HIGH COURT OF AUSTRALIA

14 December 2016

AUSTRALIAN COMPETITION AND CONSUMER COMMISSION v FLIGHT CENTRE TRAVEL GROUP LIMITED
[2016] HCA 49

Today the High Court allowed an appeal from the Full Court of the Federal Court of Australia. By majority, the High Court held that the respondent ("Flight Centre") was in competition with Singapore Airlines, Malaysia Airlines and Emirates ("the airlines") when it attempted to induce the airlines to agree not to discount the price at which they offered international airline tickets directly to customers, and therefore that Flight Centre had engaged in restrictive trade practices contrary to s 45(2)(a)(ii) of the *Trade Practices Act* 1974 (Cth) ("the Act").

Flight Centre operated a travel agency business. Pursuant to an agreement entered into with the International Air Transport Association on behalf of its member airlines, Flight Centre sold international airline tickets on behalf of the airlines. The airlines published fares to Flight Centre and other travel agents through an electronic system. Upon issuing an international airline ticket, Flight Centre was obliged to pay to the relevant airline an amount published by the airline to travel agents less a commission. Although required to remit that amount, Flight Centre was free to sell the airline ticket at any price. Flight Centre employed as part of its marketing strategy a "price beat guarantee", advertising that it would better the price of an airline ticket quoted by any other Australian travel agent or website, including a website operated by an airline, by $1, and would give the customer a voucher for $20. At times, the airlines offered international airline tickets directly to customers at prices lower than the fares published to travel agents. Between 2005 and 2009, Flight Centre sent a series of emails to the airlines, in which it tried to get each airline to stop offering international airline tickets directly to customers at prices lower than the fares published to travel agents. It threatened to stop selling the tickets of each airline if that airline did not agree.

In 2012, the appellant ("the ACCC") commenced proceedings for the recovery of pecuniary penalty in the Federal Court of Australia. The ACCC alleged that, by sending the emails, Flight Centre had attempted to induce each airline to enter into a contract, arrangement or understanding which had the purpose or likely effect of substantially lessening competition contrary to s 45(2)(a)(ii) of the Act. The primary judge made declarations of contravention and ordered that Flight Centre pay pecuniary penalty. Flight Centre appealed to the Full Court. The Full Court allowed the appeal, holding that Flight Centre was not relevantly in competition with the airlines for which it sold airline tickets as an agent. By grant of special leave, the ACCC appealed to the High Court.

A majority of the High Court held that Flight Centre was in competition with the airlines when it attempted to induce each airline to agree not to discount the price at which that airline offered international airline tickets directly to customers. The competition was in a market for the supply, to customers, of contractual rights to international air carriage via the sale of airline tickets. Flight Centre and the airlines competed in that market. The Court made orders setting aside the orders of the Full Court, reinstating the trial judge's declarations of contravention with adjustments to reflect the High Court's reasons, and remitting the matter to the Federal Court for the determination of penalty.

- *This statement is not intended to be a substitute for the reasons of the High Court or to be used in any later consideration of the Court's reasons.*

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