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AQ1—In the quoted text “Nettle J accepted that whenever…”, there is a missing opening quotation mark. Please add the missing opening quotation mark.

AQ2—In the quoted text “The French competition authority…”, there is a missing opening quotation mark. Please add the missing opening quotation mark.

The Role of Agency in Competition Law: The Australian Flight Centre Case

Rhonda L Smith and Arlen Duke*

Australian Competition and Consumer Commission v Flight Centre Travel Group Ltd (Flight Centre) was decided by the High Court in December 2016. The Australian Competition and Consumer Commission alleged that Flight Centre had engaged or attempted to engage in price fixing with the airlines by seeking agreement to a Most Favoured Nation provision. A central issue in the case was whether or not Flight Centre was acting as agent for the airlines. This article discusses how changes in business models involving agency arrangements have caused confusion about the relationship between the parties when assessing alleged anti-competitive conduct. It explains the approach adopted in the United States and in the European Union to determine whether a party is an agent. Following from this, the basis for the various court rulings in Flight Centre are discussed – the finding that Flight Centre attempted to fix prices, despite being found to be an agent for the airlines. The findings in Flight Centre are then compared to the cases involving online booking portals in Europe and whether these cases may have informed the approach in Flight Centre is considered. Some conclusions are then drawn concerning the treatment of agency arrangements in the final section.

I. Introduction

In order to get their products to consumers, a firm may sell the product to a distributor, or it may vertically integrate into downstream activities such as wholesaling and retailing. Where marketing is left to distributors/retailers there is the potential for divergence of interests and so suppliers may seek means by which they can exert some ongoing control. Agency agreements satisfy this requirement. Unlike distributors, agents are required to act in the principal's interests and follow the principal's instructions, although the extent of these obligations ultimately depends on the terms of the agency agreement.

Historically, agency arrangements were often adopted at least in part because vertical integration was too expensive and increased risk. However, the arrival of the internet has changed this. Some businesses that relied almost exclusively on agents now sell a significant proportion of their product direct to consumers, while still retaining agency arrangements. Some others who previously made some direct sales, using the phone or postal service, now find it easier to sell direct to customers. This change in the structure of the distribution model inevitably has impacted the agents and has resulted in reactions that in some cases have drawn the attention of competition authorities.

Agency arrangements have evolved, varying according to particular market circumstances and the characteristics of the parties. This article discusses how changes in business models involving agency arrangements have caused confusion about the relationship between the parties when assessing alleged anti-competitive conduct. It focuses on *Australian Competition and Consumer Commission v Flight Centre Travel Group Ltd* (*Flight Centre*),[1] a case concerning the relationship between a bricks and mortar or offline travel agent and various airlines. As French CJ noted "whether the agent contravened the Act turns critically upon whether or not the agent was, in any relevant sense, in competition with the three airlines, which were its principals at the time it made the proposals".[2] Part II of this article explains

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[1] *Australian Competition and Consumer Commission v Flight Centre Travel Group Ltd* (2016) 261 CLR 203; [2016] HCA 49.

[2] *Australian Competition and Consumer Commission v Flight Centre Travel Group Ltd* (2016) 261 CLR 203, 211 [2]; [2016] HCA 49.

the approach adopted in the United States and in the European Union to determine whether a party is an agent. Part III outlines the structure of traditional bricks and mortar, or offline, travel agencies. Part IV discusses the basis for the various court rulings in *Flight Centre* – the finding that Flight Centre attempted to fix prices, despite being found to be an agent for the airlines. Part V considers how *Flight Centre* differed from the cases involving online booking portals in Europe and considers whether these cases may have informed the approach in *Flight Centre*. Some conclusions are drawn concerning the treatment of agency arrangements in the final section.

II. When Is a Party an Agent?

In 1984 in *Copperweld Corp v Independence Tube Corp* (*Copperweld*),[3] the US Supreme Court held that a parent company is incapable of conspiring with its wholly owned subsidiary because they cannot be considered separate economic entities.[4] *Copperweld* in effect provided that arrangements between a parent and its subsidiaries were per se legal. But how far does this extend – to agency arrangements? to franchise arrangements? To answer this question judges in the United States have increasingly taken notice of economic criteria related to control, business interests and market conduct within and among the affiliated businesses. Thus in 2009, in *Valuepest.com of Charlotte Inc v Bayer Corp*,[5] the Court of Appeals (4th Cir) considered whether an agency arrangement was adopted for commercial reasons or to facilitate an anti-competitive arrangement when determining whether dealings between agent and principal were immune from prosecution. One year later in *American Needle Inc v National Football League*,[6] the US Supreme Court held that the test for whether several parties comprised a single entity depends on:

(1) the absence of independent decision-making centres,
(2) the absence of concurring entrepreneurial interests, and
(3) the lack of actual or potential competition among constituent entities.

The last factor raises the question of whether a principal that engages in significant direct sales can be said to share commonality of interest with its agent(s).

Competition authorities have been alert to the possibility that an agency agreement may be a mere cloak for anti-competitive conduct. Depending on the nature of the contractual arrangements between the parties, the agency arrangement may be found to be a sham. *United States v Apple Inc* (the Apple e-books case)[7] provides an example of the court finding that agency relationships were a sham and that the agreements between Apple and each of the publishers were used to bring about collusion. The court held that, despite the existence of a legal agency agreement, the agent should be treated as separate from the principal because the agency agreement was entered into not because it was an efficient method of distribution, but because it facilitated price fixing that underpinned Apple's new e-book venture.

In the European Union,[8] as in the United States, the determinant of agency is not the nature of the legal arrangement but rather that the agent "does not independently determine his own conduct on the market, but carries out the instruction given to him by his principal".[9] In 1962 the European Commission (EC) issued its Notice on Exclusive Dealing Contracts with Commercial Agents. This exempted dealings

[3] *Copperweld Corp v Independence Tube Corp*, 467 US 752 (1984).

[4] In economics a single economic unit, the firm, is defined in terms of a common profit objective. If different legal entities, such as a parent company and its subsidies, make decisions intended to be profit maximising for both jointly, they would be regarded as a single economic entity.

[5] *Valuepest.com of Charlotte Inc v Bayer Corp*, 561 F 3d 282 (4th Cir, 2009).

[6] *American Needle Inc v National Football League*, 560 US 183 (2010).

[7] *United States v Apple Inc*, 952 F Supp 2d 638 (SDNY, 2013).

[8] The following discussion of the EU position is elaborated in Rhonda L Smith and Alexandra Merrett, "Representing Colin Firth or Mr Darcy: Can Competition Law Handle the Reality of Modern Agents?" (2017) 13(2–3) *European Competition Journal* 314.

[9] *Daimler-Chrysler AG v Commission of the European Communities* (T-325/01) [2005] ECR II-03319, [88].

between a principal and agent from exclusive dealing prohibitions. The notice focuses attention on financial risk, and states:

> [A] commercial agent must not by the nature of his functions assume any risk resulting from the transaction. If he does assume such risk, his function becomes economically akin to that of an independent trader and he must be treated as such for the purposes of the rules of competition.[10]

Despite the reference to risk in the guidelines, early cases focused on whether, like an employee, the agent was integrated into the principal's business.[11] However more recently, the European Court of Justice has refocused attention on the allocation of risk between the parties said to be agent and principal.[12] In *DaimlerChrysler AG v Commission of the European Communities*[13] the General Court made it clear that a "genuine" agent will bear some risk, although no guidance is provided "as to what level of risk bearing would void the claim of agency".[14] In *Confederacion Espanola de Empresarios de Estaciones de Servicio v Compania Espanola de Petroleos SA*[15] the court provided further clarification, stating that the test for agency was not whether the dealer bore no risk, but rather whether any such risk was a "non-negligible proportion",[16] but did not elaborate on the meaning of the term.

In 2010, the EC issued its Guidelines on Vertical Restraints[17] which identified three types of financial or commercial risk relevant to the existence of agency:

(1) contract-specific risks which are directly related to the contracts concluded and/or negotiated by the agent on behalf of the principal, such as financing of stocks;
(2) the risks related to market-specific investments required to enable the agent to conclude and/or negotiate this type of contract.
(3) the risks related to other activities undertaken in the same product market, to the extent that the principal requires the agent to undertake such activities, but not as an agent on behalf of the principal but for its own risk.[18]

Zhang has suggested that:

> [T]he only way to make sense of the Commission's logic is to define a "genuine" agent as one that behaves almost like an employee: other than its own labour costs and risk of compensation, it should not incur any risk or expense when carrying out the activities on behalf of the principal.[19]

III. Travel Agencies

Unlike some agency arrangements, travel agencies have never been one-to-one relationships. Individual travel agencies will have agency arrangements not only with numerous airlines, but also with a variety of travel businesses (such as hotels, tour organisations and the like). The agent markets tickets on behalf of an airline but does not take ownership of them. It receives a commission on ticket sales and must remit an amount equal to the "face value" of the ticket when a sale is arranged.

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[10] *European Commission* Notice on Exclusive Dealing Contracts with Commercial Agents Official Journal 139 (24 December 1962) 2921-62, I (1962 EU Guidelines).

[11] See further Angela H Zhang, "Toward an Economic Approach to Agency Agreements" (2013) 9(3) *Journal of Competition Law & Economics* 553.

[12] See, eg, *Bundeskartellamt v Volkswagen AG and VAG Leasing GmbH* (C-266/93) [1995] ECR I-3477.

[13] *DaimlerChrysler AG v Commission of the European Communities* (T-325/01) [2005] ECR II-03319.

[14] Smith and Merrett, n 8, 321.

[15] *Confederacion Espanola de Empresarios de Estaciones de Servicio v Compania Espanola de Petroleos SA* (C-279/06) [2006] OJ C 331/9.

[16] *Confederacion Espanola de Empresarios de Estaciones de Servicio v Compania Espanola de Petroleos SA* (C-279/06) [2006] OJ C 331/9, [44].

[17] European Commission, *Guidelines on Vertical Restraints* (SEC, 2010) 411 (EU Vertical Restraint Guidelines).

[18] European Commission, n 17, 7 [14]. Zhang, n 11, concludes that the provisions in the Vertical Guidelines "are so stringent that they have almost the same effect as making the agent integrated with the principal": 570.

[19] Zhang, n 11, 570.

Travel agents operate a business and bear the associated financial risk. For potential travellers, the value of a travel agent is that it provides access to a wide range of complementary travel businesses – it is a one-stop shop for airline tickets, tours and accommodation – and it coordinates these services on behalf of the traveller. The travel agent can also provide the traveller with travel information in relation to visa and health requirements. Its business is (and always has been) about building a potential traveller base which is both large and diverse so that it can provide businesses supplying travel services – including airlines, tour operators, and hotels – access to potential travellers. The commission paid to travel agencies by travel businesses, the fee charged by the travel agent, takes into account the indirect network effect associated with the travel agency's other customers (travellers).

Travel agents provide services to competing travel businesses. In relation to airline tickets, for example, unless a traveller specifies the airline they wish to travel on, it would be expected that for a given route, a profit maximising travel agent would assess which airlines tickets to offer to a potential traveller according to the relative profitability for the travel agent's business. This may depend simply on differentials in commission payable, but may also take into account any flow-on effect from the sale of a particular airline's ticket for the rest of the travel agency business. For example, it may be known that those buying tickets on a particular airline are more likely to book accommodation through the travel agent. The travel agent may sell the ticket at its "face" value or, if it benefits other aspects of its business, it may use some of its commission to discount the price of the ticket – for example, selling the airline ticket may be part of a tour package and the commission on that package may compensate for the foregone commission on the airline ticket.

The foregoing can be summed up as follows: travel agents operate non-transaction platform businesses whose customers transact only indirectly through the platform. They enable travel businesses to access potential travellers. These travel businesses are in some cases complementary (eg, airlines and hotels), but may also be in competition (eg, different airlines). The travel agent makes a decision in the interests of its own business concerning which travel business to recommend to a traveller, which does not necessarily coincide with the interests of a particular principal. Once a travel service (eg, a particular airline) is decided upon, the travel agent then takes account of its own business interest to determine the price to be paid by the traveller.

Technological changes, and other associated changes, mean that many travel businesses now also sell directly to customers via the internet, as well as through agents. They may sell these tickets at a lower price than they provide for when using an agent. This may be on a short-term basis to clear inventory or due to the need for liquidity; alternatively, it may be more profitable to discount direct ticket sales and save on commission payments. If discounting becomes a long-term pricing strategy of travel businesses, travel agents will lose sales unless they match the price (or are able to convince travellers that they provide more than the ticket – eg, information and logistics). If sales through agents decline this makes them less attractive to travel businesses which means that these businesses then may offer reduced commissions.

Putting this into the context of a platform business, this means that the initial optimal pricing to the platform operator's customers has been disturbed by the ability to by-pass the platform and deal directly with travellers. At this point, the travel agent is acting in the interests of its own business and any agreement between the parties should be subject to competition law. If agents are viewed as competing with their principals, then strict per se prohibitions will apply, and the principal and the agent will not be able to defend the claim on the basis that the agreement does not substantially lessen competition. It is for this reason that it is important to properly classify the relationship between the principal and the agent.

IV. The Flight Centre Decision

Flight Centre is a travel agency business operating in Australia and overseas. It comprises a large distribution network of shops and call centres. It also makes sales via its website.[20] Flight Centre had a widely advertised policy guaranteeing that it would not be beaten on price – it would better the price for

[20] *Australian Competition and Consumer Commission v Flight Centre Ltd (No 2)* (2013) 307 ALR 209, [1]; [2013] FCA 1313.

a flight quoted by any other Australian travel agent or website, including airline websites.[21] However, as the airlines increasingly sold tickets on the internet at fares below the published price, matching meant that Flight Centre would incur a loss. Thus, between 19 August 2005 and 16 May 2009, Flight Centre tried to protect its margins by attempting to induce three airlines, Singapore Airlines, Malaysian Airlines and Emirates, to agree not to undercut Flight Centre through direct sales. The Australian Competition and Consumer Commission (ACCC) alleged that such an agreement would have the effect of fixing prices in breach of the then *Trade Practices Act 1974* (Cth) (*TPA*).

At trial, Logan J found in favour of the ACCC and held that Flight Centre had attempted to breach the price-fixing prohibition. This prohibition is only breached if parties to an agreement are competitors. His Honour found that Flight Centre and the airlines competed in a market for distribution services (which the airlines were said to supply to themselves in-house).[22]

This decision was overturned on appeal to the Full Court of the Federal Court of Australia (Full Court).[23] The Full Court rejected the notion of a distribution services market and instead defined the relevant market as the market for the supply of international passenger air travel services. It was held that the per se prohibition did not apply because Flight Centre operated as the airlines' agent in this market.[24]

The trial judge's finding that Flight Centre had breached competition laws by attempting to reach a price-fixing agreement with the airlines was reinstated by a majority of the High Court. Based on the individual High Court judgments, the questions that seem to be central to determining whether or not Flight Centre had acted illegally are the following:

(1) Was Flight Centre engaged as an agent by the airlines?
(2) Was the conduct of Flight Centre outside of the agency agreement?
(3) Were Flight Centre and the airlines competitors as would be required for them to engage in price fixing if Flight Centre was not acting as an agent?

Was Flight Centre an Agent of the airlines?

The term agency is "used in law to connote an authority or capacity in one person to create legal relations between a person occupying the position of principal and third parties".[25] Ordinarily, "the agent is constrained by a duty of loyalty to exercise the authority conferred by the principal in the interests of the principal, to the exclusion of the interests of the agent."[26]

Flight Centre argued that it was an agent of the airlines.[27] As previously noted, this was accepted by the Full Court, who found that Flight Centre was "agent for, and did not relevantly compete with, the airlines".[28] Further, all members of the High Court found that Flight Centre was an agent for the three airlines. For example, Kiefel and Gageler JJ concluded that Flight Centre was an agent but was free under the terms of the agency agreement to act in its own interests in the sale of an airline's tickets to customers.[29]

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[21] *Australian Competition and Consumer Commission v Flight Centre Ltd (No 2)* (2013) 307 ALR 209, [76]; [2013] FCA 1313.

[22] *Australian Competition and Consumer Commission v Flight Centre Ltd (No 2)* (2013) 307 ALR 209, [137]–[138], [142]; [2013] FCA 1313.

[23] *Flight Centre Ltd v Australian Competition and Consumer Commission* (2015) 234 FCR 367; [2015] FCAFC 104.

[24] *Flight Centre Ltd v Australian Competition and Consumer Commission* (2015) 234 FCR 367, 402–403 [175]; [2015] FCAFC 104.

[25] *Australian Competition and Consumer Commission v Flight Centre Travel Group Ltd* (2016) 261 CLR 203, 229–230 [76]; [2016] HCA 49.

[26] *Australian Competition and Consumer Commission v Flight Centre Travel Group Ltd* (2016) 261 CLR 203, [77]; [2016] HCA 49.

[27] Relevant parts of the agency agreement are set out in Kiefel and Gageler JJ's judgment: 220 [31]–[32].

[28] *Flight Centre Ltd v Australian Competition and Consumer Commission* (2015) 234 FCR 367, 404 [182]; [2015] FCAFC 104.

[29] *Australian Competition and Consumer Commission v Flight Centre Travel Group Ltd* (2016) 261 CLR 203, 232–233 [90]; [2016] HCA 49.

It is hard to understand how this could be commercially rational for the airlines. This is because acting in its own interests Flight Centre was not simply setting the ticket price, it was preferring one airline over another based on its best interest. This is hardly conducted by an agent that one would expect the airlines to see as appropriate.

AQ1 Nettle J accepted that whenever Flight Centre entered into a transaction with a customer by issuing a ticket for a flight on a particular airline, Flight Centre did so as agent for that airline".[30] Nettle J downplayed the significance of this finding, noting:

> to say that Flight Centre acted as the agent of the airline means no more than that Flight Centre was endowed by the relevant airline with authority to create in favour of the customer the right to be carried by the airline on the flight for which the airline ticket was provided.[31]

With respect, this does not dispel the irrationality.

Can an Agent and Principal Be Competitors? Was Flight Centre's Conduct Outside of the Agency Agreement?

The next issue is whether an agent can compete with a principal. Flight Centre claimed that, because it was the "agent" of each airline, it was not, and could not be, "in competition with" each airline for the purposes of the price fixing prohibition.[32] This argument was rejected by all judges in the High Court, except for French CJ (who dissented).

Kiefel and Gageler JJ explained that competition between an agent and principle may occur if the agency agreement permits it. Whether an agent had legal capacity to compete with a principal was left to the general law, which in turn left the existence of that capacity to the contract between the principal and the agent: to the scope of the authority conferred on the agent by the principal; and to the extent, if at all, to which the agent was constrained in the exercise of that authority by a duty of loyalty.[33] Their Honours go on to state:

> 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.[34]

The judgment of Gordon J was based on a clear recognition that Flight Centre was operating on behalf of multiple principals, some of whom were in competition with one another. Her Honour understood that in relation to its customers (those wishing to acquire tickets for flights), Flight Centre prioritised the airline offerings in its own interests. She attributed this, in part, to the incentive created by the "preferred airline agreements" that Flight Centre had with certain airlines, including the three relevant to the case. Those agreements provided additional incentive-based commissions and other payments, including payments to Flight Centre for promotional activities on behalf of those airlines.[35]

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[30] *Australian Competition and Consumer Commission v Flight Centre Travel Group Ltd* (2016) 261 CLR 203, 236 [103]; [2016] HCA 49.

[31] *Australian Competition and Consumer Commission v Flight Centre Travel Group Ltd* (2016) 261 CLR 203, 244 [125]; [2016] HCA 49.

[32] *Australian Competition and Consumer Commission v Flight Centre Travel Group Ltd* (2016) 261 CLR 203, 254 [152]; [2016] HCA 49.

[33] *Australian Competition and Consumer Commission v Flight Centre Travel Group Ltd* (2016) 261 CLR 203, 231 [83]; [2016] HCA 49.

[34] *Australian Competition and Consumer Commission v Flight Centre Travel Group Ltd* (2016) 261 CLR 203, 232 [88]; [2016] HCA 49.

[35] *Australian Competition and Consumer Commission v Flight Centre Travel Group Ltd* (2016) 261 CLR 203, 255 [159]; [2016] HCA 49.

And so, although her Honour acknowledged that describing Flight Centre as an agent was "legally accurate",[36] she rejected Flight Centre's argument that establishing that it was an agent meant that it was not in competition with the airlines, noting:

> At the point at which Flight Centre was dealing with its own customers in its own right without reference to any interests of any airline, the description of Flight Centre as "agent" is wrong factually. Flight Centre, in its own right, was competing against all sellers of tickets, which included the airlines and other travel agents. *Flight Centre was not acting as agent*.[37]

In other words, despite its agency arrangements with the airlines, the conduct under investigation was undertaken outside of the agency agreement, a finding that implicitly accepts that no rational business would engage an agent and allow that agent to prioritise sales to a competitor.

In Which Market Did Flight Centre and the Airlines Compete?

The Relevant Market

In order to be found to have attempted to enter into a price-fixing agreement, it must be shown that Flight Centre was in competition with the airlines *in the market in which the price fix was intended to occur*. Thus, market definition was critical to the outcome of the case pleaded by the ACCC.

Markets are characterised as having various dimensions, product and geography often being the most significant for a competition case. Sometimes the competition issue to be analysed concerns a particular step in the relevant supply chain and its relationship to adjacent upstream or downstream steps – the functional dimension of the market. The relevant functional dimension may be obvious but sometimes it is particularly difficult to identify. Whether a separate functional market exists at a particular stage in the supply chain depends on the extent of vertical integration across functional activities and whether the constraints on conduct at one functional level can be understood without reference to other functional levels. Given the difficulty of determining this, determination of the relevant functional dimension of a market is often subsumed into determination of the product dimension.

The starting point for the product dimension of the market would be the product to which the allegedly anti-competitive conduct related. In *Flight Centre*, this was not the supply and acquisition of international flights. Rather, it was the service of facilitating the booking of such flights over the counter or by telephone and remuneration for providing that service. In undertaking a Hypothetical Monopolist Test (HMT) this would be the service provided by the HM, defined to include all travel agents. The next issue for market definition would be to identify the extent to which other services are close substitutes for this service. Direct sales and internet sales by airlines are an almost perfect substitute and so should be incorporated into the HM. In the absence of other close substitutes, the product dimension of the market then becomes the supply and acquisition of booking and associated services for international airline flights. Flight Centre and the airlines would be competitors in this market.

The Market Definition Findings in Flight Centre

At trial, Dr FitzGerald, called as an expert economist by the ACCC, identified a single overarching market for international travel and ancillary products with downstream and upstream levels. He said that booking services were supplied downwards by travel agents and airlines (selling directly) to customers, and distribution services were supplied upwards by travel agents to the airlines and by airlines to themselves (through "self-supply", which eliminated the need to use a third party).[38] In Dr FitzGerald's opinion:

> [T]he relevant market was best identified as the downstream or distribution functional level of the single overarching market in which travel agents compete with airlines for the supply of booking and distribution services.[39]

[36] *Australian Competition and Consumer Commission v Flight Centre Travel Group Ltd* (2016) 261 CLR 203, 260 [177]; [2016] HCA 49.

[37] *Australian Competition and Consumer Commission v Flight Centre Travel Group Ltd* (2016) 261 CLR 203, 254 [152]; [2016] HCA 49 (emphasis added).

[38] In other words, the airlines were vertically integrated.

[39] *Australian Competition and Consumer Commission v Flight Centre Travel Group Ltd* (2016) 261 CLR 203, 238 [108]; [2016] HCA 49.

A functional definition, such as that proposed by Dr Fitzgerald, appears to separate out the supply of booking services and the supply of distribution services into separate markets. However, Logan J, the trial judge, described the market as a single market for distribution and booking services.[40]

Logan J found that while Flight Centre was a travel agent acting on behalf of international airlines for the purposes of the sale of air travel, Flight Centre also acted as an intermediary and supplied "distribution services". Logan J accepted the ACCC's argument that the airlines supplied these services, albeit in house, and thus they were in competition with Flight Centre, noting:

> [Flight Centre and the airlines] were competitors not because Flight Centre was also a supplier of air travel but rather because an airline could, if it chose, make the knowledge of availability of its flights known directly to would-be passengers and undertake directly with them the booking of those flights. These were services which were substitutable for those provided by a travel agent such as Flight Centre.[41]

This market definition was rejected by the Full Court.[42] The Full Court found that what the ACCC chose to classify as distribution services provided to airlines (either by agents or internally) were in reality no more than essential and inseparable incidents of selling a ticket to a customer in a market for sale of airline tickets. As noted by Nettle J in the High Court, the Full Court considered that "a market so defined did not correspond to any of the markets pleaded, lacked precision and clarity, and was in any event artificial".[43] In other words, it did not reflect commercial reality, the Full Court being of the opinion that "an airline's conduct in selling an airline ticket directly to a customer (including the ancillary conduct of making the flight known to the customer and booking the flight) could not sensibly be regarded as the provision by the airline of a service to itself".[44] This finding is open for debate, given that self-supply or "internalisation" of supply is a decision that businesses make regularly based on expected profitability. As noted earlier, the direct sales of the airlines have been increasing relative to sales through travel agents, possibly reflecting a desire to save the cost of commission but also due to the reduction in transaction costs caused by advances in technology.

Unlike the Full Court, Kiefel and Gageler JJ in the High Court accepted that "[t]here is no want of realism in describing Flight Centre as having provided distribution services to an airline when selling that airline's ticket to a customer in accordance with the Agency Agreement".[45] However, their Honours went on to note that:

> [I]t is quite artificial … to describe the same airline as having provided those services … to the airline itself when selling a ticket directly to a customer. Booking the flight, issuing a ticket and collecting the fare were part and parcel of the airlines making a sale. They were inseparable concomitants of that sale.[46]

Kiefel and Gageler JJ were also critical of the ACCC's description of the market as that for international passenger air travel services because this tended "to blur the product and functional dimensions of the market in a way which obscures the point that the supplies for which Flight Centre and the airlines competed were not supplies of carriage services but rather supplies of contractual rights to carriage services".[47]

Kiefel and Gageler JJ, Gordon J and Nettle J, focused on the contractual rights supplied to customers by the airlines and Flight Centre alike, in finding that Flight Centre and the airlines were competitors at the time of the impugned conduct.

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[40] *Australian Competition and Consumer Commission v Flight Centre Travel Group Ltd* (2016) 261 CLR 203, 224 [53]; [2016] HCA 49.

[41] *Australian Competition and Consumer Commission v Flight Centre Ltd (No 2)* (2013) 307 ALR 209, [142]; [2013] FCA 1313.

[42] *Flight Centre Ltd v Australian Competition and Consumer Commission* (2015) 234 FCR 367, 401 [168]; [2015] FCAFC 104.

[43] *Australian Competition and Consumer Commission v Flight Centre Travel Group Ltd* (2016) 261 CLR 203, 241 [117]; [2016] HCA 49, citing *Flight Centre Ltd v Australian Competition and Consumer Commission* (2015) 234 FCR 367, 393 [126]–[127], 395 [134]; [2015] FCAFC 104.

[44] *Australian Competition and Consumer Commission v Flight Centre Travel Group Ltd* (2016) 261 CLR 203, 241 [117]; [2016] HCA 49, citing *Flight Centre Ltd v Australian Competition and Consumer Commission* (2015) 234 FCR 367, 395–396 [134]–[137]; [2015] FCAFC 104.

[45] *Australian Competition and Consumer Commission v Flight Centre Travel Group Ltd* (2016) 261 CLR 203, 229 [73]; [2016] HCA 49.

[46] *Australian Competition and Consumer Commission v Flight Centre Travel Group Ltd* (2016) 261 CLR 203; [2016] HCA 49.

[47] *Australian Competition and Consumer Commission v Flight Centre Travel Group Ltd* (2016) 261 CLR 203, 233 [92]; [2016] HCA 49.

The definition of the words "services" and "supply" in s 4(1) supported finding that an agent (Flight Centre) could be regarded as supplying the principal's services. "Services" is defined expansively to include "any rights … benefits, privileges or facilities that are, or are to be, provided, granted or conferred in trade or commerce". "Supply" is also broadly defined in s 4(1) to include, in relation to services, "provide, grant or confer". As Nettle J notes:

> It requires no extension of the natural and ordinary meaning of those words as defined to characterise the sale of an airline ticket by a travel agent, like Flight Centre, to a customer as a supply to that customer of the right, enforceable against the relevant airline, to be carried by that airline on the flight to which the ticket relates …
>
> [W]here, 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.[48]

Gordon J also emphasised the words "provide, grant or confer" in the definition of "supply" when concluding that Flight Centre and the airlines supplied the same service in competition with each other,[49] noting that:

> Flight Centre and the airlines are supplying the same service – a ticket entitling the named holder to travel at a scheduled time on a scheduled date on an identified airline between identified places. The tickets supplied by the airlines and by Flight Centre were substitutable … They were supplying the same service – a ticket entitling the named holder to travel at a scheduled time on a scheduled date on an identified airline between identified places.[50]

Kiefel and Gageler JJ found that Flight Centre and the airlines were in competition, noting that "[w]hen Flight Centre sold an international airline ticket to a customer, the airline whose ticket was sold did not".[51] This commonsense approach, reflected also in the judgment of Gordon J, regards suppliers as competitors if customers made a choice between sourcing from one supplier rather than another. Gordon J also noted that "[i]f a travel agent or an airline sells a ticket, the others do not",[52] before concluding that:

> in its dealings with customers, Flight Centre began by acting as principal – just like each airline and each other travel agent. It acted as principal in telling the customer that "I will get you a deal", "I will sell you a ticket at the best price". At that point, Flight Centre and each airline were in direct competition – to sell a ticket.[53]

Likewise, Nettle J pointed out that an airline ticket sold by Flight Centre on behalf of an airline would be close to perfectly substitutable for the airline ticket sold directly by the airline. In short, they were competitors.

V. The European "Online Booking Portal" Cases

The reasoning in *Flight Centre* differed in a fundamental way from cases in Europe in relation to online booking portals (OBP), often referred to as the Booking.com cases. Booking.com, and other OBPs, act as intermediaries, and enable hotel customers to make direct bookings with the hotel.

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[48] *Australian Competition and Consumer Commission v Flight Centre Travel Group Ltd* (2016) 261 CLR 203, 244 [124], 253 [147]; [2016] HCA 49.

[49] *Australian Competition and Consumer Commission v Flight Centre Travel Group Ltd* (2016) 261 CLR 203, 258–259, [170]–[172]; [2016] HCA 49. Kiefel and Gageler JJ made similar observations, see 222 [41], 230 [80] and 231 [82].

[50] *Australian Competition and Consumer Commission v Flight Centre Travel Group Ltd* (2016) 261 CLR 203, 258 [170]; [2016] HCA 49.

[51] *Australian Competition and Consumer Commission v Flight Centre Travel Group Ltd* (2016) 261 CLR 203, 232–233 [90]; [2016] HCA 49.

[52] *Australian Competition and Consumer Commission v Flight Centre Travel Group Ltd* (2016) 261 CLR 203, 258 [170]; [2016] HCA 49.

[53] *Australian Competition and Consumer Commission v Flight Centre Travel Group Ltd* (2016) 261 CLR 203, 260 [175]; [2016] HCA 49.

The Bundeskartellamt described Booking.com's business operations, which are broadly reflective of the OBP model, as follows:

> Booking maintains contractual relationships with hotel customers on the one hand and hotel companies on the other. By booking a hotel room via the hotel portal, an intermediary agreement is formed between the hotel customer and Booking. No costs are charged to the hotel customer for the intermediary service of Booking; he pays solely the room price to the booked hotel. There is an agreement between Booking and the hotel companies on the inclusion of the related hotels in the Booking reservation system. The agreements provide that the hotel must pay a standard commission of [10–15%] on the overnight price to Booking for each realized individual booking.[54]

The facts in Booking.com are well-known and so are related only briefly here. Booking.com and certain other OBPs imposed price parity agreements (also known as Most Favoured Nation clauses) on hotels. Under such agreements the OBP required the hotel to provide it with the best room price, the highest room availability and the most favourable booking and cancellation conditions offered by the hotel on any other sales channel (this became known as a "wide" parity clause). These arrangements were widespread in Europe and Bookings.com was subject to investigations in a number of countries, including Germany, France, Italy, Sweden and Switzerland. In each case Bookings.com gave a commitment or undertaking to limit the restriction such that hotels could offer better deals on other sales channels (eg traditional travel agents and other OBPs) but not on the hotels' own websites, unless they offered the same or better conditions on Booking.com (referred to as a "narrow" parity clause). These narrow parity clauses were subsequently outlawed by France, Austria, Italy, and Belgium.

There are significant differences between *Flight Centre* and the European cases relating to OBPs. These include:

(1) the lack of discussion relating to agency agreements in the European matters;
(2) the specific recognition of the OBPs as platform businesses;
(3) the competition analysis undertaken in the European cases, which explicitly recognised that there was an economic rationale for the arrangements, to address free riding. Although both cases involved most favoured nation clauses (MFN), such matters are not discussed in *Flight Centre* given the per se nature of the price fixing prohibition.[55]

Each of these differences is discussed below.

Agency Agreement

Arrangements between OBPs and hotels seem to satisfy the requirements for agency – the hotels own the accommodation, not the OBPs, and the hotels set the price at which that accommodation may be purchased through the OBPs, and bear the risk of unsold rooms. However, the hotels generally also sell accommodation direct and through multiple channels, including multiple OBPs. While the European Commission accepts that this does not necessarily mean that the agency arrangement is a sham, the Court of Justice has expressed a contrary view.[56] As Bennett observes:

> The key economic question is whether the agent will make the same decision as the principal, or whether it will make its own, possibly diverging set of decisions independently of the principal. Or putting it in economic terms, we are interested in the extent to which the principal's and agent's *incentives* are aligned, thus ensuring that the two parties act as a single economic unit rather than two parties with potentially conflicting goals.[57]

As discussed above, whether or not Flight Centre acted as an agent for the airlines when engaging in the impugned conduct was a threshold issue in *Flight Centre* given that if Flight Centre was acting as agent in effect it had no separate identity from the principal and could not engage in price fixing or resale price

[54] Bundeskartellamt Decision, *Booking.com* B 9-121/13, 4.

[55] The MFN clause in Flight Centre was intended to protect Flight Centre's offer to customers not to be beaten on price (ie it was actually a meet the competition offer).

[56] *Vereniging van Vlaamse Reisbureaus v Sociale Dienst van de Plaatselijke en Gewestelijke Overheidsdiensten* (311/85) [20].

[57] Matthew Bennett, "Online Platforms: Retailers, Agents or None of the Above" (Competition Policy International, 20 June 2013) 5.

maintenance. However, this issue seems to have barely attracted comment in the European cases relating to OBPs. The lack of discussion of the agency issue by the various European competition authorities that examined the conduct of the OBPs makes it difficult to determine whether they regarded the agency arrangements as a sham, although arguably, the OBPs and the hotels have a common, not a conflicting, objective, namely to sell as much accommodation as possible.

Alternatively, the agency issue may not have received much attention because it was not relevant. This may have been because the European authorities accepted that even if the parties were in an agency relationship, the price restraint agreements were outside of the agency agreement. Another possible reason is that the prohibitions said to have been breached were not per se prohibitions, and so the need to analyse the competitive effects of the conduct did not turn on whether the OBPs and hotels were in an agency relationship (whereas in Flight Centre the argument was that if the parties were agents, they could not be said to be competitors, and were thus not capable of engaging in per se prohibited cartel behaviour).

OBPs as Platform Businesses

Some of the European cases emphasise that OBPs operate platform businesses – for example, the French competition authority stated OBPs "serve as intermediaries in a market that has two sides, linking two distinct categories of customers: hotels and consumers of overnight stays".[58] The Italian Competition Authority was not specific in its findings but later stated: "Online platforms, such as those operated by OTAs, typically operate in two-sided markets, coordinating the interdependent demands of two distinct groups of customers, who need to interact with each other."[59]

Despite effective recognition of the business model of the OBP as a platform business, the approach adopted by the competition authorities tended to cause the significance of this for the competition analysis to be overlooked. The French competition authority identified an upstream market being the supply of online travel agency reservation services … based in France".[60] This concerned the relation between Booking.com and the hotels on its platform; and a downstream market involving the service supplied by Booking.com to consumers, which included search, comparison and hotel reservation. The competition analysis only considered the upstream market. This separation of functional activities corresponds with that put forward by Dr FitzGerald in *Flight Centre*. The Swedish authority also identified horizontal and vertical relationships but defined the market as the market for online travel agency services, and so it too focused on horizontal relationships only.

Both online and offline travel agents face competition for customers from suppliers of travel services selling direct. The significance of the OBP business model is that unlike traditional bricks and mortar or offline travel agencies, OBPs do not interact directly with those seeking to book hotel rooms, instead acting as intermediaries between the two customer groups – they are transaction platforms. Consequently, they cannot influence the choice of hotel by those seeking accommodation as directly as an offline travel agent, which is a non-transaction platform with each customer group interacting only indirectly via the platform operator. Indirectly, the OBPs can offer to accept a lower commission to encourage hotels using its site to offer lower prices, but it is still the hotel as principal making the pricing decision. However, like the offline travel agent, OBPs do offer services that aim to attract users to their website and away from rival sites through their investment in the presentation, recommendation and ranking of hotels.[61]

Competition Analysis

Unlike *Flight Centre*, in the Booking cases in Europe, the competition authority was required to assess whether the price parity clauses were anti-competitive. In Europe, there was fairly unanimous agreement

[58] Autorité de la concurrence, décision n° 15-D-06, 21 April 2015, 25, quoted in Chiara Caccinelli and Joelle Toledano, "Assessing Anticompetitive Practices in Two-Sided Markets: The Booking.com Cases" (2018) 14(2) *Journal of Competition Law & Economics* 193, 205.

[59] OECD, *Hearing on Across Platform Parity Agreements* (27–28 October 2015) [11].

[60] Autorité de la concurrence, n 58, 26.

[61] The ability of platform operators to influence rankings has been a concern of the EC in relation to Google.

that the wide price parity clause would lessen competition by foreclosing rivals and raising entry barriers. More significantly, when a MFN restriction is imposed by a platform it requires the seller (a hotel) to supply offers on the OBP that are no less attractive than the offers it supplies all others, including itself. This has the effect of unifying prices, so that the prices that a customer faces are not independent of one another.

The competitive harm from the MFN agreement in Booking.com comes from the fact that it affects competition at the platform level, where each platform makes available rooms for many different hotels. This causes a reduction in competition between platforms because a platform cannot offer to accept a lower commission in order for the hotel to discount rooms on the OBP platform.

Offline travel agents, such as Flight Centre are also platform businesses. However, the MFN agreement in *Flight Centre* was to avoid the airlines undercutting Flight Centre. It was intended to shore up Flight Centre's meet the competition offer to customers booking flights. Flight Centre could not continue to absorb the losses from being undercut and so would have ceased to be at least as an effective competitive constraint in future. Importantly, the agreement Flight Centre sought to reach would not have restricted the airlines pricing to other travel agents. This "narrow" agreement reduces competition between Flight Centre and each airline, but does it substantially reduce competition in the market where there are other travel agents servicing the airlines, as the European competition authorities generally concluded? Had the ACCC needed to establish the competition effects of Flight Centre's attempt to impose a MFN agreement on the three airlines, it is not obvious that it would have succeeded.

Arguably, the damage to the competitive process in *Flight Centre* may have been a consequence of Flight Centre's "meet the competition" offer. A MFN clause to protect a price guarantee is far more concerning than the MFN clause alone, assuming that the business concerned has some degree of market power.[62] This is because a meet the competition offer tends to deter competitors from undercutting the firm offering the "price guarantee". More significantly, it similarly deters entrants from undercutting.

Free Riding Rationale

In *Flight Centre* discussion of the motive for the conduct was limited to references to the airlines undercutting Flight Centre. However, Flight Centre argued that its conduct was in fact pro-competitive – it claimed that "in attempting to have the airlines concerned allow it to access international air travel fares at the same price as the airlines concerned sold such travel by direct retail sale, it was attempting to induce them not to lessen but to increase competition".[63]

In Europe, Booking.com attempted to defend its conduct by claiming that the MFN agreement avoided free riding by the hotels on the system it had set up. Its site was frequently used by those wanting to book accommodation to compare prices but searchers could and did then book direct. Booking.com only received payment for its services from the hotel once a booking was made on its system. While not relevant in Australia where the alleged conduct was per se illegal, if intent was the basis for assessing liability, this could support an argument that the narrow agreement did not have an anti-competitive purpose.

VI. Conclusion

The *Flight Centre* and *Booking.com* cases provide guidance as to the application of competition law to agreements reached between principals and agents, but also give rise to several issues. In each case, it was an agent seeking to impose restraints on a principal and this may be the reason for the competition concern. The cases illustrate the uncertainties associated with the protection from competition law offered by agency arrangements. In the former, although an agency agreement was recognised, the conduct was still found to breach competition law because it occurred outside of the

[62] For elaboration of this, see Rhonda L Smith and Alexandra Merrett, "Playing Favourites: The Competition Effects of Preferred Customer Arrangements" (2011) 7(2) *European Competition Journal* 179.

[63] *Australian Competition and Consumer Commission v Flight Centre Ltd (No 2)* (2013) 307 ALR 209, [7]; [2013] FCA 1313.

protective umbrella of the agreement. In the latter, agency arrangements were ignored – or possibly discounted as a sham.

As noted, both Flight Centre and Booking.com are platform businesses. However, the bricks and mortar operation of the former was a non-transaction platform, while the latter was a transaction platform. The cases illustrate that the distinction may be significant for determining the impact of conduct on competition – the ability of the operator of a non-transaction platform to directly influence customer choice, including by price setting, when acting as agent for numerous competing principals may be considered a reasonable basis for concluding not that the agency agreement is a sham, but that the conduct falls outside of the agency agreement.