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Price parity or price fixing? Agency between airlines and travel agents

The Australian Competition and Consumer Commission (ACCC) has been granted leave to appeal to the High Court after *Flight Centre Ltd v Australian Competition and Consumer Commission* [2015] FCAFC 104 was handed down by the Full Court of the Federal Court. In that decision, the Full Court found that Flight Centre did not attempt to induce price fixing arrangements with three airlines when it tried to control their cheapest fares.

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Why is this appeal important?

The ACCC's appeal to the High Court is extremely significant for airlines and travel agents as the High Court may overturn a fundamental principle of agency that an agent is not in competition with its principal, and effectively undermine the law of agency in distribution schemes. If the High Court accepts the ACCC's submissions, the legality of current agency distribution arrangements between airlines and travel agents would be in serious doubt.

Background

Flight Centre had sold airfares on behalf of Singapore Airlines, Malaysia Airlines and Emirates. As part of this relationship, Flight Centre earned commission for each airfare sold and could receive incentive-based payments if sales targets were reached. The airlines could also sell airfares directly to customers from their call centres and websites, but on occasion, were sold at prices less than those made available to Flight Centre.

As these discounted offerings became more frequent, Flight Centre (being required to match these fares in accordance with its price beat guarantee) was effectively unable to sell flights at a price where they could earn any meaningful commission. It was also less likely for Flight Centre to meet their sales targets and receive incentive-based payments from the airlines.

Senior representatives of Flight Centre subsequently sent emails between 2005 and 2009 to the three airlines requesting that they stop undercutting, and that if they did not enter into agreements that restricted their ability to offer discounted airfares directly, Flight Centre would be discouraged from promoting their airfares to customers.

The ACCC alleged that Flight Centre engaged in an arrangement or understanding in restraint of trade and commerce that contravened former section 45(2)(a)(ii) of the *Trade Practices Act 1974* (Cth). Specifically, they argued that both airlines and travel agents were competing with each other in the same market, as they were providing a booking service to the consumer. The critical question therefore involved ascertaining the nature of the market.[1] At first instance, Justice Logan agreed with the ACCC's view and identified the market as the distribution and booking services for air travel. His Honour found that travel agents, including Flight Centre, competed with internal airline sales divisions in the provision of these services.[2] On this basis, Flight Centre had sought to remove airfare differentiation to maintain its retail or distribution margins.[3] Justice

Rangiah subsequently agreed with this view when he dismissed an application by Flight Centre to stay the $11 million pecuniary penalty.[4]

However, the Full Court found that they were not competing in a relevant market.[5] It was artificial to suggest that they were competing when airlines could only supply distribution services for their own flights.[6] Further, Flight Centre and three airlines were in an agency relationship. The mere fact that airlines had an 'in-house distribution service' did not necessarily mean that they were close substitutes for the services provided by Flight Centre as an agent.[7]

The Full Court was heavily persuaded by the fact that Flight Centre could produce advice on airfares from a broad range of airlines, while individual airline sales divisions could not. Similarly, Flight Centre could provide booking and ticketing to many airlines, while individual airline sales divisions could not.[8] This led the Full Court to conclude that they were not competing in the same market, and that Flight Centre could not have been in breach of any price-fixing arrangements.[9]

Is the ACCC's argument sustainable?

Is it correct to say that an airline is in competition with travel agents for ticketing distribution services because it provides its own ticketing service? In the author's view, the ACCC's argument is not sustainable. It is bizarre to think that a homeowner would be in the market for plumbing services just because he has decided to fix a leaking tap himself (rather than engaging a plumber), but this is exactly the argument the ACCC is pursuing in the airline/travel agents context. If Flight Centre's actions (ie to negotiate with airlines about commissions) are found to constitute price fixing by the High Court, it is difficult to envisage a scenario where a travel agent can negotiate with an airline that sells its own airfares (a common industry practice), without committing an offence.

When will the High Court make its decision?

Unfortunately, a High Court decision is not expected until early 2017. For airlines and travel agents, there will be some uncertainty about the legality of current distribution agreements, but until the High Court makes its decision, the decision of the Full Federal Court still stands.

1 Australian Competition and Consumer Commission v Flight Centre Ltd (No 2) [2013] FCA 1313 [137].
2 Ibid [137]-[139], [142].
3 Ibid [197].
4 Flight Centre Ltd v Australian Competition & Consumer Commission [2014] FCA 658.
5 Flight Centre Ltd v Australian Competition & Consumer Commission [2015] FCAFC 104.
6 Ibid [137].
7 Ibid [138].
8 Ibid [166].
9 Ibid [182].

High Court Hears Unusual Aviation Case

Peter Axelrod

On 8 June 2016 the High Court of Australia unanimously decided the case of Robinson Helicopter Company Incorporated v McDermott.[1] The case was unusual in three respects. First it was a product liability case in which no defect in the Robinson R22 itself was claimed - the alleged defect was in the maintenance manual; second, the case was entirely fact based, with none of the legal features which normally attract the attention of the High Court; and third, it criticised the majority of the Queensland Court of Appeal[2] for failing to give appropriate weight to the factual findings of the trial judge.[3]

The basic facts were undisputed. On 30 May 2004 an R22 crashed near the Queensland - NT border while inspecting a fence on a large cattle station. The cause of the crash was the failure of the forward flex plate[4] due to a bolt which had not been properly torqued during routine maintenance.

At least two licensed aircraft maintenance engineers [LAMEs] had failed to detect the improperly installed bolt during 100 hourly inspections after the time the error was presumably committed.[5]

Before trial the plaintiffs settled with all of the LAMEs who either might have committed the error or failed to detect it. The case continued only against the manufacturer.

The plaintiffs contended against Robinson that the maintenance manual's instruction to "verify security" of the bolt was inadequate. The trial judge found that a properly torqued bolt was required to have a torque stripe[6] and that this bolt either did not have a torque stripe or if it had had one it would have broken. In either case (missing or broken) a LAME would know immediately that the bolt was not secure or, at the very least, that it required further inspection to be sure it was properly torqued. Because it was undisputed that LAMEs understood that "verify security" meant at least to inspect the torque stripe, the manual's instruction was held at trial to be sufficient and the claims of the plaintiffs were dismissed.

The plaintiffs appealed and a majority of the Court of Appeal allowed the appeal on the grounds that they disagreed with the trial judge's findings of fact and his interpretation of the evidence. The minority decision dismissed the appeal as her Honour determined that the trial judge had sufficient evidentiary basis for the decision.

In allowing Robinson's appeal, the High Court, relying principally on its earlier case of *Fox v Percy*[7], unanimously ruled:

> ***THE FACT THAT THE JUDGE AND THE MAJORITY OF THE COURT OF APPEAL CAME TO DIFFERENT CONCLUSIONS IS IN ITSELF UNREMARKABLE. A COURT OF APPEAL CONDUCTING AN APPEAL BY WAY OF REHEARING IS BOUND TO CONDUCT A "REAL REVIEW" OF THE EVIDENCE GIVEN AT FIRST INSTANCE AND OF THE JUDGE'S REASONS FOR JUDGMENT TO DETERMINE WHETHER THE JUDGE HAS ERRED IN FACT OR LAW. IF THE COURT OF APPEAL CONCLUDES THAT THE JUDGE HAS ERRED IN FACT, IT IS REQUIRED TO MAKE ITS OWN FINDINGS OF FACT AND TO FORMULATE ITS OWN REASONING BASED ON THOSE FINDINGS. BUT A COURT OF APPEAL SHOULD NOT INTERFERE WITH A JUDGE'S FINDINGS OF FACT UNLESS THEY ARE DEMONSTRATED TO BE WRONG BY***

> *"INCONTROVERTIBLE FACTS OR UNCONTESTED TESTIMONY", OR THEY ARE "GLARINGLY IMPROBABLE" OR "CONTRARY TO COMPELLING INFERENCES". IN THIS CASE, THEY WERE NOT. THE JUDGE'S FINDINGS OF FACT ACCORDED TO THE WEIGHT OF LAY AND EXPERT EVIDENCE AND TO THE RANGE OF PERMISSIBLE INFERENCES. THE MAJORITY OF THE COURT OF APPEAL SHOULD NOT HAVE OVERTURNED THEM. [FOOTNOTES OMITTED]*

In short, the High Court found that the Court of Appeal had not applied the correct standard of review, and had it done so (as the minority did) it would have dismissed the appeal. The High Court ordered that Robinson's appeal was to be allowed with costs and it set aside the orders of the Court of Appeal, and in their place ordered that the plaintiffs' appeal be dismissed with costs.

This case reminds practitioners that their first duty is to establish the facts with sound evidence and reminds courts of appeal that interference with the trial court's findings based on such evidence requires more than just favouring a different outcome.

Robinson was represented by S.L. Doyle QC and M.T. Hickey instructed by Peter Axelrod of Meridian Lawyers. The plaintiffs were represented by W. Sofronoff QC, M. Eliadis and C. George instructed by Roger Singh and Bill King of Shine Lawyers.

1 [2016] HCA 22, decision by French CJ, Bell, Keane, Nettle and Gordon JJ.
2 McMurdo, P and Alan Wilson, J; Holmes, JA dissented.
3 Peter Lyons, J.
4 A star shaped piece of flexible steel serving a similar purpose to a universal joint in an automobile drive shaft.
5 It was never proven who made the error, but it was accepted that the most likely culprit was a LAME doing work immediately prior to the two 100 hourly inspections.
6 A painted line which connects the bolt head, the parts being bolted and the nut and which will break if the bolt rotates relative to parts being fastened.
7 214 CLR 118 at 126 [25] per Gleeson CJ, Gummow and Kirby JJ; [2003] HCA 22.

Changes to legislation governing the use of remotely piloted aircraft in Australia

Andrew Mansfield and Kevin Bartlett

On 29 March 2016, the *Civil Aviation Legislation Amendment (Part 101) Regulation 2016* (Cth) was registered. The Regulation introduces a number of important changes to the law governing the use of what will now be referred to as "remotely piloted aircraft" or RPAs. This change in terminology from "unmanned aerial vehicle" or UAV brings Australia into line with the terminology used by the International Civil Aviation Organisation.

The regulatory changes will take effect from 29 September 2016. The changes aim to ease the burden of regulatory compliance for RPA owners and operators, while maintaining Australia's aviation safety standards to protect those sharing the skies with these aircraft and those on the ground below.

The key changes include:

Categorisation of RPAs

RPA will be categorised according to gross weight: large (> 150 kg), medium (25 kg-149.999 kg), small (2 kg-24.999 kg), very small (0.101 kg-1.999 kg) or micro (< 0.1 kg).

Easing of regulatory requirements for low risk operations

There are reduced regulatory requirements for RPAs that fall within the definition of "excluded RPA"[1], including not requiring an unmanned aircraft operator's certificate (UOC) and a remote pilot licence (RePL).

A micro RPA is automatically defined to be an excluded RPA. A very small, small or medium RPA can be classified as an excluded RPA depending on whether it is being operated for the purpose of sport or recreation, or if it is being operated:

- by or on behalf of its owner
- over land owned or occupied by its owner
- in "standard RPA operating conditions", and
- for one or more specified purposes, including aerial spotting, aerial photography, agricultural operations and the carriage of cargo, provided no remuneration is received by its operator or owner, the owner or occupier of the land or any person on whose behalf the activity is being conducted.

The standard RPA operating conditions include the RPA:

- being operated within the visual line of sight of its operator
- being operated at or below 400 feet above ground level by day
- not being operated within 30 metres of a person who is not directly associated with its operation, and
- not being operated in certain prohibited and restricted areas, such as controlled aerodromes and an area in which a fire, police or other emergency operation is being conducted without the approval of the person in charge of that operation.

It is expected that these changes will particularly benefit those using RPAs for aerial photography and private owners of large parcels of farming land, who will now be permitted to carry out RPA operations themselves on their own land using anything up to a medium RPA without a UOC or RePL.

Although not expressly stated in the Regulation the accompanying Explanatory Statement states that the amendments will greatly ease the regulatory burden by permitting a person operating or

conducting operations using a very small RPA for hire or reward to do so without having to obtain a UOC or RePL, provided that the person first notifies CASA.[2] On the face of the amendments, this is arguably inconsistent with the expressed qualifying criteria for an 'excluded RPA'.

Manual of Standards

One of the key changes introduced allows CASA to issue a Manual of Standards for RPAs under Part 101 of the *Civil Aviation Safety Regulations 1998* (Cth).

This will allow detailed operational matters to be dealt with in the Manual as and when they arise in a flexible manner, for example the Manual may specify the requirements for an RPA to be operated in certain prescribed areas. This will further assist in the regulation of developments in this rapidly growing industry—CASA's March 2016 Briefing Newsletter estimated that by 2020, Australia's unmanned aviation sector will have grown between 200% and 500% from its current level.

Penalties

A number of new strict liability offences have been introduced, including conducting non-excluded RPA operations without an UOC. The penalty for these offences is capped at 50 penalty units, which currently equates to $9,000.

Issues for operators, their insurers and the public

RPA operators will no doubt rejoice in the relaxing of the regulatory burdens but should take care to fully familiarise themselves with the changes before they come into effect, to ensure they do not unwittingly breach the regulations. Operators should also ensure they have adequate insurance in place, even when undertaking excluded operations.

The relaxing of the regulatory requirements will no doubt assist in the already rapid development of the RPA industry in Australia as these aircraft become more common in our skies and an increasing number of people turn to them to conduct a variety of operations.

1 Whether an RPA is an excluded RPA is determined by the RPA category and the purpose for which the RPA is being operated.
2 Explanatory Statement to F2016L00400 registered 29 March 2016.

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Questions

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