AIR NEW ZEALAND LTD v. AUSTRALIAN COMPETITION AND CONSUMER COMMISSION (S245/2016)

PT GARUDA INDONESIA LTD v. AUSTRALIAN COMPETITION AND CONSUMER COMMISSION (S248/2016)

Court appealed from: Full Court of the Federal Court of Australia [2016] FCAFC 42

Date of judgment: 21 March 2016

Special leave granted: 14 October 2016

The Appellants each operate international air services that include the carriage of cargo.

In 2009 and 2010 the Respondent ("the ACCC") commenced Federal Court proceedings against the Appellants (and other airlines) under the *Trade Practices Act* 1974 (Cth) ("the TPA"). The ACCC alleged that during several years to 2006 the Appellants had engaged in collusive behaviour with other airlines in the setting of various fees, including fuel and insurance surcharges, for the carriage of air cargo to Australia from Hong Kong, Singapore and Indonesia. The ACCC contended that the Appellants' behaviour was contrary to s 45 (read with s 45A) of the TPA. That is, that the Appellants had made or given effect to arrangements that had the effect of substantially lessening competition in a market. Pursuant to s 4E of the TPA, the market in question was required to be "a market in Australia".

Justice Perram found that the Appellants had engaged in price fixing, in markets for the supply and acquisition of air cargo services. His Honour however dismissed both of the ACCC's applications, upon holding that the markets were not "in Australia" within the meaning of ss 4E and 45 of the TPA. Justice Perram found that the market participants were international airlines, consignors and consignees (together, "shippers") who sent large volumes of cargo, and freight forwarders (who provided intermediary services including preparation, storage, customs clearing and land transport). Airlines competed for the custom of large-volume shippers. Where such a shipper was an importer in Australia, the choice of airline would likely be made in Australia. Other connections with Australia were the carriage of cargo through Australian airspace and the airlines' provision of ground handling and tracking services in Australia. Prices however were generally negotiated and paid (by freight forwarders) at each place of departure. Airlines also imposed their surcharges at that point. Justice Perram held that the market in question was located at the place where a customer's choice of airline took effect. That place was where an airline received the cargo it was to carry. The ACCC's claims therefore failed, as the Appellants' price fixing had occurred in markets in Hong Kong, Singapore and Indonesia.

The ACCC appealed.

The Full Court of the Federal Court (Dowsett & Edelman JJ; Yates J dissenting) allowed both appeals and remitted the matters to a single Judge for the making of orders in relation to the Appellants' conduct that had contravened the TPA.

Dowsett and Edelman JJ held that the market in question was located partly overseas but also "in Australia" within the meaning of ss 4E and 45 of the TPA. This was after undertaking what their Honours held to be a necessary evaluative exercise, giving due consideration to all aspects of the market. Their Honours found it relevant that the Appellants' services were supplied to customers in Australia and that a significant part of those services was carried out in Australia. Airlines competed for business in Australia, where they also faced barriers to entry. The receipt of cargo by an airline was no more important than the flight itself or delivery at the destination. Dowsett and Edelman JJ held that their conclusion was consistent with the purpose of the TPA (as stated in s 2), which was "to enhance the welfare of Australians through the promotion of competition and fair trading and provision for consumer protection." Their Honours also held that, at the time when the TPA was enacted, it was not inconsistent with the *Air Navigation Act* 1920 (Cth) so as to be inapplicable to international airlines. Dowsett and Edelman JJ also rejected a contention by the Appellants that they had been compelled by the law of Hong Kong to join with other airlines in obtaining approval for a certain fuel surcharge.

Justice Yates however would have dismissed the appeal. His Honour held that Justice Perram had correctly focused on the geographic area in which the market product, being a suite of transport services, was bought and sold. This was the port of origin, where substitution would occur by the implementation of decisions as to which airline's services would be used.

In appeal S245/2016, the grounds of appeal include:

- The Full Court (by majority) erred in finding that each of the uni-directional route specific markets for the supply of air cargo services alleged by the ACCC for routes between airports in each of Hong Kong and Singapore, and airports in Australia, were markets in Australia within the meaning of s 4E of the TPA.

In appeal S248/2016, the grounds of appeal include:

- The Full Court should have found that the markets for carriage of cargo by air from the airports in Hong Kong, Jakarta and Denpasar to airports in Australia were not in Australia for the purposes of ss 45(3) and 4E of the TPA.

- The Full Court erred in adopting an expansive approach to the construction of the term "market in Australia" in s 4E supported by reliance upon s 2 of the TPA to conclude that the better approach was to visualise the metaphorical market and then to consider whether it is in Australia.