A WOLF IN AGENTS' CLOTHING?
IN WHAT CIRCUMSTANCES CAN AN AGENT COMPETE WITH ITS PRINCIPAL?

Elliot Ross Offord Brownlee

A dissertation submitted in partial fulfilment of the degree of
Bachelor of Laws (with Honours) at the University of Otago, Dunedin, New Zealand.

6 October 2017.

Acknowledgements

To my supervisor, Professor Rex Ahdar. Thank you for your invaluable feedback, cordial banter, friendly presence at Holy Name Dunedin North, and appreciation for West Coast whitebait. It has been a pleasure working with you.

To my parents, Carol and Tim. Without the love, dedication, and support that you have given me throughout my life, I would not have the opportunities that I do today. I am forever grateful.

To Chrispy, Blake, Levi, Moose, Maria, and Clates. You have supported me ever since I made the leap from auditing to law in 2014. Thank you for your patience and encouragement.

Finally, to Gabriella, Anne, Jonny, Finn, Matt, and Alice, for your friendship. We are all in this together.

Table of Contents

Introduction

The *Flight Centre* cases[1] concerned an alleged attempt by Flight Centre ("FC") to induce Singapore Airlines, Malaysia Airlines and Emirates ("the Airlines") to contravene s 45 of the Trade Practices Act 1974 (Cth) ("the TPA"). This provision prohibited corporations from entering into a contract, arrangement or understanding that had the purpose, effect or likely effect of substantially lessening competition in a market. It has now been repealed and replaced by s 45 of the Competition and Consumer Act 2010 (Cth).

Justice Logan found in the Federal Court that on six occasions between August 2005 and March 2009, FC requested that the Airlines stop selling airfares directly to customers at a discount because this reduced the commission that FC could make on its own sales of airfares to customers as an agent of the Airlines.[2]

This conduct engaged s 45A(1) of the TPA, a deeming provision for price fixing arrangements that attracted per se liability. It has now been repealed and replaced by s 44ZZRD and s 44ZZRF of the Competition and Consumer Act (Cth). These provisions define and deem cartel conduct, including price fixing to be an offence.[3] However, at the time, s 45A(1) of the TPA provided:

> Without limiting the generality of s 45, a provision of a contract, arrangement or understanding, or of a proposed contract, arrangement or understanding, shall be deemed for the purposes of that section to have the purpose, or to have or to be likely to have the effect, of substantially lessening competition if the provision has the purpose, or has or is likely to have the effect, as the case may be, of fixing, controlling or maintaining, or providing for the fixing, controlling or maintaining of, the price for, or a discount, allowance, rebate or credit in relation to, goods or services supplied or acquired or to be supplied or acquired by the parties to the contract, arrangement or understanding or the proposed parties to the contract, arrangement or understanding, or by any of them, or by any bodies corporate that related to any of them, *in competition with each other* (emphasis added).

The question this dissertation seeks to answer concerns the last five words of this provision. Can an agent be 'in competition' with its principal so that it can be held liable for price fixing under Australian and New Zealand competition legislation, and if so, in what circumstances? This is a question of form versus substance. On one hand, agents and principals have been

---

1 *Australian Competition and Consumer Commission v Flight Centre Ltd (No 2)* [2013] FCA 1313, (2013) 307 ALR 209 [*Flight Centre Ltd* (FCA)]; *Flight Centre Ltd v Australian Competition and Consumer Commission* [2015] FCAFC 104, (2015) 234 FCR 367 [*Flight Centre Ltd* (FCAFC)]; *Australian Competition and Consumer Commission v Flight Centre Travel Group Ltd* [2016] HCA 49, (2016) 339 ALR 242 [*Flight Centre Ltd* (HCA)].

2 *Flight Centre Ltd* (FCA), above n 1, at [162]–[198]. These findings were not challenged on appeal.

3 Section 44ZZRF is the offence provision for cartel conduct while s 44ZZRD defines what cartel conduct is. New Zealand now has similarly worded cartel provisions in the Commerce Act 1986, ss 30–30A. These were added by the Commerce (Cartels and Other Matters) Amendment Act 2017, s 8.

regarded as a single economic unit, incapable of conspiring with each other.[4] On the other, the inquiry has been said to be more contextual and must look beyond the mere existence of an agency relationship at law. The latter was how the majority of the High Court of Australia approached the issue in *Australian Competition and Consumer Commission v Flight Centre Travel Group Ltd*. It is contended that this method is most consistent with the purpose of competition law, which is to benefit and protect consumers.[5]

This dissertation is comprised of four chapters. Chapter I summarises the cases that made up the *Flight Centre* litigation and highlights the varying opinions of the Judges at each stage as to the issue of agency and competition. Chapter II addresses the concept of a legal agent and examines the distribution arrangements of the Airlines to explain how the relationship between FC and the Airlines was competitive, and why it is necessary to look beyond the legal form of the relationship to its actual substance in practice. Chapter III considers the approaches of the United States and the European Union to the question of agency and competition. Chapter IV then considers whether these approaches can aid in answering the question in Australia and New Zealand. It then concludes by analysing the reasoning of the majority Judges of the High Court in *Flight Centre* in order to ascertain the relevant circumstances in which an agent will likely be held to be in competition with its principal. Despite the varying reasons of the Judges, it is contended that the result in the case can be distilled down to one factor, that FC was in competition with the Airlines because it had full discretion over the price at which it sold airfares to customers.

---

4 *Morton Buildings of Nebraska Inc v Morton Buildings Inc* 531 F 2d 910 (8th Cir 1976) at 917; *Flight Centre Ltd* (HCA), above n 1, at [19] per French CJ dissenting.

5 Commerce Act, s 1A; Competition and Consumer Act (Cth), s 2.

Chapter I: The *Flight Centre* Litigation

A The Facts

FC is a travel agency business. It acts as an "international air travel intermediary" by offering airfares to customers on behalf of the Airlines and by booking those airfares on behalf of customers.[6] The Passenger Sales Agency Agreement ("PSAA") governed its relationship with the Airlines. It was a standard form agreement between it and the International Airline Transport Association, of which the Airlines were members.[7] FC was authorised under the PSAA to sell airfares on the Airlines behalf and in accordance with their instructions.[8] However, the PSAA did not constrain the price at which FC could choose to sell an airfare.[9]

FC received access to the Airlines airfares electronically through the Global Distribution System ("GDS").[10] The Airlines determined the price of the airfare, which included an amount of "at-source commission".[11] Whenever FC received payment for an airfare, the amount of the airfare less the at-source commission was automatically remitted from its bank account to the Airlines.[12] Since there were no price constraints under the PSAA, FC could sell an airfare at a higher price than what was published in the GDS and earn a greater margin on the sale.[13] In practice, FC's strategy was to offer to better the price of any airfare offered by $1 and to give the customer a $20 voucher ("Price Beat Guarantee").[14]

FC had also entered into annual "Preferred Airline Agreements" with each of the Airlines, which allowed it to earn additional income on top of the at-source commission it received for selling airfares.[15] This was usually in return for meeting agreed upon revenue targets and actively marketing the Airlines as a preferred carrier.[16]

The problem for FC though was that the Airlines were increasingly selling airfares directly to consumers rather than through travel agents. Often these airfares were not made available to travel agents in the GDS,[17] or they were being sold directly at a discount below the price that was published in the GDS.[18] This meant that FC had to meet these discounts through its Price Beat Guarantee in order to remain competitive. As can be seen in the tables below, the effect

---

6 *Flight Centre Ltd* (FCA), above n 1, at [23].
7 *Flight Centre Ltd* (FCA), above n 1, at [36].
8 *Flight Centre Ltd* (HCA), above n 1, at [31].
9 *Flight Centre Ltd* (HCA), above n 1, at [34].
10 *Flight Centre Ltd* (FCA), above n 1, at [31].
11 *Flight Centre Ltd* (FCA), above n 1, at [33].
12 *Flight Centre Ltd* (FCA), above n 1, at [36].
13 *Flight Centre Ltd* (HCA), above n 1, at [34].
14 *Flight Centre Ltd* (FCA), above n 1, at [75]–[76].
15 *Flight Centre Ltd* (FCA), above n 1, at [38].
16 The nature of these agreements with each of the Airlines is discussed in detail in *Flight Centre Ltd* (FCA), above n 1, at [45]–[74].
17 *Flight Centre Ltd* (FCA), above n 1, at [37].
18 *Flight Centre Ltd* (FCA), above n 1, at [84] in relation to Singapore Airlines. This also occurred in relation to the other five alleged contraventions and is discussed at [162]–[197].

of this was to reduce the amount of commission that FC could make on a sale than it would otherwise make if the Airlines sold directly at the same prices published in the GDS:[19]

ORDINARY SALE BY FLIGHT CENTRE IN THE GDS		
Published Fare in the GDS		$ 1,000.00
Net Fare Remitted to Airlines		$ 910.00
FC's Commission	9%	**$ 90.00**

THE IMPACT OF DIRECT SALES	
Published Fare in the GDS	$ 1,000.00
Fare Sold Directly At 4% Discount by the Airlines	$ 960.00
Less Net Fare	$ (910.00)
FC's Commission if it Matches the Discounted Price	**$ 50.00**

Justice Logan held in the Federal Court that it was this pressure that led FC to engage with the Airlines on six occasions between August 2005 and March 2009. FC's aim was to stop the Airlines from undercutting the airfares that were published in the GDS and thereby preserve its margin.[20] These arrangements or understandings were deemed to have the purpose, effect or likely effect of substantially lessening competition, in accordance with s 45A(1) of the TPA.[21]

B The Federal Court and the Full Federal Court on Agency and Competition

The main point of contention in the lower Courts was whether FC and the Airlines both competed in the same market, as this was a requirement of s 45. In the Federal Court, Logan J held they competed in the market for the supply of distribution and booking services in respect of available international air travel.[22] The Full Federal Court rejected this finding and held that such a market was artificial and lacked commercial reality.[23] Instead, rivalry existed between FC and the Airlines in the market for the supply of international passenger air travel services.[24] However, this was not a market in which FC and the Airlines supplied services in competition with each other because only the Airlines supplied air travel.[25] FC merely

---

19 These tables show the impact of an airfare being sold directly by the Airlines on FC's commission. It is based on the evidence of Mr Darren Burgess, FC's Supply Relationship and Contracting Manager. See *Flight Centre Ltd* (FCA), above n 1, at [102].

20 *Flight Centre Ltd* (FCA), above n 1, at [160], [164], [170], [177], [187] and [196].

21 *Flight Centre Ltd* (FCA), above n 1, at [161].

22 *Flight Centre Ltd* (FCA), above n 1, at [137].

23 *Flight Centre Ltd* (FCAFC), above n 1, at [134]; unanimously upheld by the High Court of Australia in *Flight Centre Ltd* (HCA), above n 1, at [7] per French CJ, [75] per Kiefel and Gageler JJ, [123] per Nettle J and [150] per Gordon J.

24 At [173].

25 At [175].

operated in this market as an agent of the Airlines. Justice Logan made a similar finding on this point in the Federal Court.[26]

The Full Federal Court's view was based on the traditional notions of agency, although they acknowledged that an agency relationship does not necessarily preclude competition under the TPA. Each case will turn on its own facts and the precise nature of the agency relationship is important.[27] There may well be competition if the agent is no more than a distributor or re-seller, but not where the agent has the power, authority and accompanying legal and equitable duties to contract for and on behalf of the principal.[28]

C The High Court of Australia on Agency and Competition

By a majority (French CJ dissenting), the High Court of Australia reversed the Full Federal Court's decision and held that FC and the Airlines competed in the market for the supply of international airline tickets.[29]

1 Chief Justice French's dissent

Chief Justice French took a similar position to the Full Federal Court. His Honour considered that an agent could be viewed as acting as one economic unit with its principal when it contracts with third parties on their behalf.[30] However, it was inconsistent with that characterisation to treat such conduct as being competitive under the TPA.[31] While it could be strictly said that FC was supplying a service in terms of the TPA, and that its concerns about the Airlines pricing practices were analogous to those of a competitor, FC's conduct was to be properly regarded as that of the Airlines.[32] Furthermore, to regard FC's concerns about pricing as competitive assumed:[33]

> … a concept of competition under the Act which is inconsistent with that of an agency relationship at law. It opens the door to an operation of the Act which would seem to have little to do with protection of competition.

2 Justices Kiefel and Gageler

In holding that FC competed with the Airlines, Kiefel and Gageler JJ were concerned with the actual nature of the agency relationship. This started with a consideration of the contractual relationship between the parties. For instance, the scope of authority conferred on

---

26 *Flight Centre Ltd* (FCA), above n 1, at [135].
27 *Flight Centre Ltd* (FCAFC), above n 1, at [163].
28 At [163].
29 *Flight Centre Ltd* (HCA), above n 1, at [92] per Kiefel and Gageler JJ, [148] per Nettle J and [177] per Gordon J.
30 At [19].
31 At [19].
32 At [22]–[23].
33 At [23].

the agent by the principal and whether that authority was constrained by a duty of loyalty.[34] If the agent had no authority to negotiate with third parties or was required to act in the principal's best interests, then it would not only lack the means of engaging in competition, but also the necessary autonomy and incentive to compete.[35] In their view the existence of an agency agreement does not preclude competition. Whether or not competition exists depends upon the competitive forces at play.[36]

In Kiefel and Gageler JJ's opinion, what was crucial to the outcome of the case was that FC had full discretion under the PSAA to sell an airfare, and to set the prices at which those airfares sold for.[37] FC therefore had a wide scope of authority that was unconstrained. It "… was free in law to act in its own interests in the sale of an airline's tickets to customers", which it did by pursuing its own marketing strategy and by undercutting the prices of other retailers through its Price Beat Guarantee.[38]

3 Justice Nettle

Justice Nettle's approach echoes Kiefel and Gageler JJ's in that the agency relationship did nothing more than endow FC with the authority to enter into a contract on behalf of the Airlines.[39] However, his Honour's analysis also focused on what was actually taking place in the market. While an agent may be less likely to be said to compete with its principal, the question of whether an agent can be regarded as supplying a good or service in their own right depends upon the nature, history and state of relations between the parties.[40]

In considering the facts, Nettle J noted that FC had an "unimpeded contractual right" to determine the price of airfares and could therefore place downward competitive pressure on prices charged directly by the Airlines.[41] This meant that when FC sought the Airlines to stop discounting direct airfares, it was doing so on its own behalf.[42] It could also be inferred that by selling airfares directly, the Airlines were doing so in order to avoid paying FC commission, and this meant they were plainly in competition with FC.[43] His Honour concluded that the "factual reality and legal substance of the matter" showed that it was FC who supplied airfares to customers, albeit as an agent.[44]

---

34 At [83].
35 At [83].
36 At [84].
37 At [89].
38 At [90].
39 At [125].
40 At [147].
41 At [132].
42 At [145].
43 At [130].
44 At [147].

4 Justice Gordon

Justice Gordon was dismissive of FC's role as an agent because s 45A was concerned with competition and not agency.[45] Her Honour thought that the focus on FC as a legal agent was too narrow. By dealing with customers in its own right FC effectively acted as its own principal, and by seeking to get customers the best deal it was in direct competition with the Airlines.[46] While the description of FC as an agent may be legally accurate, in Gordon J's opinion the description:[47]

> … masks the proper identification of the rivalrous behaviours that occur at the point at which Flight Centre is dealing with customers in its own right without reference to any interests of any airlines.

D Summary of the Different Viewpoints

It can be seen that form was a key consideration for both sides in these cases. For the Full Federal Court and French CJ, if the agent is a legal agent who can enter into contractual relations on its principal's behalf, then there is no scope for further inquiry. While deciding the case differently, Kiefel and Gageler JJ also focus on form, in particular, the powers and duties that the agent has under the agency agreement.

However, both Nettle and Gordon JJ show that agency may not be necessary to resolve the inquiry. Instead, it may be possible to look at the conduct of the parties in the market to determine whether it is competitive. The remainder of this dissertation will consider these different views and argue why the analysis should not stop with the agent's legal status. It will also seek to determine whether the approach of Kiefel and Gageler JJ, or Nettle and Gordon JJ is most appropriate.

---

45 At [153].
46 At [175].
47 At [177].

Chapter II: Can an Agent Compete? Choosing Substance Over Legal Form

A What is Competition?

Under the current Australian and New Zealand competition legislation, two features need to be present in order to establish a per se price fixing claim:[48]

1. a contract, arrangement or understanding that has the purpose, or has or is likely to have the effect of directly or indirectly fixing prices; and

2. the parties to that contract, arrangement or understanding are in competition with each other.

It was non contentious that the arrangements between FC and the Airlines would have the effect of fixing prices. Therefore the key issue is whether the parties were 'in competition' with each other.

New Zealand and Australia both have broad definitions of what competition means. In New Zealand, competition means "workable or effective competition."[49] This has been said to encompass:[50]

> … a market framework which participants may enter and in which they may engage in rivalrous behaviour with the expectation of deriving advantage from greater efficiency.

In Australia, parties to a contract, arrangement or understanding are in 'competition with each other' if they are or are likely to be, or would or would likely be, but for the contract, arrangement or understanding, in competition with each other in relation to the supply, acquisition, resupply or production of goods or services.[51] The same is also true in New Zealand.[52] However, Matt Sumpter has noted that the phrase is yet to receive focused judicial consideration here.[53]

Whether parties are, or are likely to be in competition with each other is a question of fact.[54] While market definition is not a critical element of a price fixing claim, it can be a useful tool

---

48 Competition and Consumer Act (Cth), s 44ZZRD; Commerce Act, s 30A.

49 Commerce Act, s 3(1).

50 *Port Nelson Ltd v Commerce Commission* [1996] 3 NZLR 554 (CA) at 564–565. See also: *Wellington International Airport Ltd v Commerce Commission* [2013] NZHC 3289 at [6]–[27]. For the Australian formulation see *Re Queensland Co-Operative Milling Assoc Ltd* (1976) 25 FLR 169 (ATPT) at 187–189; cited with approval in *Port Nelson Ltd*, at 565.

51 Competition and Consumer Act (Cth), s 44ZZRD(4).

52 Commerce Act, s 30B(c).

53 Matt Sumpter *New Zealand Competition Law and Policy* (CCH, Auckland, 2010) at 147.

54 *Norcast SárL v Bradken Ltd* [2013] FCA 235, (2013) 219 FCR 14 at [259]; Russell Miller *Miller's Australian Competition and Consumer Law Annotated* (38th ed, Thomson Reuters, Sydney, 2016) at 477.

for determining whether parties are in competition with each other.[55] This is because for a horizontal price fixing claim to be successful, the parties to the contract, arrangement or understanding must be operating at the same level in the supply chain.[56]

All three Courts grappled with the issue of market definition in *Flight Centre*, with the High Court ultimately concluding that FC and the Airlines competed in the market for international airline tickets, notwithstanding FC's status as agent. It was also the key issue for both the Federal and Full Federal Courts' in *Australian Competition and Consumer Commission v Australia and New Zealand Banking Group Ltd*.[57] That case was similar to *Flight Centre* in that it concerned whether mortgage brokers and bank branches both competed in the same market for the supply of loan arrangement services.[58] The mortgage brokers received a commission from ANZ if a borrower obtained a loan from the bank through them.[59]

Both Courts in *ANZ* held that the bank and the mortgage brokers did not compete in such a market. It has therefore been suggested that this case is difficult to reconcile with the first instance decision in *Flight Centre* due to the similar distribution models that were present in both cases.[60] However, it has been acknowledged that the decisions are distinguishable on the basis of how the services provided by the parties in those cases are characterised.[61] In *ANZ*, the Full Federal Court agreed with the Federal Court's finding that the mortgage brokers and the banks provided different services. ANZ provided loan arrangement services as part of the process of selling an ANZ loan,[62] whereas mortgage brokers acted independently and provided advice about many different loan products offered by many different loan providers.[63]

Nevertheless, even if it can be established that an agent and its principal operate in the same market, the question of how the agency relationship affects competition still remains. This is where the Full Federal Court and the High Court majority differed in *Flight Centre*. It is contended that in order to conclude that FC and the Airlines did compete, two hurdles need to be overcome. These are:

1. A classification problem – Agents and principals are usually seen as operating at different levels of the supply chain. A question that therefore

---

55 Sumpter, above n 53, at 146.

56 Sumpter, above n 53, at 146.

57 *Australian Competition and Consumer Commission v Australia and New Zealand Banking Group Ltd* [2013] FCA 1206; *Australian Competition and Consumer Commission v Australia and New Zealand Banking Group Ltd* [2015] FCAFC 103, (2015) 236 FCR 78 [*ANZ* (FCAFC)].

58 *ANZ* (FCAFC), above n 57, at [1].

59 *ANZ* (FCAFC), above n 57, at [1].

60 Stephen Corones "Agents As Intermediaries: When Do They Compete With Their Suppliers?" (2014) 42(1) ABLR 50 at 54.

61 Andrew Christopher and Thea Fabricius "In competition with each other? Implications of the apparently divergent outcomes in Flight Centre and ANZ" (2015) 23(1) AJCCL 6 at 12.

62 *ANZ* (FCAFC), above n 57, at [173].

63 *ANZ* (FCAFC), above n 57, at [190].

needs answering is whether FC can be viewed as a competitor operating at the same level as the Airlines, rather than merely being just a downstream distributor.

2. The nature of legal agency – Is it possible to look beyond form to the substance of the relationship, so that while an agent may be an agent in law, such a description is still in the words of Gordon J, "wrong factually"?[64]

B The Classification Problem

1 Agents as part of a vertical arrangement

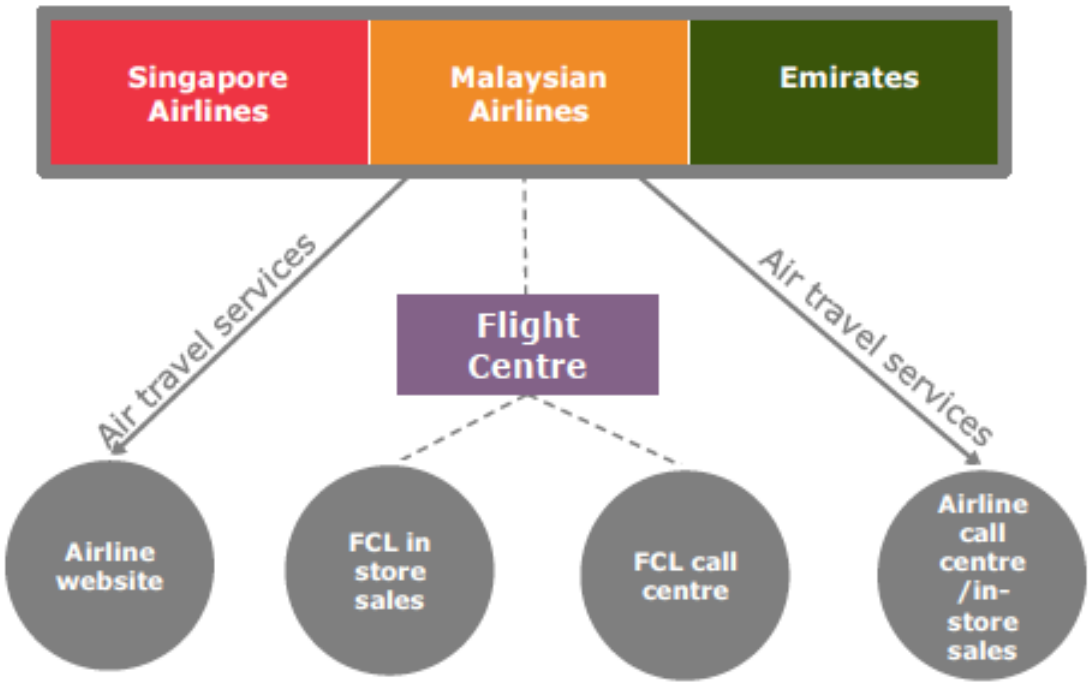
The classification problem is premised on the agent's position in the supply chain, which traditionally has been to view it as constituting a part of a vertical arrangement.[65] So in arguing that Logan J's first instance decision in *Flight Centre* was incorrect, Russell Miller stated that firms supplying the same services but at different functional levels operate in separate markets.[66] While vertical price fixing arrangements in the form of resale price maintenance are currently illegal per se under s 37 of the Commerce Act 1986, this ban is unlikely to apply to agents because they only sell goods on behalf of a supplier and do not take title to them.[67]

2 The hybrid nature of dual distribution arrangements

It is contended that Miller's point obscures the nature of the arrangements between FC and the Airlines, which was one of dual distribution. The Airlines, who ultimately provide the actual transportation, sold airfares directly while also using travel agents like FC. Figure 1 illustrates this relationship:[68]

64 *Flight Centre Ltd* (HCA), above n 1, at [152].
65 Sumpter, above n 53, at 203.
66 Miller, above n 54, at 233.
67 Sumpter, above n 53, at 227–228. In Australia resale price maintenance applies to both goods and services; Competition and Consumer Act (Cth), s 96A. However, in New Zealand it only applies to goods; Commerce Act, s 37.
68 Ashurst "Vertical price fixing? ACCC arguments in Flight Centre and ANZ grounded by Full Court" (Competition Law News, 3 August 2015) at 3.

Figure 1: Dual Distribution Arrangements of Flight Centre and the Airlines



Source: Ashurst "Vertical price fixing? ACCC arguments in Flight Centre and ANZ grounded by Full Court" (Competition Law News, 3 August 2015) at 3.

Firms that engage in dual distribution compete at two different levels in the distribution chain.[69] Firms compete with other manufacturers at the production level while also competing with distributors of their products at the distribution level.[70] It has been said that at the distribution level, dual distribution arrangements are of a hybrid nature. By using distributors the arrangements have vertical aspects. However, they also involve elements of horizontal competition because the manufacturer is competing against its distributors by selling directly.[71]

The challenge under US antitrust law in this context has been whether to regard restraints imposed by a manufacturer on its distributor as being horizontal or vertical. This is because horizontal restraints are illegal per se, whereas vertical restraints are subject to a less stringent rule of reason analysis.[72] The US rule of reason is similar to New Zealand's substantial

69 Robert Zwirb "Dual Distribution And Antitrust Law" (1988) 21 Loy LA L Rev 1273 at 1275.

70 Zwirb, above n 69, at 1275–1276.

71 Barbara O Bruckmann "Fresh Perspectives on Dual Distribution: Managing Antitrust Risks of Price-Related Restraints" (2003) 17(3) Antitrust 18 at 18; Gregory Gundlach and Alex Loff "Dual distribution restraints: Insights from business research and practice" (2013) 58(1) Antitrust Bull 69 at 70–71.

72 *Continental TV Inc v GTE Sylvania Inc* 433 US 36 (1977) at 57–59, cited by Zwirb, above n 69, at 1283–1284; Val Ricks and R Chet Loftis "Seeing The Diagonal Clearly: Telling Vertical From Horziontal In Antitrust Law" (1996) 28 U Tol L Rev 151 at 151–155.

lessening of competition test under s 27 Commerce Act.[73] There is therefore an obvious incentive to argue that a restraint is vertical in order to avoid the strictness of per se liability, in particular because vertical restraints are often permitted under the rule of reason.[74]

US courts have in the past considered the source of the restraint in determining what side of the horizontal/vertical divide a dual distribution restraint falls.[75] If the restriction originated from the manufacturer the arrangement was deemed to be vertical, whereas if it originated from distributors in concert with the manufacturer it was deemed to be horizontal.[76] While this approach has not been overruled,[77] some commentators have expressed the opinion that such an analysis is insufficient because it ignores the benefits that some restraints may have, such as increasing efficiencies in the distribution of the manufacturer's product and thus promoting inter-brand competition.[78] These restraints, such as territorial restrictions, would otherwise be regarded as being vertical and subject to the rule of reason if the manufacturer did not sell directly and only relied on distributors.[79]

An alternative method that has been posited involves first examining whether a restriction has the potential to increase efficiency, and then considering whether the restriction increases the ability to restrict output.[80] It is only where the restriction lacks the former, and has the latter feature that the per se rule should apply.[81] This analysis can also be supplemented by inquiring into the likely business purpose that the restraint serves, which may aid in understanding the effects of the restraint.[82] A further alternative that has been suggested is to consider whether the restraint serves the vertical interests of the supplier or the dominant interests of the distributors.[83]

However, it is unlikely that such a detailed inquiry is necessary in Australia or New Zealand. This is because our key price fixing provisions, ss 30A(2) Commerce Act and 44ZZRD(2) Competition and Consumer Act (Cth) do not distinguish between vertical and horizontal arrangements.[84] All that is required is for the parties to be 'in competition' with each other. As already explained, competition is an ever present feature of the dual distribution relationship. It arises because the separate channels of distribution (direct sales by the

---

73 Sumpter, above n 53, at 96. Note that resale price maintenance agreements are now also analysed under the rule of reason: *Leegin Creative Leather Products Inc v PSKS Inc* 551 US 877 (2007).

74 Ricks and Chet Loftis, above n 72, at 155.

75 Zwirb, above n 69, at 1286–1287; Ricks and Chet Loftis, above n 72, at 156; Bruckman, above n 71, at 19.

76 Zwirb, above n 69, at 1286–1287.

77 Bruckmann, above n 71, at 20.

78 Zwirb, above n 69, at 1290; Ricks and Chet Loftis, above n 69, at 168.

79 Zwirb, above n 69, at 1277;

80 Zwirb, above n 69, at 1332–1333. This method is based on the reasoning of the US Supreme Court in *Broadcast Music Inc v Columbia Broadcasting System* 441 US 1 (1979).

81 Zwirb, above n 69, at 1333.

82 Zwirb, above n 69, at 1335–1336.

83 Ricks and Chet Loftis, above n 72, at 169–175.

84 Christopher and Fabricius, above n 61, at 6–7.

manufacturer and indirect sales via distributors) may come into conflict and end up competing for the same set of customers.[85] This is exactly what occurred in *Flight Centre*. Due to the ever-increasing level of direct sales by the Airlines at lower prices, FC had to respond in order to maintain its margins.

Even if there was a distinction between vertical and horizontal arrangements in Australasian law, it still seems likely that FC's proposed arrangement with the Airlines would be deemed to be horizontal under the US methods. This is because the proposed restraint originated with FC at the US level and it sought to serve FC's interests rather than the Airlines. It is also questionable whether the restraint would increase efficiency, and it would likely reduce output because the Airlines would be prevented from discounting airfares relative to the prices published in the GDS. Furthermore, Barbara Bruckmann noted that direct communications from a manufacturer's store, that put pressure on competing independent distributors to adhere to suggested prices, may result in a court finding an unlawful horizontal price fixing agreement.[86] *Flight Centre* is somewhat analogous to this point. While the pressure could be seen as being directed upwards from FC at the distribution level, to the Airlines at the supply level, it can also be viewed as a proposed price fixing arrangement at the distribution level between two airfare retailers.

C The Nature of Legal Agency

1 An agent's acts are really the principal's

While dual distribution relationships have a competitive aspect, the problem of agency persists. Can the agent be separated from its principal so that the two parties can be 'in competition'? *Bowstead & Reynolds on Agency*, the leading UK text, states that agency generally refers to the situation where a person (the agent) has the authority to affect the legal relations of another person (the principal) against third parties.[87] These acts usually occur in the formation and discharge of contracts, and in the disposition of property.[88] In the contractual sphere, the ruling notion of agency has been said to be that an agent's acts are to be treated as being those of the principal.[89] This is characterised by the Latin phrase *qui facit per alium facit per se*: he who acts through another does the act himself.[90]

This general formulation can be seen echoing in the reasoning of the lower Courts, and in French CJ's dissenting High Court judgment in *Flight Centre*. The Federal and Full Federal Courts both considered that only the Airlines supplied international air travel. Although FC

85 Gundlach and Loff, above n 71, at 80.
86 Bruckmann, above n 71, at 21.
87 Peter Watts and FMB Reynolds *Bowstead & Reynolds on Agency* (20th ed, Sweet & Maxwell, London, 2014) at 1–003.
88 At 1–003.
89 At 1–027.
90 At 1–027; quoted by French CJ in *Flight Centre Ltd* (HCA), above n 1, at [15].

operated in this market, this was only as their agent. In effect this was to say that while FC could sell airfares to whomever they chose at prices they set themselves, this was still to be treated in law as an act of the Airlines, and not an act of FC in competition with them. Chief Justice French also deferred to this view despite acknowledging that FC could be said to be supplying a service in terms of the Act.

This view is persuasive because when purely considering the legal form, it is difficult to see how FC was acting in its own right. As can be seen from French CJ's concluding paragraphs, it was impossible for his Honour to do so.[91] "[FC's] proposals with respect to the pricing practices of its principals were not proposals offered by it as their competitor but as their agent."[92] So while FC did seek to control the price of airfares, its actions were not competitive because as an agent it was incentivised to secure business for the Airlines exclusive supply of air travel services.[93]

2 Commercial certainty

The argument in favour of legal agency also has its attractions from a commercial perspective. Brent Fisse has observed that the rise of the digital economy has caused the use of dual distribution agreements to markedly increase because the internet has provided new distribution channels.[94] Dual distribution agreements are generally output enhancing,[95] but the effect of the High Court's decision to extend per se liability to these types of agreements is to increase compliance costs. Parties will now have to check that existing and future agreements are not in breach of cartel provisions under the Act.[96] Commercial law firms in Australia, New Zealand and the United Kingdom have already expressed this warning, and have advised their clients to carefully consider their current arrangements.[97] A further concern is that because liability is per se, the Australian Competition and Consumer Commission has a lower burden of proof, and does not have to show that there has been a substantial lessening of competition.[98] This has been seen as an issue because the penalties

---

91 *Flight Centre Ltd* (HCA), above n 1, at [23]–[24].

92 At [24].

93 Chapman Tripp "Court takes ACCC back to basics" (4 August 2015). <www.chapmantripp.com/publications/court-takes-accc-back-to-basics>.

94 Brent Fisse "The High Court Decision in ACCC v Flight Centre – Crash Landings Ahead?" (2017) 45(1) ABLR 61 at 65.

95 At 65.

96 At 67.

97 Ashurst "ACCC wins long-haul case against Flight Centre: has "competition" expanded to a new plane?" (16 December 2016) <www.ashurst.com/en/news-and-insights/legal-updates/competition-law-news---accc-wins-long-haul-case-against-flight-centre/>; Torrin Crowther, Glen Shewan and Luke Becker "Australian High Court rules against Flight Centre in price-fixing case" (15 December 2016) Bell Gully <www.bellgully.com/publications/australian-high-court-rules-against-flight-centre-in-price-fixing-case>; Norton Rose Fulbright "Agent v Principal? Agency in Australian Competition Law" (July 2017) <www.nortonrosefulbright.com/knowledge/publications/155188/agent-v-principal-agency-in-australian-competition-law>.

98 Fisse, above n 94, at 65–66.

for breaching s 44ZZRF Competition and Consumer Act (Cth) are severe.[99] This includes a maximum fine of $10,000,000 for companies,[100] while individuals can be held criminally liable and sentenced to imprisonment.[101]

The tenet of the commercial argument would therefore appear to be one of certainty. On the approach of the Full Federal Court and French CJ, parties to dual distribution agreements could rest assured that provided they were in a legal agency relationship, they would not attract per se liability under the Act and be subject to potentially severe penalties. However, the High Court's decision makes the position less clear, particularly given the varying reasons for the majority's judgment. Under Kiefel and Gageler JJ's method, the parties to an agreement would either need to show that the agent did not have full discretion over price, or that there were some constraints on the agent's authority so that it was not acting in its own interests. To satisfy Nettle and Gordon JJ's approach, the parties would have to undertake a further enquiry into the state of relations of both parties in the market to ensure that they were not in competition.

While certainty should not be a means to instantly dismiss the High Court decision, the arguments are still persuasive. Given the concerns, is there a basis to impose per se liability in these circumstances when some commentators have suggested there is no obvious competition impact?[102]

D An Agent in Law But Not in Substance?

As discussed earlier, the agent's authority to affect their principal's legal relations with third parties generally defines legal agency. However, it is also necessary to consider the other features that comprise the relationship. This is because if these features are lacking, it may be possible to argue that the agent is not in substance an agent for the purposes of the test applied by the Full Federal Court and French CJ in *Flight Centre*.

1 Agency is a fiduciary relationship

The agency relationship is inherently a fiduciary relationship.[103] This derives from the agent having the authority to affect their principal's legal position.[104] It is because of this special power to alter someone's legal position that the law also imposes special duties of a fiduciary nature on the agent.[105] Lord Justice Millett has said that "[t]he distinguishing obligation of a

99 Fisse, above n 94, at 65–66.
100 Competition and Consumer Act (Cth), s 44ZZRF.
101 Competition and Consumer Act (Cth), s 79.
102 Chapman Tripp, above n 93.
103 *Amaltal Corp Ltd v Maruha Corp* [2007] NZSC 40, [2007] 3 NZLR 192 at [22].
104 Watts and Reynolds, above n 87, at 1–004.
105 Watts and Reynolds, above n 87, at 1–014 and 1–023.

fiduciary is the obligation of loyalty."[106] This obligation consists of a number of duties including duties to act in good faith, not to profit from a position and not to enter into conflicts of interest.[107] Other duties include duties not use the principal's property to acquire an undisclosed benefit,[108] not to acquire benefits from third parties,[109] to keep the principal's property separate,[110] and to account in equity to the principal.[111] For Watts and Reynolds, these duties form such a prominent part of the agent's position that they are to be incorporated within the definition of agency.[112]

However, that is not to say that these duties cannot be altered. If there is a contract of agency the rights and duties of the principal and agent will be dependent upon the express and implied terms of the contract between them.[113] As Mason J said in *Hospital Products Ltd v United States Surgical Corp*, if a fiduciary relationship is to exist at all, it must be consistent with, and conform to the terms of the contract between the parties.[114] In this regard it has been suggested that in some situations there may be very limited or no fiduciary duties owed at all.[115]

2 Agency is not a commercially adverse relationship

It has been said that agency and sale are mutually exclusive relationships and that the outcome of many commercial disputes may turn on this distinction between an agent and a "buyer for resale".[116] Agency involves a fiduciary relationship of trust and confidence, whereas sale is a "commercially adverse relationship".[117] In a commercially adverse relationship the two sides (buyer and seller) have adverse commercial interests, they both seek to profit from the other.[118] In other words, the parties are at arm's length commercially.[119] However, an agency relationship is not commercially adverse because the agent must act in the principal's interests, even if employed on a commercial basis.[120] The imposition of fiduciary duties supports this position.[121]

106 *Bristol and West Building Society v Mothew* [1998] Ch 1 (CA) at 18; quoted by Watts and Reynolds, above n 87, at 6–034.
107 At 18; quoted by Watts and Reynolds, above n 87, at 6–034.
108 Watts and Reynolds, above n 87, at 6–075.
109 Watts and Reynolds, above n 87, at 6–079.
110 Watts and Reynolds, above n 87, at 6–090.
111 Watts and Reynolds, above n 87, at 6–094.
112 Watts and Reynolds, above n 87, at 1–014.
113 *Kelly v Cooper* [1993] AC 205 (PC) at 213–214.
114 *Hospital Products Ltd v United States Surgical Corp* (1984) 156 CLR 41 (HCA) at 97 per Mason J.
115 Watts and Reynolds, above n 87, at 6–056.
116 Watts and Reynolds, above n 87, at 1–032.
117 Watts and Reynolds, above n 87, at 1–032.
118 AS Burrows and MG Bridge *Principles of English Commercial Law* (Oxford University Press, 2015) at 1.10.
119 Burrows and Bridge, above n 118, at 1.153.
120 Burrows and Bridge, above n 118, at 1.10.
121 Burrows and Bridge, above n 118, at 1.10.

As Finn J noted in *Hannaford v Australian Farmlink Pty Ltd*, the distinction between sale and agency "can be a fine one not easy to draw."[122] In the US, the focus in the past has been on whether the supposed agent is acting primarily for his own benefit. So for buyers, § 14J of the *Restatement of the Law, Second: Agency* provided:[123]

> One who receives goods from another for resale to a third person is not thereby the other's agent in the transaction: whether he is an agent for this purpose or is himself a buyer depends upon whether the parties agree that his duty is to act primarily for the benefit of the one delivering the goods to him or is to act primarily for his own benefit.

For suppliers, § 14K of the *Restatement of the Law, Second: Agency* provided:[124]

> One who contracts to acquire property from a third person and convey it to another is the agent of the other only if it is agreed that he is to act primarily for the benefit of the other and not for himself.

A general approach was taken in New Zealand in *Fraser-Ramsay (New Zealand) Ltd v De Renzy*, where Williams J was concerned with whether there was an intention to create a fiduciary relationship between the parties.[125] However, Finn J in *Hannaford* considered that the analysis requires a finely tuned contextual focus on particular indications.[126] These include:[127]

1. whether the supposed agent has authority to enter into contracts with third parties on the principal's behalf;

2. interlocking factors such as who sets the sale price and whether the supposed agent is remunerated by pre-arranged commission;

3. whether the supposed agent is to answer to the buyer for the quality of goods sold; and

---

122 *Hannaford v Australian Farmlink Pty Ltd* [2008] FCA 1591 at [46].

123 American Law Institute *Restatement of the Law, Second: Agency* (2nd ed, St Paul, Minnesota, 1958) § 14J; quoted in *Hannaford*, above n 122, at [48]. Note that this edition has now been superseded by American Law Institute *Restatement of the Law, Third: Agency* (3rd ed, St Paul, Minnesota, 2006). However, *Restatement, Second* is still regarded as being of value outside the US because it expresses specific views on a large number of detailed points. In contrast, *Restatement, Third* is less detailed and seeks to set out many fewer and more generalised principles; Watts and Reynolds, above n 87, at xvi.

124 American Law Institute, above n 123, § 14K.

125 *Fraser-Ramsay (New Zealand) Ltd v De Renzy* (1912) 32 NZLR 553 (CA) at 566; considered in *Hannaford*, above n 122, at [49].

126 *Hannaford*, above n 122, at [49].

127 At [51]–[54].

4. whether the parties have agreed that the supposed agent must keep their principal's property separate and an accurate account of transactions entered into on the principal's behalf.

3 What duties did Flight Centre owe? Is it an agent in substance?

As can be seen from the facts of *Flight Centre*, FC owed a limited set of duties to the Airlines. While it is not suggested that the relationship of agency and the commercially adverse relationship of sale is not distinct, it is contended that the lines between them nevertheless appear to be blurred in this case. At its core is the fact that FC was not under a duty to act in the Airlines interests. This is important because this feature is at the heart of the distinction between agency and sale. FC had full discretion over price and it could choose whether or not to sell a particular airfare. In some circumstances it has been held that an agent can sell above a prearranged price and retain the profits.[128] Furthermore, it has been acknowledged that some agents, such as brokers, are hired for their expertise in determining market price,[129] However, they are still under a duty to sell goods at the best obtainable price.[130]

The difference in *Flight Centre* however, is that there were no price constraints imposed whatsoever. Not only could FC sell in excess of the amount published in the GDS, but it was also free to place downward pressure on prices. It was under no duty to achieve the best price it could for the Airlines, and by pursuing its Price Beat Guarantee strategy it did not.

I submit that there should not be a strict deference to legal agency in situations where the agency relationship has features that are more akin to a commercially adverse relationship of sale. In those circumstances it might not be appropriate to simply treat the agent's acts as being those of its principal. This can be justified first on the basis that the law has previously treated agents as also being principals. In *Aluminium Industrie Vaassen BV v Romalpa Aluminium Ltd*, Roskill LJ held the defendant, who sold the plaintiff's aluminium products to third parties subject to the plaintiff retaining title to the products until they were repaid, sold those products to third parties as principal but also owed a duty to account to the plaintiff for the proceeds of sale as agent.[131] FC could also be viewed as acting in a similar manner. As against its customers, FC acted like a principal in pursuing its own marketing strategy, and by setting its own prices. However, as against the Airlines, it was an agent because it entered

---

128 *Mercantile International Group Plc v Chuan Soon Huat Industrial Group Ltd* [2002] EWCA Civ 288, [2002] 1 All ER (Comm) 788 at [32]–[33], applying *Ex parte Bright, Re Smith* (1879) 10 Ch D 566 (CA).

129 *Morrison v Murray Biscuit Co* 797 F 2d 1430 (7th Cir 1986) at 1438.

130 Watts and Reynolds, above n 87, at 6–019.

131 *Aluminium Industrie Vaassen BV v Romalpa Aluminium Ltd* [1976] 1 WLR 676 (CA) at 690.

into contracts on the Airlines behalf, and was also under duty to remit the net proceeds of its sales to them. This is consistent with how Gordon J viewed the facts in the High Court.[132]

A similar point can be made in the context of fiduciary duties. This is because it has been long established that while a general fiduciary relationship may not exist between the parties, fiduciary duties might still be owed in respect of certain activities.[133] From this it could be said that when the agency relationship limits the scope of the duties owed by the agent, in particular where there is no obligation to act in its principal's best interests, there is greater ability to treat the agent as a commercial party acting in its own right.

Finally, the Full Federal Court in *ANZ* said the following:[134]

> It does not necessarily follow that there can never be a case where a manufacturer (or product originator) which has its own distribution division (or separate economic unit) competes with external distribution channels in the market for the supply of the particular product.

The Full Court released this decision on the same day that they released their decision in *Flight Centre*. However, in *Flight Centre* the Court qualified the above statement by saying that only agents in the sense of distributors or resellers can compete. In doing so the Court set a bright line for competition between those who are legal agents and those who are not. It is contended that it should not have done so and that the words in *ANZ* should mean more than what they now appear to following *Flight Centre*. Why should the test be so strict when cases such as *Flight Centre* show that the distinction between agency and sale is not so obvious?

E Summary: How Flight Centre Could be 'in Competition' with the Airlines

Since dual distribution relationships have a competitive aspect, it is likely that the 'in competition' requirements of s 44ZZRD(2) Competition and Consumer Act (Cth) and s 30A(2) Commerce Act will be prima facie met with regard to those arrangements. The remaining question is whether a price fixing claim can be defeated by an agency argument. While the legal notion of agency is to treat an agent's act as its principal's, it is contended that in some circumstances an agent can be treated as acting in its own right. This will be the case where the agency relationship is closer to being a commercially adverse relationship of sale. This will occur when the agent has full discretion over price and as a result is not required to act in its principal's best interests. This was clearly the case in *Flight Centre*.

---

132 *Flight Centre Ltd* (HCA), above n 1, at [177].

133 *New Zealand Netherlands Society "Oranje" Inc v Kuys* [1973] 2 NZLR 163 (PC) at 166; *Hospital Products Ltd*, above n 114, at 98 per Mason J; *Amaltal Corp Ltd*, above n 103, at [21].

134 *ANZ Ltd* (FCAFC), above n 57, at [297].

Chapter III: Overseas Approaches to the Agency Question

The arguments of counsel and the reasoning of the High Court Judges in *Flight Centre* focused on the approaches of the US and the European Union ("EU").[135] These jurisdictions also formed the basis of Christopher and Fabricius' article on Logan J's first instance decision.[136] This chapter does the same, while Chapter IV considers whether they can have a role in resolving the ultimate question of competition in *Flight Centre*.

A The United States

Liability for price fixing in the US falls under § 1 of the *Sherman Act*, which provides:[137]

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal.

Two elements therefore need to be satisfied in order for § 1 to be violated. First, there must be a contract, combination or conspiracy, and second, that contract, combination or conspiracy must impose an unreasonable restraint of trade.[138] Price fixing arrangements have traditionally been deemed to be illegal per se regardless of their reasonableness.[139] However, this is no longer the case for resale price maintenance.[140]

1 An exception for agents

A contract, combination or conspiracy requires concerted action. Independent action is not proscribed.[141] In other words, more than one party is required to establish a conspiracy, and the general rule has been that a conspiracy cannot be based on an agreement between a corporation and its officers, agents or employees.[142]

US case law has taken a number of approaches over the years as to whether an agent and its principal can engage in an anticompetitive conspiracy. The starting point has been to consider whether the agency relationship is genuine. In *United States v General Electric Co*, the US Supreme Court held that General Electric was entitled to set the price at which its agents sold their electric lamps under genuine contracts of agency or consignment because the agent was

---

135 *Flight Centre Ltd* (HCA), above n 1, at [18]–[20] per French CJ, [85]–[88] per Kiefel and Gageler JJ and [133]–[143] per Nettle J.

136 Christopher and Fabricius, above n 61, at 13–15.

137 Sherman Anti-Trust Act 15 USC § 1.

138 *Valuepost.com of Charlotte Inc v Bayer Corp* 561 F 3d 282 (4th Cir 2009) at 286, citing *Dickson v Microsoft Corp* 309 F 3d 193 (4th Cir 2002) at 202.

139 *United States v Trenton Properties Co* 273 US 392 (1927) at 397–398.

140 *Leegin Creative Leather Products Inc*, above n 73.

141 *Monsanto Co v Spray-Rite Service Corp* 465 US 752 (1984) at 761.

142 *Morton Buildings of Nebraska Inc*, above n 4, at 917.

merely transferring title from the principal to the purchaser.[143] However, a majority of the Supreme Court later held in *Simpson v Union Oil Co of California* that a consignment agreement that fixed the price at which Union Oil's dealers could sell its gasoline was in breach of the Act.[144] As part of entering into the consignment agreement, dealers were required to enter into one-year lease agreements of their premises.[145] It was alleged that Union Oil used the lease agreements to police the prices charged by dealers, their leases not being renewed if they breached the terms of the consignment agreement.[146] While the dealers lacked the ability to set their own prices, the majority noted that they exhibited most of the indicia of entrepreneurs.[147] They bore all the risks of loss except for acts of God.[148] In contrast, the principal in *General Electric Co* assumed the risks of fire, flood, obsolescence, price decline, and also insured stock held by the agent.[149]

The majority's opinion in *Simpson* was that Union Oil's distribution scheme was a classic resale price maintenance programme. The effect of the lease and consignment agreements was to coerce the dealers into:[150]

> … an arrangement under which their supplier is able to impose noncompetitive prices on thousands of persons whose prices otherwise might be competitive. The evil of this resale price maintenance programme … is its inexorable potentiality for and even certainty in destroying competition in retail sales of gasoline by these nominal "consignees" who are in reality small struggling competitors seeking retail gas customers.

The majority therefore concluded that to allow Union Oil to rely on the use of the consignment device would allow antitrust liability to be avoided "…merely by clever manipulation of words, not by differences in substance."[151]

Other cases have had different focuses of inquiry. In *Morton Buildings of Nebraska Inc v Morton Buildings Inc*, the US Court of Appeals Eighth Circuit stated that a corporation could not enter into a conspiracy with its agent unless the agent was acting beyond the scope of its authority or for its own benefit.[152] The Eighth Circuit followed this approach in *The Victorian House Inc v Fisher Camuto Corp*, and held that the defendant had entered into a conspiracy with one of its distributors to terminate the plaintiff's contract to sell the defendant's stock. [153] The distributor also operated his own retail stores, which competed in the same area as the

143 *United States v General Electric Co* 272 US 476 (1926) at 488.
144 *Simpson v Union Oil Co of California* 377 US 13 (1964).
145 At 14.
146 At 14–15.
147 At 20.
148 At 15 and 20.
149 *General Electric Co*, above n 143, at 483.
150 *Simpson*, above n 144, at 21.
151 At 22.
152 *Morton Buildings of Nebraska Inc*, above n 4, at 917.
153 *The Victorian House Inc v Fisher Camuto Corp* 769 F 2d 466 (8th Cir 1985).

plaintiff.[154] His stores were operating at a loss at the time, while the plaintiff was selling the defendant's stock at a sizeable discount.[155] The distributor was held to be acting in his own interests, notwithstanding his status as an agent, because terminating the plaintiff's contract would lower price competition and make the distributor's stores more competitive.[156]

In *Pink Supply Corp v Hiebert*, the Eighth Circuit considered whether there was a unity of economic interests in determining whether a principal and agent could be considered separate entities in order to engage in a conspiracy.[157] The court said:[158]

> Corporate agents, even if separately incorporated, who function as an integral part of the corporate entity, represent no separate step in the distribution chain, act for the corporate principal's benefit and are functionally indistinguishable from employees, may lack the independent economic consciousness necessary to be considered conspirators separate from their principal.

The US Court of Appeals Seventh Circuit considered these approaches in *Morrison v Murray Biscuit Co*.[159] In reconciling the different Supreme Court opinions in *General Electric Co* and *Simpson*, Judge Posner stated that the key was to ask whether the agency agreement had "a function other than to circumvent the rule against price fixing".[160] As to the Eighth Circuit's focus on whether the agent was acting for its own benefit, his Honour considered that all this meant was that the terms of the agency agreement will not always resolve the issue and that if the agent is really acting as a principal, his formal contractual status will not save him.[161]

The Seventh Circuit affirmed this approach in *Illinois Corporate Travel Inc v American Airlines Inc*.[162] In that case American Airlines refused to allow a travel agent to advertise airfares at a discount by rebating part of their commission.[163] The travel agent's case failed because the Court agreed with the District Court's finding that the relationship was one of genuine agency and not one to circumvent the rules against price fixing.[164] American Airlines set the prices, held all inventory, bore all the credit risk of customers and bore the risk that it may be unable to provide transportation due to weather or mechanical difficulties.[165]

---

154 At 468.
155 At 469.
156 At 469.
157 *Pink Supply Corp v Hiebert Inc* 788 F 2d 1313 (8th Cir 1986) at 1316.
158 At 1316.
159 *Murray Biscuit Co*, above n 129.
160 At 1436.
161 At 1438–1439.
162 *Illinois Corporate Travel Inc v American Airlines Inc* 806 F 2d 722 (7th Cir 1986) at 725.
163 At 724.
164 At 725.
165 At 725.

In reaching this finding, the Court clarified that the *Murray Biscuit Co* test does not turn on intention.[166] Rather the question is whether:[167]

> "…when, objectively viewed, the [agency] arrangement serves one of the economic functions of agencies in general, such as apportioning risk to the firm best able to bear risk, or lodging pricing decisions in the firm best able to gauge market conditions."

The Court noted that American Airlines' policy may injure consumers if they had to pay higher prices, but considered this was merely a short run view, and that the effects of the policy needed to be balanced against any potential benefits to consumers that may be "worth the price".[168] They accepted a potential benefit of the policy included the prevention of free riding by discount agencies at the expense of full service agencies, and that a unilateral pricing strategy would allow agencies to compete on service.[169]

The Eighth Circuit later refined the approach in *Ryko Manufacturing Co v Eden Services*.[170] The Court, applying *Simpson* noted that they were required to examine various indicators of entrepreneurship as well as the allocation of business risks in evaluating the substance of the agency agreement.[171] If the agent dealt with the principal as an independent businessman and bore most of the risks on transactions with third parties, then the agreement was unlikely to insulate the agent from antitrust liability.[172] The opposite was true though if it was the principal who bore most of the risks and if they still retained title, dominion and control over its goods.[173] Of relevance to the Court in that case was that the agent never took possession or title to the principal's stock and therefore did not bear any of the risks of holding inventory.[174] Additionally, purchase orders were made in the principal's name so the agent bore no credit risk, the agent was not solely responsible for making sales, and the agent only had a minor capital investment in the venture and was remunerated by commission.[175] This all pointed to the finding that the agent did not have entrepreneurial independence.[176]

2 Tying the different methods together

In the more recent decision of *Valuepost.com of Charlotte Inc v Bayer Corp*, the US Court of Appeals Fourth Circuit applied aspects of the reasoning in *Simpson*, *Murray Biscuit Co* and

166 At 725.
167 At 726.
168 At 727.
169 At 728–729.
170 *Ryko Manufacturing Co v Eden Services* 823 F 2d 1215 (8th Cir 1987).
171 At 1223.
172 At 1223.
173 At 1223.
174 At 1225.
175 At 1225–1226.
176 At 1226.

Ryko Manufacturing Co to reach the conclusion that there was a genuine agency agreement.[177] In doing so the Court made three inquiries. These were as to:

1. Which party bore the risk of loss?[178] This was the threshold question for the Court,[179] and doing so they drew upon *Ryko Manufacturing Co*.[180]

2. Whether the agency agreement was entered into for "legitimate business reasons".[181] This was an application of the *Murray Biscuit Co* test for whether the agency agreement had a function other than to circumvent the rule against fixing.[182]

3. Whether the agency agreement was a "product of coercion".[183] The Fourth Circuit noted this was a concern of the Supreme Court in *Simpson*, because the gasoline retailers were entirely dependent on their contracts with Union Oil for supply.[184]

It would therefore seem that the US approach has become more unified following *Valuepost.com*. While the earlier decisions tended to focus on one discrete feature, the analysis is now a more universal inquiry that encompasses the structural features as well as the economic justifications for the agency agreement.

B The European Union

1 Relevant competition legislation

Price fixing is governed in the EU under Article 101(1) of the Treaty on the Functioning of the European Union.[185] The article prohibits:[186]

> … all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the internal market, and in particular those which:
>
> (a) directly or indirectly fix purchase or selling prices or any other trading conditions.

177 *Valuepost.com of Charlotte Inc*, above n 138.
178 At 291–292.
179 At 291.
180 At 290 and 292.
181 At 292–293.
182 At 290–291.
183 At 293.
184 At 291.
185 Treaty on the Functioning of the European Union [2012] OJ C326/47; formerly Treaty Establishing the European Community [2002] C325/1, Article 81(1).
186 Treaty on the Functioning of the European Union [2012] OJ C326/47, Article 101(1).

Whether a party is an 'undertaking' is critical to determining liability because it is only agreements between undertakings that are caught by Article 101(1).[187] In *Höfner v Macroton GmbH* the European Court of Justice held that 'undertaking' encompasses every entity engaged in economic activity regardless of the entity's legal status and how it is financed.[188] In *Pavlov v Stichting Pensioenfonds Medische Specialisten*, the Court of Justice defined 'economic activity' to mean "…any activity consisting in offering goods or services on a given market…" [189] In *Albany International BV v Stichting Bedrijfspensioenfonds Textielindustrie*, Advocate General Jacobs considered that the concept serves dual purposes:[190]

> On the one hand … it makes it possible to determine the categories of actors to which the competition rules apply. That issue arises for example in cases concerning public bodies. The test in such cases is whether the actor is engaged in an activity of an economic or commercial nature. On the other hand, it serves to establish the entity to which a certain behaviour is attributable. That second issue arises, for example, in cases involving the relationship between subsidiary and parent companies. The test here is whether there is an independent entity acting in its own right or whether there is only an 'agent' without autonomy to determine its course of action.

The Advocate General also noted that the notion of 'undertaking' is relative and has to be established with regard to the specific activity under scrutiny.[191]

2 When is an agent a separate undertaking?

For an agent to therefore be liable under Article 101(1) it needs to be capable of being regarded as an undertaking separate from its principal. Critical to this analysis is whether the parties to the agreement can be regarded as a single economic entity.[192] If they are then there can be no agreement between undertakings for the purposes of Article 101(1).[193]

In the EU, agents are commonly regarded as commercial agents.[194] This stems from the European Commission's Directive on Self-Employed Commercial Agents, which regulates

---

187 Richard Whish and David Bailey *Competition Law* (8th ed, Oxford University Press, Oxford, 2015) at 85.

188 Case C-41/90 *Höfner v Macroton GmbH* [1991] ECR I-1979 at [21]; quoted in Whish and Bailey, above n 187, at 86.

189 Case C-180/98 *Pavlov v Stichting Pensioenfonds Medische Specialisten* [2000] ECR I-6451 at [75]; quoted in Whish and Bailey, above n 187, at 86.

190 Case C-67/96 *Albany International BV v Stichting Bedrijfspensioenfonds Textielindustrie* [1999] ECR I-5751 at [206].

191 At [207].

192 Alison Jones "The Boundaries of an Undertaking in EU Competition Law" (2012) 8(2) ECJ 301 at 302–303; this principle was established in Case 170/83 *Hydrotherm Gerätebau GmbH v Compact del Dott Ing Mario Andreoli* [1984] ECR 2999 at [11].

193 Whish & Bailey, above n 187, at 95.

194 Whish & Bailey, above n 187, at 658.

the relationship between agents and their principals, and provides special rights of protection to agents. [195] This was a new concept for the United Kingdom at the time because the focus of common law agency was on protecting the principle rather than the agent.[196]

As to when an agent might be regarded as a separate undertaking, in *Coöperatieve Vereniging "Suiker Unie" UA v Commission of the European Communities*, the Court of Justice held that:[197]

> If ... an agent works for the benefit of his principal he may in principle be treated as an auxiliary organ forming an integral part of the latter's undertaking, who must carry out his principal's instructions and thus, like a commercial employee, forms an economic unit with this undertaking.

In *DaimlerChrysler AG v Commission of the European Communities*, the Court of First Instance held that the position was otherwise if the agent was allowed under the agency agreement to perform duties that were approximately similar to an independent dealer from an economic perspective.[198] This is because those duties require the agent to accept the financial risks of selling, or of the performance of contracts entered into with third parties.[199] Furthermore, it was held that an agent would not be a separate undertaking, despite having separate legal personality, if it did not independently determine its conduct in the market and merely carried out the principal's instructions.[200]

The Court of Justice affirmed this view in *Confederación Española de Empresarios de Estaciones de Servicio v Compañía Española de Petróleos SA*, and concluded that agency agreements fall within Article 101(1) if the agent assumes one or more of the financial or commercial risks linked to the sale to third parties to a non-negligible extent.[201] In doing so the Court acknowledged that the inquiry will turn on the terms of the agency agreement and "… must be analysed on a case-by-case basis, taking account of the real economic situation rather than the legal classification of the contractual relationship…"[202] The Court also expressed the types of risk factors that may be present when undertaking the inquiry. These include:

---

195 Directive 86/653 on Self-Employed Commercial Agents [1986] OJ L382/17; Watts and Reynolds, above n 87, at 1–040.

196 Watts and Reynolds, above n 87, at 11–001.

197 Case 40/73 *Coöperatieve Vereniging "Suiker Unie" UA v Commission of the European Communities* [1975] ECR 1663 at [480].

198 Case T-325/01 *DaimlerChrysler AG v Commission of the European Communities* [2005] ECR II-3319 at [87].

199 At [87].

200 At [88].

201 Case C-217/05 *Confederación Española de Empresarios de Estaciones de Servicio v Compañía Española de Petróleos SA* [2006] ECR I-11987 [*CEPSA*] at [65].

202 At [46].

1. Risks linked to the sale of goods:[203]

    a. whether the agent assumes the costs of distribution;[204]

    b. whether the agent maintains an inventory of the principal's stock at his own expense;[205]

    c. whether the agent assumes any responsibility for any damage caused to the goods;[206] and

    d. whether the agent assumes any financial risks associated with the sale of the goods, such as deferred payment.[207]

2. Risks linked market specific investments that are necessary for the agent to negotiate or conclude contracts with third parties[208] These include investments made by the agent that are specifically related to the sale of goods, such as investments in premises, equipment or advertising campaigns.[209]

The European Commission drew upon *DaimlerChrysler AG* and *CEPSA* in its *Guidelines on Vertical Restraints*.[210] The *Guidelines* state that there are three relevant types of commercial and financial risk: contract-specific risks, market-specific risks and risks related to other activities conducted in the same market that the principal requires the agent to undertake for its own risk.[211] The analysis starts with contract-specific risks and if none are present, moves on to market-specific risks, and then finally the risks related to other activities within the same market.[212]

An agent will generally not be an undertaking for the purposes of Article 101(1) where property in the goods does not vest in the agent or the agent does not supply the contracted services, and where the agent does not:[213]

- contribute to the costs relating to the supply of the goods or services including transport costs;

---

203 At [51].
204 At [53].
205 At [54].
206 At [55].
207 At [56].
208 At [51].
209 At [59].
210 Commission Notice: Guidelines on Vertical Restraints [2010] OJ C130/1 at [12]–[21].
211 At [14].
212 At [17].
213 At [16]; Whish & Bailey, above n 187, at 660.

- maintain at its own cost or risk an inventory of the principal's goods;
- undertake responsibility towards third parties for damage caused by the product;
- take responsibility for the non-performance of contracts by customers';
- have to invest in sales promotion;
- make market-specific investments in equipment, premises or training of staff; and
- undertake other activities within the same product market required by the principal, unless they are fully reimbursed by the principal.

In the case of genuine agents, their selling function forms part of the principal's activities because the principal bears all the commercial and financial risks of sale.[214] This means that any obligations imposed on the agent fall outside Article 101(1).[215] However, if the agent bears one or more of the above risks then it will be treated as an independent undertaking and subject to Article 101(1).[216]

As can be seen from above, the approach of the EU courts, and in particular the *Guidelines*, has been to create a discrete set of risk criteria. Provided that an agent bears at least one of the risks mentioned, it will be an undertaking and capable of conspiring under Article 101(1). Angela Zhang has been critical of this method.[217] She noted that the rigidness of the guidelines, coupled with the lack of clarification in *CEPSA* as to when a risk will be 'non-negligible' has led to "tremendous uncertainties and difficulties regarding antitrust compliance".[218] In her opinion, the *Guidelines* are so stringent that the effect of them is to almost integrate the agent with the principal.[219] On the Commission's logic, besides having labour costs and the risk of making compensation, a genuine agent is one that behaves almost like an employee.[220] Instead she has contended that approach should be to consider whether the agency agreement is a more efficient contractual form for the parties, as opposed to distribution.[221]

214 At [17].
215 At [17].
216 At [21].
217 Angela Zhang "Toward an Economic Approach to Agency Agreements" (2013) 9(3) Journal of Competition Law & Economics 553.
218 At 554–555.
219 At 570.
220 At 570.
221 At 590.

Chapter IV: What Approach Should Our Courts Take?

As previously discussed, a key criticism of the High Court's decision in *Flight Centre* has been the potential uncertainty that it has created. However, as the US and EU experience has shown, there will be some instances where the agent has the capacity to enter into anticompetitive arrangements with its principal. It is therefore contended that uncertainty should not be the reason for allowing a blanket defence for agency agreements, which is what the Full Federal Court and French CJ appeared to do by setting a bright line between legal agents and dealers.

A The Applicability of the Overseas Approaches

The US and EU approaches are premised on the notion of a single economic unit. If separate legal entities form the same economic unit then they are not capable of conspiring with each other. In undertaking this analysis, a lot of emphasis is placed on the risk factors that an agent may or may not bear. However, Christopher and Fabricius have questioned whether such an approach could be incorporated into Australian law. This is because focusing on the economic rationale of an agency agreement would represent a major departure from the current literal and proscriptive approach.[222] Namely, satisfying the 'in competition' requirement. New Zealand courts have also been cautious about incorporating US antitrust doctrine into domestic law. In *Union Shipping NZ Ltd v Port Nelson Ltd*, McGechan J declined to fully incorporate the 'essential facilities doctrine' into New Zealand law due to the different statutory regimes and commercial settings of the two countries.[223] His Honour noted that while US law may provide valuable insights, the task of New Zealand courts is to interpret and apply New Zealand competition legislation, focusing on the requirements of the relevant provisions.[224]

Nevertheless Christopher and Fabricius suggested taking a more nuanced approach to the price fixing provision in s 44ZZRD Competition and Consumer Act, which recognises that some price fixing agreements may be pro-competitive, and that some agency arrangements may have economic benefits despite the agent and principal literally satisfying the 'in competition' requirement.[225] With regard to price fixing, Lockhart J suggested such an approach in *Radio 2UE Sydney Pty Ltd v Stereo FM Pty Ltd*.[226] His Honour considered that price fixing arrangements that improved competition should not be subject to the per se prohibition against price fixing.[227] However, this approach has not been subsequently

222 Christopher and Fabricius, above n 61, at 15.
223 *Union Shipping NZ Ltd v Port Nelson Ltd* [1990] 2 NZLR 662 (HC) at 705.
224 At 705–706; quoted with approval by Barker J in *Fisher & Paykel Ltd v Commerce Commission* [1990] 2 NZLR 731 (HC) at 756–757.
225 Christopher and Fabricius, above n 61, at 15–16.
226 *Radio 2UE Sydney Pty Ltd v Stereo FM Pty Ltd* (1982) 62 FLR 437 (FCA).
227 At 448.

followed in Australia.[228] Justice Elias cited Lockhart J's statement with apparent approval in *Commerce Commission v Caltex New Zealand Ltd*.[229] This has been criticised as not reflecting the view that there is no flexibility in interpreting Australasian price fixing provisions, and that Lockhart J's approach would at best only apply to joint venture activities.[230]

It therefore seems unlikely that a general exception for agency agreements, like that in the US and the EU can be incorporated into Australasian law. This is due to the general reluctance of our courts to incorporate foreign doctrine, as well as their focus on adhering to the terms of our competition legislation. This means that if anything at all can be taken from the US and EU, it would have to be in relation to aiding in the interpretation of our price fixing provisions.

1 Consideration of the US and EU approaches by the High Court

With the exception of Gordon J, all of the High Court Judges in *Flight Centre* considered the US and EU approaches to varying levels of degree. After discussing the EU approach, French CJ considered that a legal agent might well be acting as a single economic unit with its principal when entering into contracts on its principal's behalf and therefore it was incorrect to characterise the agent's conduct as being competitive.[231] However, his Honour did not take into account other factors that are associated with the analysis, such as whether the agent can determine its own conduct in the market, or whether it bore any risks. Chief Justice French also briefly considered the US approach, but was largely dismissive of its relevance.[232]

Kiefel and Gageler JJ considered that the approach taken by the European Court of First Instance in *DaimlerChrysler AG* was broadly consistent with their view that an agency relationship does not of itself preclude competition, and that whether or not competition exists depends on the competitive forces at play.[233] While they noted that the US approach largely rests in Judge Posner's decision in *Morrison*, they were of the view that the inquiry undertaken in that and subsequent cases was not the same as what is required under Australian competition legislation.[234]

Justice Nettle undertook the most in depth inquiry into the two approaches. His Honour noted that the EU approach turned on legislation that is substantially different from that of

228 Brent Fisse "Facilitating practices, vertical restraints and most favoured customers: Australian competition law is ill-equipped to meet the challenge" (2016) 44(5) ABLR 325 at 332.

229 *Commerce Commission v Caltex New Zealand Ltd* [1998] 2 NZLR 78 (HC) at 82–83.

230 Henry Holderness (ed) *Commercial Law in New Zealand* (online looseleaf ed, LexisNexis) at 35.5.2. See also Lindsay Hampton and Paul G Scott *Guide to Competition Law* (LexisNexis, Wellington, 2013) at 166–169. The authors note it is uncertain how New Zealand courts will approach the issue in the future.

231 *Flight Centre Ltd* (HCA), above n 1, at [19].

232 At [20].

233 At [84]–[85].

234 At [86]–[88].

Australia.[235] That being said, his Honour also concluded that FC's reliance on *DaimlerChrysler AG* to argue that they were part of a single economic unit was misplaced due to the particular facts of *Flight Centre*.[236] In Nettle J's opinion, the reasoning in *DaimlerChrysler AG* was not applicable because by selling airfares directly, a degree of competition arose between FC and the Airlines.[237] Furthermore, nothing was said in *DaimlerChrysler AG* that was opposed to the conclusion that an agreement between FC and the Airlines to raise prices would be anti-competitive.[238]

As to the US approach, Nettle J discussed *General Electric Co*, *Simpson*, *Murray Biscuit Co* and *Illinois Corporate Travel Ltd* in detail.[239] However his Honour was not convinced that they were of any assistance to FC.[240] At best, all that *General Electric Co* stood for under Australian law, was that merely appointing an agent to sell goods at a price determined by the principal did not contravene the per se prohibition on price fixing.[241] Furthermore, his Honour stated that to consider the economic benefits of any agency arrangement would import a "…body of anti-trust jurisprudence and a range of considerations, which differ from those that apply to s 45A of the Trade Practices Act."[242]

2 Is there anything that can be taken from the US and EU approaches?

The High Court expressed reluctance at giving any great weight to the US and EU approaches. Rather, the inquiry turns on a strict construction of the legislation, and whether there is an agreement between parties that has the purpose, effect or likely effect of fixing prices, and whether the parties to that agreement are in competition with each other. It is contended that this was an appropriate conclusion to draw. The US and EU approaches are concerned with whether the agent and principal are separate parties, so that any agreement between them can be characterised as a concerted action, rather than a unilateral act of the principal. This involves an inquiry into the allocation of risks and the economic rationale for the agency agreement to determine whether the agency is genuine. However, the focus for Australia and New Zealand is not whether the agency is genuine, but whether the parties are in competition. Dual distribution arrangements are competitive so resolving the question ultimately turns on whether the agent can be considered to be acting separately from its principal despite its legal status. That was the point of difference between the Full Federal Court and French CJ, and the High Court majority.

235 At [143].
236 At [142]–[143].
237 At [143].
238 At [143].
239 At [134]–[140].
240 At [133].
241 At [139].
242 At [141].

To that end, the US and EU approaches are still useful in highlighting that form should not prevail over substance. This was a key finding of the US Supreme Court in *Simpson*.[243] Statements by the EU courts are also indicative of the situations of when an agent might be 'in competition'. Such as whether the agent can determine its own conduct in the marketplace,[244] or whether the agent works for the benefit of its principal and carries out its instructions.[245]

B What is the Right Approach?

Two different approaches to answering the agency and competition question appear to arise in the majority judgments in *Flight Centre*. Kiefel and Gageler JJ's method was to focus on the rights and duties conferred upon the agent by the agency agreement in order to determine whether the agent had the means to compete. Conversely, Gordon and Nettle JJ's approach was more contextual, and sought to evaluate what was occurring in the marketplace in order to determine whether the parties were in fact 'in competition'. For Gordon J, whether one of the parties was an agent was of no relevance.

Justice Gordon's approach is on its face persuasive because, as has already been mentioned,[246] whether the parties to a contract, arrangement or understanding are 'in competition' with each other is a question of fact. Furthermore, Kiefel and Gageler JJ's approach appears to stop short of what is required by the statutory test if it only asks whether the parties have the means to compete and does not ask whether the parties were, or were likely to be in competition. Nevertheless it is contended that both methods end up considering the same features and are therefore in a sense similar. For Kiefel and Gageler JJ, the terms of the agency agreement allowed FC to compete because it had full discretion over price and no duty to act in the Airlines interests, which it then did by pursuing its own marketing strategy and by undercutting the Airlines. For Nettle and Gordon JJ, it could be seen from what was happening in the marketplace that FC and the Airlines were in competition. However, this was only possible because the terms of the agency allowed FC to do so.

As to the particular features that will put an agent 'in competition' with its principal, it is contended that in the context of *Flight Centre* there is only one: having full discretion over price. For Kiefel and Gageler JJ, the determining features were FC having full discretion over price and no obligation to act in the Airlines' interests. However, if the agent has full discretion over price it is difficult to conceive how the agent could be under such a duty anyway. It is this feature that takes the agent away from the strict nature of legal agency and closer to the realm of the commercially adverse relationship of sale.

---

243 *Simpson*, above n 144, at 22.
244 *DaimlerChrysler AG*, above n 198, at [88].
245 *Coöperatieve Vereniging "Suiker Unie" UA*, above n 201, at [480].
246 Above n 54.

The High Court's decision has been criticised for its uncertainty. However, it is contended that uncertainty diminishes once it is seen that the determinative reason for the decision was price discretion, as opposed to whether the agent bore certain risks like in the EU and US. The competitive nature of dual distribution arrangements does have the potential to capture a large number of principal/agent relationships, but it is only those where the agent has full price discretion where liability is likely. This means that in practice there is a decent degree of guidance from the *Flight Centre* decision, because parties only need to look to one feature of their agency agreements.

C Looking Ahead

Notwithstanding that it can be shown that an agent can be in competition with its principal when the agent has full discretion over price, it was initially thought that the result in *Flight Centre* might be short lived. As Fisse noted, in 2015 the Competition Policy Review recommended that trading restrictions imposed by one firm on another in connection with the supply or acquisition of goods or services should be exempted from per se cartel liability.[247] The Australian Government accepted this recommendation,[248]and drafted an amendment to s 44ZZRS(1) Competition and Consumer Act (Cth):[249]

> **44ZZRS Restrictions on supplies and acquisitions**
>
> (1) Sections 44ZZRF, 44ZZRG, 44ZZRJ and 44ZZRK do not apply in relation to making, or giving effect to, a contract, arrangement or understanding that contains a cartel provision to the extent that the cartel provision:
>
> (a) imposes, on a party to the contract, arrangement or understanding (the acquirer) acquiring goods or services from another party to the contract, arrangement or understanding, an obligation that relates to:
>
> (i) the acquisition by the acquirer of the goods or services; or
>
> (ii) the acquisition by the acquirer, from any person, of other goods or services that are substitutable for, or otherwise competitive with, the goods or services; or
>
> (iii) the supply by the acquirer of the goods or services or of other or services that are substitutable for, or otherwise competitive with, the goods or services; or
>
> (b) imposes, on a party to the contract, arrangement or understanding (the supplier) supplying goods or services to another party to the contract, arrangement or understanding, an obligation that relates to:

---

247 Ian Harper, Peter Anderson, Su McCluskey and Michael O'Bryan *Competition Policy Review: Final Report* (Commonwealth of Australia, March 2015) at 59 (recommendation 27); Fisse, above n 228, at 338.

248 Paul Davidson "Government response to the Harper Competition Policy Review: a quick guide" (7 September 2016) Parliament of Australia <www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/pubs/rp/rp1617/Quick_Guides/HarperCompetition>.

249 Exposure Draft Legislation: Competition and Consumer Amendment (Competition Policy Review) Bill 2016 (Cth), cl 24.

(i) the supply by the supplier of the goods or services; or

(ii) the supply by the supplier, to any person, of other goods or services that are substitutable for, or otherwise competitive with, the goods or services.

Fisse was of the view that s 44ZZRS(1)(b) would cover the fact situation in *Flight Centre*,[250] although such an arrangement would still be subject to the substantial lessening of competition test in s 45 Competition and Consumer Act (Cth).[251] However, this amendment was ultimately not included in the Competition and Consumer Amendment (Competition Policy Review) Bill 2017 (Cth), which was tabled before Parliament in March 2017.[252] However, it has been noted that the exemption will be considered further and may form part of a future legislative package.[253]

New Zealand has also recently added an exemption from per se liability for vertical supply contracts in s 32(1) Commerce Act:

32 Exception for vertical supply contracts

(1) Nothing in section 30 applies to a person in relation to a cartel provision in a contract, if—

(a) the contract is entered into between a supplier or likely supplier of goods or services and a customer or likely customer of that supplier; and

(b) the cartel provision—

(i) relates to the supply or likely supply of the goods or services to the customer or likely customer, including to the maximum price at which the customer or likely customer may resupply the goods or services; and

(ii) does not have the dominant purpose of lessening competition between any 2 or more of the parties to the contract.

However, this exemption is also unlikely to apply to the facts of *Flight Centre* because the exemption would only seem to apply to price restraints within the chain of distribution and not to restraints on the price at which the Airlines could sell to third parties.[254] It is therefore contended that the High Court's decision in *Flight Centre*, and the rationale for when an

250 Fisse, above n 94, at 67.

251 Exposure Draft Legislation: Competition and Consumer Amendment (Competition Policy Review) Bill 2016 (Cth), cl 24.

252 Competition and Consumer Amendment (Competition Policy Review) Bill 2017 (Cth) (45-1); Clifford Chance "Key changes to Australian competition laws in response to Harper Review are now on the table" (Briefing Note, April 2017) at 2.

253 Clifford Chance, above n 252, at 2.

254 Fisse, above n 228, at 338, footnote 37.

agent will be in competition with its principal is still relevant to both Australia and New Zealand

Conclusion

The *Flight Centre* cases raised a novel question, but nevertheless a question that is of significance for commercial parties. In what circumstances will an agent be 'in competition' with its principal and therefore have the capacity to be liable for price fixing under Australian and New Zealand competition law? The High Court of Australia's holding that Flight Centre competed with Singapore Airlines, Malaysia Airlines and Emirates was met with criticism that the decision created a great deal of uncertainty for businesses who use agents to distribute their products and services. However, the argument of this dissertation has been that this fear is misplaced once the reasoning of the High Court is analysed. By using a dual distribution arrangement, a manufacturer places itself in a competitive relationship with its distributors. The main tension that remains is whether an agent can be viewed as acting separately from its principal, despite being tied to it in a legal sense. It is contended that it can be if the agency agreement creates a relationship that is more akin to the commercially adverse relationship of sale. That will likely only be the case where the agent has full discretion over price, because it is this feature that allows the agent to act in its own interests and determine its conduct in the marketplace. Once it is realised that this was the determining feature in *Flight Centre*, the uncertainty dissipates. While later reform may exempt a case like *Flight Centre*, there is no reason to cry 'wolf' (or as the commentators say, 'uncertainty') until that occurs.

Bibliography

A Cases

1 New Zealand

Amaltal Corp Ltd v Maruha Corp [2007] NZSC 40, [2007] 3 NZLR 192.
Commerce Commission v Caltex New Zealand Ltd [1998] 2 NZLR 78 (HC).
Fisher & Paykel Ltd v Commerce Commission [1990] 2 NZLR 731 (HC).
Fraser-Ramsay (New Zealand) Ltd v De Renzy (1912) 32 NZLR 553 (CA).
Giltrap City Ltd v Commerce Commission [2004] 1 NZLR 608 (CA).
New Zealand Netherlands Society "Oranje" Inc v Kuys [1973] 2 NZLR 163 (PC).
Port Nelson Ltd v Commerce Commission [1996] 3 NZLR 554 (CA).
Wellington International Airport Ltd v Commerce Commission [2013] NZHC 3289.
Union Shipping NZ Ltd v Port Nelson Ltd [1990] 2 NZLR 662 (HC).

2 Australia

Australian Competition and Consumer Commission v Australia and New Zealand Banking Group Ltd [2013] FCA 1206.
Australian Competition and Consumer Commission v Australia and New Zealand Banking Group Ltd [2015] FCAFC 103, (2015) 236 FCR 78.
Australian Competition and Consumer Commission v Flight Centre Ltd (No 2) [2013] FCA 1313, (2013) 307 ALR 209.
Australian Competition and Consumer Commission v Flight Centre Travel Group Ltd [2016] HCA 49, (2016) 339 ALR 242.
Flight Centre Ltd v Australian Competition and Consumer Commission [2015] FCAFC 104, (2015) 234 FCR 367.
Hannaford v Australian Farmlink Pty Ltd [2008] FCA 1591.
Hospital Products Ltd v United States Surgical Corp (1984) 156 CLR 41 (HCA).
Norcast SárL v Bradken Ltd [2013] FCA 235, (2013) 219 FCR 14.
Radio 2UE Sydney Pty Ltd v Stereo FM Pty Ltd (1982) 62 FLR 437 (FCA).
Re Queensland Co-Operative Milling Assoc Ltd (1976) 25 FLR 169 (ATPT).
Scott v Davis (2000) 204 CLR 333 (HCA).
Tonto Home Loans Australia Pty Ltd v Tavares [2011] NSWCA 389.

3 England and Wales

Aluminium Industrie Vaassen BV v Romalpa Aluminium Ltd [1976] 1 WLR 676 (CA).
Ex parte Bright, Re Smith (1879) 10 Ch D 566 (CA).

Mercantile International Group Plc v Chuan Soon Huat Industrial Group Ltd [2002] EWCA Civ 288, [2002] 1 All ER (Comm) 788.

4 United States

American Needle Inc v National Football League 560 US 183 (2010).
Continental TV Inc v GTE Sylvania Inc 433 US 36 (1977).
Copperweld Corp v Independence Tube Corp 467 US 752 (1984).
Dickson v Microsoft Corp 309 F 3d 193 (4th Cir 2002).
Dr Miles Medical Co v John D Park & Sons Co 220 US 373 (1911).
Green v Associated Milk Producers Inc 692 F 2d 1153 (8th Cir 1982).
Illinois Corporate Travel Inc v American Airlines Inc 806 F 2d 722 (7th Cir 1986).
Leegin Creative Leather Products Inc v PSKS Inc 551 US 877 (2007).
Morrison v Murray Biscuit Co 797 F 2d 1430 (7th Cir 1986).
Morton Buildings of Nebraska Inc v Morton Buildings Inc 531 F 2d 910 (8th Cir 1976).
Monsanto Co v Spray-Rite Service Corp 465 US 752 (1984).
Pink Supply Corp v Hiebert Inc 788 F 2d 1313 (8th Cir 1986) at 1316.
Ryko Manufacturing Co v Eden Services 823 F 2d 1215 (8th Cir 1987).
Simpson v Union Oil Co of California 377 US 13 (1964).
The Victorian House Inc v Fisher Camuto Corp 769 F 2d 466 (8th Cir 1985).
United States v General Electric Co 272 US 476 (1926).
United States v Masonite Corp 316 US 265 (1942).
United States v Socony-Vacuum Oil Co Inc 310 US 150 (1940).
United States v Trenton Properties Co 273 US 392 (1927).
Valuepost.com of Charlotte Inc v Bayer Corp 561 F 3d 282 (4th Cir 2009).

5 European Union

Case C-67/96 *Albany International BV v Stichting Bedrijfspensioenfonds Textielindustrie* [1999] ECR I-5751.
Case C-217/05 *Confederación Española de Empresarios de Estaciones de Servicio v Compañía Española de Petróleos SA* [2006] ECR I-11987.
Case 40/73 *Coöperatieve Vereniging "Suiker Unie" UA v Commission of the European Communities* [1975] ECR 1663.
Case T-325/01 *DaimlerChrysler AG v Commission of the European Communities* [2005] ECR II-3319.
Case C-41/90 *Höfner v Macroton GmbH* [1991] ECR I-1979.
Hydrotherm Gerätebau GmbH v Compact del Dott Ing Mario Andreoli [1984] ECR 2999.
Case C-180/98 *Pavlov v Stichting Pensioenfonds Medische Specialisten* [2000] ECR I-6451.

6 Hong Kong

Wong Mee Wan v Kwan Kin Travel Ltd [1996] 1 WLR 38 (PC).

7 Bermuda

Kelly v Cooper [1993] AC 205 (PC).

B Legislation

1 New Zealand

Commerce Act 1986.
Commerce (Cartels and Other Matters) Amendment Act 2017.

2 Australia

Exposure Draft Legislation: Competition and Consumer Amendment (Competition Policy Review) Bill 2016 (Cth).
Competition and Consumer Act 2010 (Cth).
Competition and Consumer Amendment (Competition Policy Review) Bill 2017 (Cth) (45-1).
Trade Practices Act 1974 (Cth).

3 United States

Sherman Anti-Trust Act 15 USC §§ 1–7.

4 European Union

Commission Notice: Guidelines on Vertical Restraints [2010] OJ C130/1.
Directive 86/653 on Self-Employed Commercial Agents [1986] OJ L382/17.
Treaty Establishing the European Community [2002] C325/1.
Treaty on the Functioning of the European Union [2012] OJ C326/47.

C Papers and Reports

Ian Harper, Peter Anderson, Su McCluskey and Michael O'Bryan *Competition Policy Review: Final Report* (Commonwealth of Australia, March 2015).

D Books and Chapters in Books

American Law Institute *Restatement of the Law of Agency* (2nd ed, St Paul, Minnesota, 1958).
AS Burrows and MG Bridge *Principles of English Commercial Law* (Oxford University Press, 2015).
GHL Fridman *The Law of Agency* (7th ed, Butterworths, London, 1996).
Lindsay Hampton and Paul G Scott *Guide to Competition Law* (LexisNexis, Wellington, 2013).
Russell Miller *Miller's Australian Competition and Consumer Law Annotated* (38th ed, Thomson Reuters, Sydney, 2016).
Peter Watts and FMB Reynolds *Bowstead & Reynolds on Agency* (20th ed, Sweet & Maxwell, London, 2014).
Matt Sumpter *New Zealand Competition Law and Policy* (CCH, Auckland, 2010).
Richard Whish and David Bailey *Competition Law* (8th ed, Oxford University Press, Oxford, 2015).

E Looseleaf Texts

Henry Holderness (ed) *Commercial Law in New Zealand* (online looseleaf ed, LexisNexis).

F Journal Articles

Barbara O Bruckmann "Fresh Perspectives on Dual Distribution: Managing Antitrust Risks of Price-Related Restraints" (2003) 17(3) Antitrust 18.
Edward D Cavanagh "The Rule of Reason Re-Examined" (2012) 67 The Business Lawyer 435.
Andrew Christopher and Thea Fabricius "In competition with each other? Implications of the apparently divergent outcomes in Flight Centre and ANZ" (2015) 23(1) AJCCL 6.
Stephen Corones "Agents As Intermediaries: When Do They Compete With Their Suppliers?" (2014) 42(1) ABLR 50.
Brent Fisse "Facilitating practices, vertical restraints and most favoured customers: Australian competition law is ill-equipped to meet the challenge" (2016) 44(5) ABLR 325.
Brent Fisse "The High Court Decision in ACCC v Flight Centre – Crash Landings Ahead?" (2017) 45(1) ABLR 61.
Gregory Gundlach and Alex Loff "Dual distribution restraints: Insights from business research and practice" (2013) 58(1) Antitrust Bull 69.
Alison Jones "The Boundaries of an Undertaking in EU Competition Law" (2012) 8(2) ECJ 301.
Ernest N Reddick "Join Ventures and Other Competitor Collaborations as Single Entity 'Undertakings' Under US Law" (2012) 8(2) ECJ 333.

Val Ricks and R Chet Loftis "Seeing The Diagonal Clearly: Telling Vertical From Horziontal In Antitrust Law" (1996) 28 U Tol L Rev 151.
Angela Zhang "Toward an Economic Approach to Agency Agreements" (2013) 9(3) Journal of Competition Law & Economics 553.
Robert Zwirb "Dual Distribution And Antitrust Law" (1988) 21 Loy LA L Rev 1273.

G Internet Materials

Ashurst "ACCC wins long-haul case against Flight Centre: has "competition" expanded to a new plane?" (16 December 2016) <www.ashurst.com/en/news-and-insights/legal-updates/competition-law-news---accc-wins-long-haul-case-against-flight-centre/>.
Chapman Tripp "Court takes ACCC back to basics" (4 August 2015) <www.chapmantripp.com/publications/court-takes-accc-back-to-basics>.
Torrin Crowther, Glen Shewan and Luke Becker "Australian High Court rules against Flight Centre in price-fixing case" (15 December 2016) Bell Gully <www.bellgully.com/publications/australian-high-court-rules-against-flight-centre-in-price-fixing-case>.
Paul Davidson "Government response to the Harper Competition Policy Review: a quick guide" (7 September 2016) Parliament of Australia.
<www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/pubs/rp/rp1617/Quick_Guides/HarperCompetition>.
Norton Rose Fulbright "Agent v Principal? Agency in Australian Competition Law" (July 2017) <www.nortonrosefulbright.com/knowledge/publications/155188/agent-v-principal-agency-in-australian-competition-law>.

H Press Releases

Ashurst "Vertical price fixing? ACCC arguments in Flight Centre and ANZ grounded by Full Court" (Competition Law News, 3 August 2015).
Clifford Chance "Key changes to Australian competition laws in response to Harper Review are now on the table" (Briefing Note, April 2017).