HIGH COURT OF AUSTRALIA

14 June 2017

AIR NEW ZEALAND LTD v AUSTRALIAN COMPETITION AND CONSUMER COMMISSION; PT GARUDA INDONESIA LTD v AUSTRALIAN COMPETITION AND CONSUMER COMMISSION
[2017] HCA 21

Today the High Court unanimously dismissed two appeals from a decision of the Full Court of the Federal Court of Australia. Air New Zealand Ltd and PT Garuda Indonesia Ltd ("the airlines"), supplied unidirectional air cargo services from ports of origin in Hong Kong, Singapore and Indonesia to destination ports in Australia ("the air cargo services"). The principal issue on appeal was whether there was a market "in Australia" for the air cargo services for which the airlines competed for the purposes of the *Trade Practices Act* 1974 (Cth) ("the TPA"). The High Court held that the findings of fact made by the primary judge led to the conclusion that there was such a market.

The Australian Competition and Consumer Commission ("the ACCC") brought proceedings against the airlines alleging breaches of the TPA. At trial, the airlines were found to have been parties to understandings that amounted to price fixing. The understandings involved the imposition of surcharges and fees on the supply of the air cargo services. The primary judge found that this conduct would have contravened s 45(2) of the TPA, as each understanding had the purpose, effect, or likely effect, of substantially lessening competition. But s 4E of the TPA required that the relevant competition for the purposes of s 45(2) was competition in a market in Australia and his Honour found that the market for the air cargo services for which the airlines competed was not in Australia: it was in the place where the "switching decision" – the choice of airline – was given effect, namely, where the cargo was delivered to the airlines at the port of origin.

The ACCC appealed to the Full Court of the Federal Court. By majority, the Full Court allowed the appeal, holding that there was a market in Australia for the air cargo services. The majority held that defining a market for the purposes of the TPA involved a "flexible assessment" of various matters, not limited to questions of substitutability, and that the better approach for determining whether a market was in Australia for the purposes of s 4E was to "visualise" the metaphorical market, and then to consider whether it was within Australia, in the sense that at least part of it was in Australia.

By grant of special leave, the airlines appealed to the High Court. The plurality held that a market, within the meaning of the TPA, was a notional facility which accommodated rivalrous behaviour involving sellers and buyers, and that it was the substitutability of services as the driver of the rivalry between competitors to which s 4E looked to identify a market, rather than the circumstances of the act of substitution or the "switching decision" itself. In this case, the primary judge's findings established that Australia was not merely the "end of the line" for the air cargo services but was also a vital source of demand for those services from customers, namely, large shippers who were regarded as important to the profitability of the airlines' businesses. As a practical matter of business, the airlines' rivalrous pursuit of Australian customers, in the course of which the matching of supply with demand occurred, was in a market which included Australia; that was so even if the market might also have been said to include Singapore, Hong Kong or Indonesia.

In addition, the Court affirmed the decision of the Full Court in rejecting a defence raised by the airlines that foreign laws and administrative practices of a foreign regulator compelled each of them to arrive at, or give effect to, the impugned understandings. The Court also rejected a further defence raised by PT Garuda Indonesia Ltd that there was a practical and operative inconsistency between the *Air Navigation Act* 1920 (Cth), when read with the Australia-Indonesia Air Services Agreement, and the prohibition in ss 45 and 45A of the TPA.

- *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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