {J [20], [135]; FC [12], [67], [181]}.

25 In order to demonstrate why the international air travel services were supplied by the airlines and not by Flight Centre, it will be convenient first to recapitulate relevant principles of the law of agency. The principles will then be considered in the present context of the potential application of the statutory prohibition upon price-fixing to the particular facts of this case. Finally, it will be shown that the same result would follow under the principles applicable in other jurisdictions (to some of which the ACCC has referred as "useful guidance" {AS [63]}).

Relevant principles of the law of agency

26 This Court (Dixon CJ, McTiernan, Williams, Fullagar and Taylor JJ) explained in *International Harvester Company of Australia Pty Ltd v Carrigan's Hazeldene Pastoral Company* (1958) 100 CLR 644 (***International Harvester***) at 652 that agency is a word used in the law to connote an authority or capacity in one person to create legal relations between a principal and third parties.[15] That explanation was similar, but not identical, to the statement by Dixon, Fullagar and Kitto JJ in *Petersen v Moloney* (1951) 84 CLR 91 at 94 that the legal conception of agency is expressed in the maxim "qui facit per alium facit per se" (he who does an act through another does the act himself) and that an agent is a person who is able by virtue of authority conferred by a principal to create or affect legal rights and duties as between the principal and third parties.

27 Contractual relations created or affected by an agent are directly between the principal and the third party and there is no contract between the agent and the third party: *Scott v Davis* (2000) 204 CLR 333 at 408-9 [228] per Gummow J. Signature by an agent acting within authority is signature by the principal: *Motel Marine Pty Ltd v IAC (Finance) Pty Ltd* (1964) 110 CLR 9 at 13 per Kitto, Taylor and Owen JJ. An agent cannot be made liable on an obligation incurred in the name of the principal and not in the name of the agent: *Railway Commissioners for NSW v Orton* (1922) 30 CLR 422 at 426 per Knox CJ, Gavan Duffy and Starke JJ.

28 The general rule is that money received by an agent is treated as if it had been received by the principal: *Christie v Robinson* (1907) 4 CLR 1338 at 1350 per O'Connor J, citing *Ellis v Goulton* [1893] 1 QB 350 at 352 per Bowen LJ (and see similarly at 1346 per Griffith CJ).

29 A relationship of agency, in the legal sense,[16] is to be distinguished from a dealership or

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[15] The Court noted, however, the "much quoted observation" of Lord Herschell in *Kennedy v De Trafford* [1897] AC 180 at 188 that the word is commonly abused and that a person may be an agent in a popular or business sense in a broader range of circumstances.

[16] Rather than the broader popular or business sense, as to which see note 15 above.

re-sale arrangement. So, for example, in *International Harvester*, it appeared clear to the Court that the defendant machine manufacturer was not party to a contract of sale to the plaintiff because the transaction had been effected on the basis that a dealer had bought the machine from the defendant and re-sold it to the plaintiff. That may be contrasted with the position of the jewellery seller in *Weiner v Harris* [1910] 1 KB 285 who had not bought the jewellery and was to be remunerated for selling for and on behalf of the plaintiff manufacturer, with authority from the plaintiff so to do. The remuneration for selling was said by Farwell LJ at 294 to be consistent with the finding of agency and quite inconsistent with a finding that ownership had passed to the seller, because an owner is not remunerated for selling his own goods (see similarly at 290 per Cozens-Hardy MR).[17]

30 There is nothing to prevent a principal from remunerating its agent by a commission varying according to the amount of profit obtained by a sale, and such a commission does not convert the agent into a purchaser and re-seller: *Ex parte Bright; Re Smith* (1879) 10 Ch D 566 at 570 per Jessel MR (with whom James and Bramwell LJJ agreed). Nor is there anything to prevent a principal appointing an agent on the basis that the agent will have no right to commission unless a sale is made above a stipulated price: *McDonald v Peek* [1923] SASR 513.

Application in the present context

31 Flight Centre was not a dealer, or purchaser and re-seller. It operated as agent for the airlines, in the legal sense, for the sale or supply of international air travel services. The courts below were correct so to find {FC [163]; J [135]}.

32 Flight Centre had, and exercised, the authority to create legal relations directly between passengers and the airlines on behalf of whom it sold the flights. There were limitations upon that authority, including that Flight Centre was not permitted to vary any of the conditions of the services to be supplied by the airlines. It was the airlines that bore the liabilities and risks associated with the supply of the services {cf AS [62]} and Flight Centre had no proprietary rights. Flight Centre collected the fares from the passengers on behalf of the airlines and held the monies on trust as the property of the airlines.[18]

33 All of that was quintessential of an agency relationship in the legal sense.[19] The fact that

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[17] Agency may also be contrasted with the position of the mortgage sub-introducer in *Tonto Home Loans Australia Pty Ltd v Tavares* [2011] NSWCA 389; (2011) 15 BPR 29,699, which did not have authority to bind the mortgage originator (and through it, the lender) to acceptance of any loan or otherwise to act on behalf of the mortgage originator in a relevant sense: at 29,731-33 [132], 29,743-45 [181]-[195] per Allsop P (with whom Bathurst CJ and Campbell JA agreed).

[18] The relevant provisions of the PSAA making these propositions good are set out under para 5 above.

[19] See the principles distilled from the authorities in paras 26 to 29 above, none of which is gainsaid by the authorities cited in notes 29 and 30 to AS [54]. The decision of the New York County Court cited by the ACCC in

Flight Centre was permitted by the airlines to collect a higher or lower fare from the passenger, which would have the effect of increasing or reducing the margin or commission earned by Flight Centre (because the nett amount, determined by the airline, had to be remitted) did not convert the agency relationship into one of purchaser and re-seller.[20]

34 Applying the "qui facit per alium facit per se" principle, and the ordinary meaning of the statutory text,[21] the flights sold through the agency of Flight Centre were supplied by the airlines and not by Flight Centre.[22]

35 There is a presumption in statutory interpretation that there is no intention to interfere with basic common law doctrines unless the words of the statute expressly or necessarily require that result: *Baker v Campbell* (1983) 153 CLR 52 at 123 per Dawson J, citing *Potter v Minahan* (1908) 7 CLR 277 at 304 per O'Connor J (the legislature does not intend to make any alteration in the law beyond what it explicitly declares, it is in the last degree improbable that the legislature would overthrow fundamental principles or depart from the general system of law without expressing its intention with irresistible clearness, and to give any such effect to general words simply because they have that meaning in their widest or usual or natural sense would be to give

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note 29 was to grant summary judgment against a defendant airline which had unsuccessfully argued that the travel agent acted as agent for the plaintiff passengers in the transaction in issue. The tentative acceptance in obiter that in other circumstances a travel agent may act as agent for a passenger should be given little weight, particularly since the New York County Court made clear that it had no evidence before it of any specific IATA regulations. The decision of the Privy Council cited by the ACCC in note 30 did not concern a travel agent in the presently relevant sense. It concerned a defendant package tour operator which had put together, offered, undertaken to provide and operated, a package tour, with the tour group being accompanied by a tour leader employed by the defendant operator: *Wong Mee Wan v Kwan Kin Travel Services Ltd* [1996] 1 WLR 38 at 40E, 44H, 46C, 46E and 46H per Lord Slynn of Hadley.

[20] See the authorities referred to in para 30 above.

[21] See, eg *Ex parte Turner; Re Hardy* (1947) 48 SR 133 at 135; 65 WN (NSW) 32 at 33 per Jordan CJ ('supplied' has the meaning which it has in common parlance, namely, provided by or on behalf of a person to whom the thing belongs to someone to whom it does not or did not belong; a non-technical word in a section creating a criminal offence ought not be read with a wider signification than it possesses in common parlance unless an intention that it should appears with reasonable plainness). The Chief Justice was in dissent, but has since been followed on the point in *Spittles v Michael's Appliance Services Pty Ltd* (2008) 71 NSWLR 115 at 118 [15] per Handley AJA (with whom Bell JA and Barr JA agreed), the Court of Appeal concluding at 118-119 [20] that a person who worked on goods under contract without acquiring title to or possession of those goods was not a supplier of the goods within the meaning of sec 75AD of the Act, cf *Commonwealth v Sterling Nicholas Duty Free Pty Ltd* (1972) 126 CLR 297.

[22] Reliance by the ACCC on *ACCC v IMB Group Pty Ltd* (2002) ATPR (Digest) 46-221 (***IMB***) and *ACCC v IMB Group Pty Ltd* (2003) Aus Contract R 90-165 (***IMB appeal***), in support of the contrary conclusion {AS [61]}, is misplaced. *IMB* and *IMB appeal* concerned claims of misleading or deceptive conduct, unconscionable conduct and third line forcing. The facts, and statutory language, relevant in those proceedings are distinguishable from the present case {J [132]-[134]; FC [162]}. In any event, the Full Federal Court in *IMB appeal* at [41] recognised that the primary judge in *IMB* considered that the relevant services were to be supplied by the principals (the insurers), accompanied by the supply of different services offered by their agent in such a way as to constitute a single transaction (see similarly *IMB* at [85], [91]). Insofar as either of those judgments may be read as suggesting that services sold by an agent on behalf of its principal are supplied by the agent within the meaning of sec 45A (cf *IMB* at [86], [90], [101]; *IMB appeal* at [89]), Flight Centre would submit that they were wrongly decided.

them a meaning in which they were not really used) and *Hocking v Western Australian Bank* (1909) 9 CLR 738 at 746 per Griffith CJ (it is a sound rule, to be applied in the construction of all Acts altering the common law, that they are to be taken to alter it only so far as is necessary to give effect to the express provisions of the Act), and cited in *Balog v Independent Commission Against Corruption* (1990) 169 CLR 625 at 635-636 per Mason CJ, Deane, Dawson, Toohey and Gaudron JJ (where two alternative constructions of legislation are open, that which is consonant with the common law is to be preferred). Put another way, it is to be presumed that Parliament intended that legislative provisions will be applied in accordance with the established general system of law: *Commonwealth v Director, Fair Work Building Industry Inspectorate* [2015] HCA 46; (2015) 326 ALR 476 (***Fair Work Director***) at 493 [64] per French CJ, Kiefel, Bell, Nettle and Gordon JJ.

36 The Act does not declare any intention to interfere with or alter the established laws of contract or of agency. Indeed, it is premised upon such laws being applicable: see, eg the non-exhaustive definitions in subsec 4(1) of "services" (which refers to rights, benefits or privileges provided, granted or conferred under contract) and of "supply" (which, when used as a verb in relation to services, is the act of providing, granting or conferring rights, benefits or privileges under contract); see also the references in sec 84 of the Act to an agent acting within the scope of the actual or apparent authority of the agent.

37 Acceptance of the contention by the ACCC that Flight Centre supplied international passenger air travel services (ie flights) in competition with the airlines {AS [73]-[79]} would produce incoherence with the established laws of contract and agency. The established position is that contractual relations are created or affected by an agent directly between the principal and the third party and there is no contract (or rights "provide[d], grant[ed] or confer[red]" under contract) between the agent and the third party. The agent sells or supplies on behalf of its principal and the principal is therefore entitled to circumscribe the authority of its agent so to sell or supply, including as to a minimum sale price. On the construction for which the ACCC contends, competition law would prohibit a principal agreeing (or attempting to induce an agreement) upon a price at which its agent is authorised to sell the principal's goods or services.[23] It is difficult to see how, on the ACCC's construction, competition law would not prohibit even an employer attempting to induce an agreement with its employee salesperson as to the price at which the salesperson is authorised to sell the employer's goods or services.[24] Moreover, the

[23] This is the converse of the presently relevant facts but, having regard to the language of subsec 45A(1), the conclusion would have to follow from an acceptance of the ACCC's construction.

[24] Paragraph 51(2)(a) of the Act could not be relied upon to avoid a finding of contravention, because that provision only prevents regard being had to the making of agreements or their provisions (or acts done in relation to them) to

ACCC's construction sits uneasily alongside the resale price maintenance provisions in (Pt VIII of) the Act.[25]

38 The incoherence is avoided by the conclusion, compelled by the statutory text and context and the particular features of the agency arrangements in this case, that there was no supply (or re-supply)[26] by Flight Centre in competition with its principals, the airlines.

39 Contrary to AS [48], the behaviour of Flight Centre was not "explicable only by it being in competition with the airlines". It was explicable on the basis that Flight Centre was a sales agent for reward, seeking to maximise its volume of sales on behalf of (and thus the commission it earned from) its principals, the airlines. That is no different to a sales employee, remunerated on commission, seeking to maximise his or her sales volumes and complaining if he or she perceived that more favourable terms were being offered by the employer supplier through alternative sales channels. That may be a "commercial imperative" {AS [29]} for the sales employee or agent, but it is not competition within the statutory meaning.

40 The mischief the per se price-fixing prohibition seeks to remedy[27] is producers or suppliers agreeing to suspend or attenuate their rivalry by fixing the price at which one or more of them will supply their substitutable product,[28] thereby undermining the economic efficiency benefits of competition. It is not directed to the regulation of decisions by an individual producer or supplier as to the channels through which it will make its sales, or the terms on which it will appoint and remunerate those selling on its behalf through those various channels.

Same result under principles applicable in other jurisdictions

41 In the United States, the prohibition upon price-fixing does not apply to genuine contracts of agency. In determining whether there is a genuine contract of agency, the courts in the United

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the extent that the agreement or the provision relates to employment conditions such as remuneration, hours of work or working conditions of employees: *Adamson v NSW Rugby League Ltd* (1991) 27 FCR 535 at 549-551 per Hill J.

[25] If, contrary to the accepted findings below, Flight Centre were held to have sold or supplied flights to passengers, the sale or supply by Flight Centre would likely have been sale (or re-supply) of services supplied by the airlines within the meaning of sec 96 and sec 96A of the Act (because the airlines were the original or ultimate providers of the services {J [20]; FC [67]}). Any agreement between an airline and Flight Centre for the airline to supply flights to Flight Centre with a term preventing Flight Centre from selling or re-supplying the flights below a specified price could have contravened sec 48 read with subsec 96(3)(c) and sec 96A. Section 45 would then not apply to or in relation to such a term because of the anti-overlap provision in subsec 45(5) and an attempt to induce the making of such an agreement would not be an attempt to induce a contravention of sec 45 insofar as that term was concerned.

[26] There was no re-supply by Flight Centre within the meaning of subsec 4C(f) of the Act because Flight Centre never purchased or acquired the flights (or any rights constituting the flights) from the airlines, cf eg the acquisition and re-supply by the respondent in *ASX Operations Pty Ltd v Pont Data Australia Pty Ltd* (1990) 27 FCR 460.

[27] *Heydon's Case* (1584) 3 Co Rep 7a at 7b, cited in *Alcan* at 46-47 [47] per Hayne, Heydon, Crennan and Kiefel JJ.

[28] So, for example, the relevant competition in the last appeal heard by this Court under Pt IV of the Act, *Rural Press Ltd v ACCC* (2003) 216 CLR 53 (***Rural Press***) was between independently published newspapers which competed for readers and advertisers within geographic areas: at 64-68 [16]-[28] per Gummow, Hayne and Heydon JJ.

States look to the objective substance of the arrangements to consider whether the agency relationship has an economic function other than to circumvent the rule against price fixing.

42 The seminal authority is the decision of the United States Supreme Court in *United States v General Electric Co* 272 US 476 (1926) (***General Electric***). The issue in that case was whether sales agents appointed by General Electric were to be regarded as agents or as purchasers and re-sellers. If the latter, then a restriction that General Electric had imposed as to the prices at which the sales were to be made would have been a restraint of trade in violation of the Anti-Trust Act 1890 (US). The conclusion (at 488) was that there was nothing as a matter of principle or in the authorities which required the Supreme Court to hold that "genuine contracts of agency", such as those before it in *General Electric*, were violations of American antitrust law. Chief Justice Taft, delivering the opinion of the Supreme Court, noted that: the agents were not obliged to pay over money for the stock held until it was sold; the stock was to remain the property of General Electric until sold (at which time the title would pass directly to the consumer); the proceeds of sale were to be held in trust for the benefit of General Electric; and the agents were to pay whatever amounts they should have collected for all sales made (less commissions to which they were entitled) regardless of whether or not the agents in fact collected those amounts. The agents were obliged to pay all expenses for the storage, cartage, transportation, handling, sale and distribution of the stock and other incidental expenses, but the Chief Justice said that there was no inconsistency between that obligation and the relationship of agency: at 482, 484. The Court found nothing in the form of the contracts or the practice under them which made the so-called agents anything other than "genuine agents of the company": at 483-484.

43 *General Electric* was distinguished, but not overruled, by a majority of the United States Supreme Court in *Simpson v Union Oil Company of California* 377 US 13 (1964) (***Simpson***) at 23. Justice Douglas, delivering the majority opinion, acknowledged that the integrity of consignments had been recognised by many courts including the Supreme Court, that consignments performed an important function in commerce (at 17-18) and that there "is nothing illegal about" an arrangement under which an owner of an article sends it to a dealer who undertakes to sell it only at a price determined by the owner (at 21). However, his Honour said that a consignment could not be used as a device to avoid the antitrust laws "merely by clever manipulation of words, not by differences in substance": at 21-22; see similarly at 24 ("easy manipulation" by "clever draftsmanship").

44 Those characterisations of avoidance devices in *Simpson* were referred to by the Seventh Circuit of the United States Court of Appeals in *Morrison v Murray Biscuit Co* 797 F 2d 1430 (7th Cir, 1986) (***Morrison***), analysing how *General Electric* and *Simpson* were to be reconciled.

Circuit Judge Posner, delivering the opinion of the Court of Appeals, said that the "key to reconciliation is to be found by asking whether the agency relationship has a function other than to circumvent the rule against price fixing" (at 1436), noting that there was no suggestion that the arrangement in *Morrison* was "artificial or unnatural": at 1437. Circuit Judge Posner referred to United States authorities and explained that the purpose of antitrust law was "to protect the competitive process as a means of promoting economic efficiency" and that "[e]fficiency would not be promoted by a rule that forbade principals to tell their agents at what price to sell the principal's product unless the agent was an employee": at 1437.

45 *Morrison* was affirmed in *Illinois Corporate Travel v American Airlines Inc* 806 F 2d 722 (7^{th} Cir, 1986) (***Illinois***), a differently constituted United States Court of Appeals. The Court of Appeals concluded that the travel agents in that case did not resell air travel and were genuine agents within the meaning of *General Electric* (not holding any inventory of seats purchased for resale and not taking the risks of unfilled seats or of any inability to deliver the transportation services as promised): at 725. The conclusion was that the agency relationship should be treated like an employment relationship because, objectively viewed, it served an economic function other than to circumvent the rule against price fixing: at 725-726; see similarly *Valuepest.com of Charlotte Inc v Bayer Corporation* 561 F 3d 282 (4^{th} Cir, 2009), following *Morrison* and *Illinois* on this point ("principal-agency agreements are important. The owner of a good may generally set the price at which the good is sold. If one of the benefits of manufacturing a good is to set the price by which it is sold, then it is only sensible not to deprive the manufacturer of its right if, for reasons of efficiency, it chooses to use agents that are loyal to it rather than employees").

46 The ACCC correctly notes that the European price-fixing prohibition does not apply to agreements between agents and principals forming "a single economic unit" (as opposed to where the agent is to "perform duties which from an economic point of view are approximately the same as those carried out by an independent dealer, because they provide for the agent accepting the financial risks of selling or of the performance of the contracts entered into with third parties") {AS [63], citing *DaimlerChrysler AG v Commission of the European Communities* (2005) ECR II-3319 (***DaimlerChrysler***) at [86]-[88]}. The European Court of First Instance in *DaimlerChrysler* concluded that the relationship between the MercedesBenz sales agents and their principal was such that they should be treated in the same way as employees and considered as integrated in that undertaking and thus forming an economic unit with it: at [102]. That was notwithstanding that: the agents were authorised to grant discounts deducted from their commissions (which the European Court said "cannot be classified as price risk": [99]); the agents were required to bear the costs of purchasing demonstration vehicles which could be

difficult to resell at a profit (at [108]); and that the agents were obliged to carry out repair work under the MercedesBenz guarantee and to acquire and stock spare parts (which, although potentially loss-making, was found not to "give rise to meaningful economic risks": at [111]).

47 According to the Guidelines on Vertical Restraints issued by the European Commission on 19th May 2010 (**Guidelines**), citing *DaimlerChrysler* and other European authorities,[29] the determining factor as to the applicability of Article 101 of the Treaty on the Functioning of the European Union[30] to sales agency arrangements is the financial or commercial risk borne by the agent in relation to the activities for which it has been appointed agent by the principal: at [13]. The question of risk is to be assessed on a case by case basis with regard to the economic reality of the situation: at [17]. The Guidelines state that the fact that an agent acts for several principals is not material to the assessment, and nor are risks relating to the provision of agency services in general (eg the risk of the agent's income being dependent upon its success as an agent or general investments in for instance premises or personnel): at [13], [15]. An agreement will generally be considered an agency agreement where (at [16]) property in the contract goods bought or sold does not vest in the agent and the agent does not itself supply the contract services and (relevantly) the agent: does not contribute to the costs relating to the supply or purchase of the contract goods or services; does not undertake responsibility towards third parties for damage caused by the product sold unless the agent is at fault; and does not take responsibility for customer non-performance, except by loss of the agent's commission, unless the agent is at fault.

48 Whether United States or European principles were applied, the same result would follow in this case. An agreement between Flight Centre and its principals (the airlines) in relation to the price of the product sold by Flight Centre as their agent would not be prohibited as price-fixing. The objective substance of the relationship between Flight Centre and the airlines was one of genuine agency, without any purpose of circumventing the rule against price fixing. Flight Centre does not take on the commercial risk of supplying, or contributing to the cost of supplying, international passenger air travel services or of non-performance or third party liability.

Putative market or markets for distribution and booking services

49 The ACCC continues to advocate for the market definition and service characterisation applied by the primary judge {AS [19], [25], [26], [49]}. However, as the Full Court observed {FC [124], [127]-[129]}, the definition and characterisation by the primary judge of the relevant services, market and competition lacked precision and clarity. The primary judge considered that

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[29] *Confederación Española de Empresarios de Estaciones de Servicio v Compañía Española de Petróleos* [2006] ECR I-11987; *CEPSA Estaciones de Servicio SA v LV Tobar e Hijos SL* [2008] ECR I-6681.

[30] Previously Article 81 of the Treaty establishing the European Community.

Flight Centre and the airlines were in competition with each other in the sense necessary to attract the operation of sec 45A because airlines could and did engage in sales channel disintermediation (or, what his Honour described as "cutting out the middle man") {J [142]}. The primary judge made the further point that, to the extent that any supplier avails itself of an ability to "cut out the middle man" and deal directly with a consumer, the supplier will be in competition with the middle man within the meaning of sec 45 and sec 45A {J [144]}. This was too broad and imprecise[31] and, if left uncorrected, would have meant that any agreement between principal and agent fixing a commission or margin to be paid to the agent for selling on behalf of the principal would be deemed by sec 45A to contravene sec 45 because the principal also supplied or could supply the product directly (in parallel to, or instead of, through its agency distribution channels). The deeming provision in sec 45A should have had no application in the present circumstances of principal and agent where the agent did not itself supply (and had not the ability itself to supply) air travel services substitutable for those sold by the agent on behalf of the principal.[32]

50 The analysis of the Full Court established that the supposed market for distribution and booking services was an artificial construct that did not reflect the commercial reality {FC [176]}. There was no such market (or markets) in which Flight Centre and the airlines competed because the airlines did not supply distribution services to themselves in competition with Flight Centre and because Flight Centre did not supply booking services to consumers in competition with the airlines {FC [168]}.

51 The Full Court was correct to conclude that the airlines did not supply distribution services to themselves in competition with Flight Centre, because:

51.1 it was artificial to characterise the activities of an airline in selling a flight to a consumer (including ancillary activities such as making the flight known to the consumer and booking the flight) as the provision by the airline to itself of a selling or distribution service {FC [132]-[137]}; and

51.2 alternatively, substitutability (and therefore competition) between any such service

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[31] The reasons of the primary judge record that the Court at first instance did not doubt that there was a single market for distribution and booking services {J [137], [138]; see also J [109], [113]; FC [124]-[126]}. It was said that a "travel agent is placed, Janus-like, in the distribution chain supplying intermediary services to each group of consumers", apparently as an explanation for the finding that "both airlines and would-be passengers are consumers of the services of travel agents such as Flight Centre" {J [138]}. These findings as to an aggregated service being supplied in a single market were erroneous and in tension with other parts of the reasons which referred separately to a market for distribution services and a market for booking services, and which appeared to suggest that those services may have been supplied separately from one another {eg J [9], [105], [110], [141], [144]}. The Full Court recognised that there could not have been a single market for distribution and booking services: there would have at least needed to be separate markets for the supply of distribution services and booking services in relation to each airline's flights {FC [140]-[145], [164], [165]}.

[32] Cf the hypothetical (or presently irrelevant) position of an airline selling flights as agent for another airline.

supplied by an airline to itself and a selling service supplied by an agent like Flight Centre could not be established {FC [138]-[142]}.

52 The Full Court was correct to conclude that Flight Centre did not supply booking services to consumers in competition with the airlines, because:

52.1 the so-called booking services were in reality no more than inseparable incidents of selling international passenger air travel services. Where an airline sells an international passenger air travel service directly to a consumer, it is artificial to conceive of the airline separately supplying that consumer with a service by the provision of price and availability information and the issuing of a ticket. The same analysis applies where the sale is made on behalf of the airline by an agent like Flight Centre {FC [146]-[150]};

52.2 alternatively, Flight Centre did not supply the booking services to consumers, as it could only have done so as agent for and on behalf of (rather than in competition with) the airlines. The booking of a flight that had been purchased could accurately be characterised as an activity necessary to provide a valid ticket or an ancillary service. By the operation of clause 3 of the PSAA, any such service was provided on behalf of the airlines {FC [152]-[161]};[33] and

52.3 in any event, substitutability (and thus competition) between any such services supplied by the airlines and by an agent like Flight Centre could not be established {FC [166]-[167]}.

53 The ACCC seeks to distance itself {AS [69]} from any challenge to the conclusion by the Full Court that the airlines did not supply distribution services to themselves in competition with Flight Centre and the ACCC has not demonstrated error in the reasoning of the Full Court in relation to booking services {cf AS [31ff]}.

54 The Full Court was correct to hold that the only relevant products or services in this case were international passenger air travel services {FC [179]}. Contrary to AS [49], consumers do not choose between booking services. They choose between, and then book, international passenger air travel services. Flight Centre was not in the business of selling booking services to consumers. It was in the business (relevantly) of selling flights to consumers, on behalf of airlines. An airline selling a flight directly to a consumer was not separately providing a booking service to the consumer and Flight Centre as agent was likewise not providing any such booking service to the consumer. All that Flight Centre was doing in this respect was providing the airline with an agency selling service, part of which incidentally involved booking and ticketing.[34] A

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[33] Cf AS [57]-[58] (and see similarly AS [40]), as to which see paras 6 and 7 above.

[34] This characterisation was consistent with the finding by the primary judge {J [151]} that the airlines paid the price for any distribution and booking services provided by Flight Centre. The ACCC did not challenge this finding in the Full Court and the Full Court accordingly held that neither Flight Centre nor the airlines exacted any price from consumers in respect of so-called booking services {FC [167]}.

consumer in many industries will have a choice "from a range of market participants competing to facilitate his or her access to" goods or services {AS [49]}. That is merely to observe that consumers may choose from a range of sellers, and sometimes a range of sales channels, through which to acquire products. Invariably, the sellers will receive payment from consumers. Generally, they will have provided some details about the features and availability of various products. Often, they will issue documents to confirm purchases. None of that means that the sellers have supplied a separate sales facilitation or booking service to the consumer. They have simply sold a product, by taking the steps involved in any particular sale.

55 The submissions by the ACCC {AS [72]} that the price of the underlying product that the booking facilitates (ie the flight) is an important determinant of a consumer's choice of booking service and that booking services may be substitutable because their underlying products are substitutable {AS [67]} only highlight the illusory nature of the booking services said to exist separably from the sale of international passenger air travel services. As the ACCC frankly acknowledges {AS [72]}, "the booking service does not stand alone". No separate booking service was being provided because no rights other than those constituting the flights were being "provide[d], grant[ed] or confer[red]" to consumers within the meaning of the Act {cf AS [59]}.The ACCC's characterisation of the sale of a flight as the supply of a flight and the supply of a separate service for the booking and receipt of payment for that flight is artificial and in tension with the reluctance in authorities under Pt IV of the Act to accept a splitting of sale transactions into constituent elements involving the supply of multiple goods and/or services.[35]

56 The putative booking service and the flights were not different stages of production {cf AS [36], [51]} and were not different functional levels or dimensions in a supply chain {cf AS [36], [49]; see also [41]}. The booking service as defined by the primary judge was neither an input factor for, nor an output of, the flights {cf AS [36]}.[36] It was nothing more than the sale of (or functions incidental to or involved in the sale of) the only services being supplied, the flights.

57 The Full Court did not fail to appreciate the commercial reality of the breadth of services that Flight Centre and other travel agents provided to consumers {cf AS [50]; see also [40]}. The Full Court noted that Flight Centre and other agents provided travel-related services to consumers

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[35] See, eg *Castlemaine Tooheys Ltd v Williams & Hodgson Transport Pty Ltd* (1986) 162 CLR 395 at 400-401 per Gibbs CJ and at 402-403 per Wilson J (Dawson J agreeing) and *Paul Dainty Corporation Pty Ltd v National Tennis Centre Trust* (1990) 22 FCR 495. See also *ACCC v ANZ* [2015] FCAFC 103; (2015) 324 ALR 392 at 421 [139], 422 [146]-[149], 423 [151]-[157] per Allsop CJ, Davies and Wigney JJ.

[36] The ACCC cites *Singapore Airlines Ltd v Taprobane Tours WA Pty Ltd* (1991) 33 FCR 158 in AS [36] (and elsewhere), but that decision is against the ACCC. French J (as his Honour then was, and with whom Spender and O'Loughlin JJ agreed) at 182 rejected a market definition along narrow functional lines (limited to the wholesale supply of airline services to package tour wholesalers) as being "unduly restrictive".

including, for example, advice about destinations and booking accommodation and ground transportation and tours. However, as the Full Court explained, the characterisation of (or competition in relation to) those other services was not in issue on the appeal {FC [21], [161]}.

58 Although the views and practices of those within an industry can often be instructive on questions of market definition, as discussed in *Rural Press* at 72-73 [45] {AS [42]}, the evidence to which the ACCC draws attention {AS [43]-[46]} does not demonstrate any error. The Full Court was cognisant of the evidence of industry participants, and of the passage in *Rural Press* upon which the ACCC relies, but correctly recognised that close consideration nonetheless needed to be paid to the statutorily required questions of market definition and service characterisation {FC [171]-[176]}. The evidence referred to by the ACCC reveals that the relevant market was the market for the supply of international passenger air travel services.[37] The lay references to "being uncompetitive to the effect of some AUD 150-200 per person" {AS [44]}, being "undercut" {AS [46]} and "matching this offer" {AS [44]} (and see similarly "fares that are matched" {AS [45]}) were plainly references to prices in the market for the supply of international passenger air travel services to consumers. Likewise, the reference in an email sent on behalf of one of the airlines to that airline "defend[ing its] position in this market" {AS [44]} must have been a reference to the market for the supply of international passenger air travel services to consumers. Nothing in the email supports the proposition that the market with which the airline was concerned was a market for (distribution and/or) booking services. The email to which it responded referred expressly to "the outbound international market", in which a carrier of the airline's size was said to have had "significant market power" {FC [33]}.

59 In any event, as the Full Court held, any booking service that may have been supplied by Flight Centre to consumers was not substitutable with any booking services supplied by the airlines. Flight Centre could provide advice concerning the availability of flights operated by, and could book and ticket for, a broad range of airlines (including various airlines not members of the same alliance group or groups)[38] whereas individual airlines could not {FC [166]}. Further, there was no analysis by the primary judge as to whether changes in the price of any booking services supplied by Flight Centre would cause consumers to acquire booking services from the airlines directly. That was unsurprising given that neither Flight Centre nor the airlines charged consumers any price in respect of the so-called booking services.[39] So there was no basis for a

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[37] As to which see paras 39 and 40 above.

[38] See, eg the list of Flight Centre's preferred airlines as at 25 June 2009 {Exhibit 1 Tab A3 at trial, FC Appeal Book Part C Tab 31.3}, cf Singapore airlines selling directly via the internet its own flights exclusively {Exhibit 1 Tab A82, the relevant extract of which is reproduced in AS [46]}.

[39] See note 34 above.

finding of substitutability (and therefore competition) between any booking services supplied to consumers by Flight Centre and the airlines {FC [167], cf AS [72]}.

ACCC should not be permitted to advance a contention it disavowed below

60 The ACCC should not be permitted to overturn the decision of the Full Court on the ground that Flight Centre was in competition with the airlines in the market for the supply of international air travel services to consumers {AS [73]-[78]; Notice of Appeal [3]} because the ACCC expressly disavowed reliance upon this ground below.

61 The ACCC did not file a notice of contention in the Full Court below to challenge the finding by the primary judge that Flight Centre did not supply air travel services {FC [78]-[80]; J [131]-[135]}. Indeed, the ACCC explicitly conceded the correctness of the finding, submitting to the Full Court that Flight Centre and the airlines "did not compete to supply international air travel, because only the airlines supplied international air travel to consumers".[40]

62 The disavowal by the ACCC of the alternative contention below did not prevent Flight Centre adducing evidence in opposition to it, because the contention had been run (and rejected) at trial, cf *Suttor v Gundowda Pty Ltd* (1950) 81 CLR 418. But that does not give the ACCC carte blanche to reverse its position, without explanation, on appeal to this Court. In *University of Wollongong v Metwally (No 2)* (1985) 59 ALJR 481 (***Metwally***), a constitutional argument as to the invalidity of a Commonwealth law was sought to be raised when it had not previously been taken. The *Suttor v Gundowda* principle was not engaged (or even referred to) because the constitutional argument raised a pure question of law. Nevertheless, the Court did not allow the point to be taken, reaffirming the principle that a party should be bound by the conduct of its case. Gibbs CJ, Mason, Wilson, Brennan, Deane and Dawson JJ said at 483:

> It is elementary that a party is bound by the conduct of his case. Except in the most exceptional circumstances, it would be contrary to all principle to allow a party, after a case had been decided against him, to raise a new argument which, whether deliberately or by inadvertence, he failed to put during the hearing when he had an opportunity to do so.

See similarly *Coulton v Holcombe* (1986) 162 CLR 1 at 7-11 per Gibbs CJ, Wilson, Brennan and Dawson JJ (citing *Metwally* and other authorities).

63 The principle should apply a fortiori to a regulator prosecuting penalty proceedings. The courts and litigants rightly expect that regulatory authorities will conduct any litigation in which they are engaged fairly: *ASIC v Hellicar* (2012) 247 CLR 345 at 406 [147] per French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ (their Honours at 407 [152] assuming, without deciding, that the regulator was subject to a duty to conduct litigation fairly); see similarly at

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[40] See note 6 above.

434 [239] per Heydon J (citing the "old-fashioned traditional, and almost instinctive, standard of fair play to be observed by the Crown in dealing with subjects" referred to by Griffith CJ in *Melbourne Steamship Co Ltd v Moorehead* (1912) 15 CLR 333 at 342) and *Fair Work Director* at 496 [78] per Gageler J. The differences between criminal prosecutions and civil penalty proceedings recognised in *Fair Work Director* by French CJ, Kiefel, Bell, Nettle and Gordon JJ at 490-491 [51]-[58] and by Keane J at 501-502 [100]-[104] do not detract from, indeed they underscore, the importance of a regulator seeking civil penalties being bound by the conduct of its case. The framing of the issues for determination (or agreement) in a civil penalty proceeding is particularly important because the respondent, although liable to penalty, is denied most of the procedural protections of an accused in criminal proceedings.

64 The contention the ACCC now seeks to advance is not one as to a jurisdictional error or excess of power by a tribunal below, cf *Pilbara Infrastructure Pty Ltd v Australian Competition Tribunal* (2012) 246 CLR 379 at 397-398 [27]-[34] per French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ. Nor does it raise even a pure question of law.[41] The ACCC is simply inviting this Court to apply a characterisation of the evidence as to market and service definition different from that which it urged upon the Full Court. It does so without pointing to any "exceptional circumstances".[42]

65 The ACCC cannot properly ask this Court to find error by the Full Court in not applying a market definition and service characterisation that the ACCC itself disavowed.

PART VII: Argument on notice of contention or cross-appeal

66 There is no notice of contention and no notice of cross-appeal.

PART VIII: Time estimate

67 Flight Centre would seek two and a half hours for the presentation of its oral argument.

5th May 2016

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[41] Cf *Connecticut Fire Insurance Co v Kavanagh* (1892) AC 473 at 480.

[42] The briefing of new counsel is not a relevant exceptional circumstance: *Sunset Vineyard Management Pty Ltd v Southcorp Wines Pty Ltd* [2008] VSCA 96 at [38] per Warren CJ (with whom Dodds-Streeton JA agreed).