When services sourced overseas are in a 'market' in Australia

Air New Zealand Ltd v Australian Competition and Consumer Commission [2017] HCA 21

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Introduction

The key issue before the High Court concerned whether Air NZ and Garuda supplied their air freight services from overseas ports in a 'market' in Australia within the meaning of s 4E of the former *Trade Practices Act 1974* (Cth) (TPA). Contrary to the decision of the primary judge, the Court unanimously affirmed the Full Court's decision that these services were supplied in a market in Australia, but did so for slightly different reasons.

There were also other grounds on which Air NZ and Garuda said they were exculpated from liability under the TPA. First, they both alleged that their conduct was compelled by foreign regulations, which meant they had not made the impugned understandings. Secondly, Garuda alleged that ss 45 and 45A of the TPA were inconsistent with certain provisions of the *Air Navigation Act 1920* (Cth), with the effect that s 45(2) did not apply to Garuda's conduct. These contentions were rejected by Gordon J, with whom the plurality (Kiefel CJ, Bell & Keane JJ) and Nettle J agreed.

Background

Section 45(2) of the former TPA prohibited the making of a contract, arrangement or understanding containing a provision that had the purpose, effect or likely effect of substantially lessening competition. It also prohibited giving effect to such a provision.

A provision was deemed to have had the requisite purpose or effect if it had the purpose, effect or likely effect of fixing, maintaining or controlling prices between competitors: s 45A. Although this meant there was no need in price-fixing cases to demonstrate a substantive impact on competition, the price-fixing still had to relate to competition in a 'market'. That was because s 45(3) defined 'competition' for the purposes of s 45 to be competition in any 'market' in which a party supplied or acquired goods or services. Further, it also meant that the market had to be in Australia, because s 4E defined 'market' as meaning 'a market in Australia'.

At first instance, the primary judge held that Air NZ and Garuda had been party to price-fixing arrangements in relation to fuel surcharges on their air freight services between Hong Kong, Singapore and Indonesia, on the one hand, and Australia, on the other hand. However, his Honour concluded that this conduct did not contravene s 45(2), because it had occurred in a market *outside* Australia. That decision was predicated on the finding that the substitution or switching decisions (being the ultimate choice of airlines) were given effect at the ports of origin in Hong Kong, Singapore and Indonesia.[1]

The Full Court disagreed with the primary judge's conclusion on the location of the market, and allowed the ACCC's appeal. Air NZ and Garuda both appealed to the High Court.

The High Court's decision on whether the market was in Australia

The plurality said that a market under the TPA is 'a notional facility which accommodates rivalrous behavior involving sellers and buyers'.[2] However, their Honours recognised that this abstract notion of a market presents a challenge when s 4E requires that it have a concrete location in Australia. Their Honours held that the task of attributing a geographical location to a market is to be approached 'as a practical matter of business' and not divorced from the 'commercial context of the conduct in question'.[3]

The plurality recognised that although substitutability is often an important, if not decisive, factor, this is not always the case.[4] Their Honours observed that s 4E treats substitutability as the principal driver of the rivalrous behavior accommodated by a market, but the act of substitution merely marks the conclusion of that rivalry.[5] In that way, the plurality found that the primary judge's approach accorded too much weight to substitutability in locating the market. Instead, the focus needed to be on the 'geographical area of the rivalry which precedes that act of substitution'.[6] In their Honours' view, the key issue is the location of the rivalry, or the interplay between the relevant supply and demand, not the place where the act of substitution is recorded.

In this case, the primary judge's findings of fact revealed that shippers in Australia were a substantial source of demand for air freight services from overseas ports, and that airlines engaged in rivalrous behavior that sought to match the supply of their services with that demand.[7] The airlines' 'deliberate and rivalrous pursuit of orders emanating from Australian shippers' provided compelling evidence that they were competing with each other in a market in Australia.[8] Accordingly, the plurality concluded that the price-fixing conduct took place in a market in Australia.[9]

Nettle J reached the same conclusion as the plurality, and the importance of focussing on the location of the competitive rivalry is apparent from his Honour's reasons. His Honour said that, 'where sellers are engaged in marketing their goods and services, or perceive themselves to be competing, in areas beyond the area in which they are located, *commercial reality* is likely to dictate that the market includes those further areas' (emphasis added).[10]

Gordon J also came to the same view. Like the plurality, her Honour recognised the abstract nature of market definition, and said 'market identification is an economic tool, or instrumental concept, that uses and integrates those legal and economic concepts best adapted to analyse the asserted anti-competitive conduct'.[11] However, in saying that, her Honour also acknowledged that a market should not be defined 'arbitrarily' and that it must be based on findings of fact.[12]

In her Honour's view, the key question in locating the market centred on what was the *area of effective competition* in which the airlines operated.[13] In this case, the evidence demonstrated that the airlines physically competed in Australia to obtain custom from shippers, and marketed their services to them.[14] Further, there was economically significant demand from large shippers in Australia, the airlines negotiated with those shippers, the airlines tracked those shippers' activities and the airlines designed their products according to this demand.[15] These factors were sufficient to demonstrate that the airlines competed in a market in Australia.[16]

The foreign state compulsion issue

The airlines contended that where conduct is compelled by a law or valid practice of a foreign state, it cannot be the case that the compelled person made a contract, arrangement or understanding with the requisite purpose, effect or likely effect under s 45(2). Their submission was that they did not arrive at, or give effect to, certain impugned understandings within the meaning of s45(2) because regulations made in Hong Kong, and the administrative practices of the Hong Kong regulator,[17] compelled each of them to do so.[18]

In holding that those contentions were rightly rejected by the primary judge and the majority of the Full Court,[19] Gordon J (with whom the plurality and Nettle J agreed) did not decide this issue as a matter of principle, because it was unnecessary to do so. The short point was that, on the unchallenged findings of the primary judge, the airlines were not compelled by any foreign law or practice to agree on fuel surcharges, or to impose fuel surcharges, so the contentions did not arise.[20]

The inconsistency issue

Garuda argued that ss 45 and 45A of the TPA, and certain parts of the *Air Navigation Act 1920* (Cth) were practically and operationally inconsistent. In particular, it was noted that s 13 of the Air Navigation Act permitted the Minister to suspend or cancel an international airline licence if the airline did not comply with the relevant air services agreement between Australia and Indonesia. This was said to be significant in Garuda's case, because the Air Services Agreement between Australia and Indonesia contained provisions requiring the fixing of 'tariffs'.

Gordon J (with whom the plurality and Nettle J agreed) found that the alleged inconsistency did not arise, because, the conduct that contravened the TPA involved understandings arrived at in Hong Kong and Indonesia containing provisions to charge specific fuel surcharges, not agreements or understandings to set tariffs by way of minima under the Australia-Indonesia ASA.[21]

ENDNOTES

1 *Australian Competition and Consumer Commission v Air New Zealand Limited* (2014) 319 ALR 388 at [323].
2 *Air New Zealand v Australian Competition and Consumer Commission* [2017] HCA 21 at [12].
3 *Air New Zealand v Australian Competition and Consumer Commission* [2017] HCA 21 at [14].
4 *Air New Zealand v Australian Competition and Consumer Commission* [2017] HCA 21 at [26].
5 *Air New Zealand v Australian Competition and Consumer Commission* [2017] HCA 21 at [27].
6 *Air New Zealand v Australian Competition and Consumer Commission* [2017] HCA 21 at [28].
7 *Air New Zealand v Australian Competition and Consumer Commission* [2017] HCA 21 at [31].
8 *Air New Zealand v Australian Competition and Consumer Commission* [2017] HCA 21 at [34].
9 *Air New Zealand v Australian Competition and Consumer Commission* [2017] HCA 21 at [35].
10 *Air New Zealand v Australian Competition and Consumer Commission* [2017] HCA 21 at [40].
11 *Air New Zealand v Australian Competition and Consumer Commission* [2017] HCA 21 at [59].
12 *Air New Zealand v Australian Competition and Consumer Commission* [2017] HCA 21 at [60].
13 *Air New Zealand v Australian Competition and Consumer Commission* [2017] HCA 21 at [83].
14 *Air New Zealand v Australian Competition and Consumer Commission* [2017] HCA 21 at [116].
15 *Air New Zealand v Australian Competition and Consumer Commission* [2017] HCA 21 at [121].
16 *Air New Zealand v Australian Competition and Consumer Commission* [2017] HCA 21 at [122].
17 *Air New Zealand v Australian Competition and Consumer Commission* [2017] HCA 21 at [53].
18 *Air New Zealand v Australian Competition and Consumer Commission* [2017] HCA 21 at [138].
19 *Air New Zealand v Australian Competition and Consumer Commission* [2017] HCA 21 at [140].
20 *Air New Zealand v Australian Competition and Consumer Commission* [2017] HCA 21 at [141].
21 *Air New Zealand v Australian Competition and Consumer Commission* [2017] HCA 21 at [174].

Revisiting Project Blue Sky

Kate Lindeman reports on *Forrest & Forrest Pty Ltd v Wilson* [2017] HCA 30

In *Forrest & Forrest Pty Ltd v Wilson*, the High Court, by a majority of 4:1 (Nettle J dissenting), allowed an appeal concerning the effect of non-compliance with certain provisions of the *Mining Act 1978* (WA). The case contains the High Court's latest statement on the effect of the principle established by *Project Blue Sky*,[1] specifically considering how the doctrine operates in the context of statutory regimes conferring power on states to grant rights to exploit natural resources.

Facts and procedural history

In 2011, the second and fourth respondents lodged applications for mining leases. The Mining Act required the lodgement of mining operations statements and mineralisation reports within a prescribed period after lodging the applications, but none were lodged in time.[2]

The warden (the first respondent) nevertheless held that he had jurisdiction to hear the applications. He considered that failure to lodge the mineralisation reports on time was no more than an irregularity, which could be cured by subsequent lodgement, as well as by the wide discretion given to the minister to grant an application under the Mining Act notwithstanding non-compliance with provisions of the Act. The warden proceeded to recommend that the minister grant the applications for mining leases.

Forrest applied for judicial review of the warden's decision on a number of grounds, only one of which was relevant in the High Court; namely, that the warden made a jurisdictional error in holding that he had jurisdiction to hear the applications for the mining leases. Allanson J, at first instance, concluded that the warden's hearing of the applications did not amount to a jurisdictional error, and the Court of Appeal of the Supreme Court of Western Australia (McLure P, Newnes and Murphy JJA) upheld the decision, finding that only a failure to provide a mineralisation report at all would prevent the satisfaction of a condition precedent to the warden making a recommendation to the minister. Forrest appealed to the High Court.

High Court Appeal

The majority of the court (Kiefel CJ, Bell, Gageler and Keane JJ) allowed the appeal, holding that the relevant provisions of the Mining Act imposed essential preliminaries to the exercise of power by the minister to grant a mining lease.[3] This conclusion involved a consideration of the application of *Project Blue Sky* to a statutory regime conferring power to grant rights to exploit natural resources.

Project Blue Sky

In *Project Blue Sky*, a majority of the High Court held:[4]

> An act done in breach of a condition regulating the exercise of a statutory power is not necessarily invalid and of no effect. Whether it is depends upon whether there can be discerned a legislative purpose to invalidate any act that fails to comply with the condition. The existence of the purpose is ascertained by reference to the language of the statute, its subject matter and objects, and the consequences for the parties of holding void every act done in breach of the condition.'

In *Forrest*, the majority observed that the court in *Project Blue Sky* was strongly influenced by the fact that the conditions in question regulated the exercise of functions already conferred on the relevant agency, as well as by the circumstance that the provisions did not have a 'rule-like quality', that many of the relevant obligations were expressed in 'indeterminate language', and that 'public inconvenience would be a result of the invalidity of the Act'.[5] The majority in *Forrest* considered that the present case was readily distinguishable.

The majority pointed to the fact that, first, the express terms of the provisions in question and their structure as 'sequential steps in an integrated process leading to the possibility of the grant of a mining lease', revealed that the relevant sections imposed essential preliminaries to the exercise of the minister's power under the Act.[6] Secondly, the majority observed that any inconvenience suffered by treating the requirements of the Act as conditions precedent to the exercise of the minister's power would enure only to those with some responsibility for the non-observance, whereas the contrary view would disadvantage both the public interest and individuals who were within the protection of the Act. Finally, the majority emphasised that *Project Blue Sky* was not concerned with a statutory regime for granting rights to exploit the resources of a state.[7]

Interpretation of statutory regime conferring power to grant rights to exploit state resources

The majority referred to a line of authority[8] which establishes that where a statutory regime confers power on the executive government of a state to grant exclusive rights to exploit the resources of the state, the regime will, subject to provision to the contrary, be understood as mandating compliance with the requirements of the regime as essential to the making of a valid grant. This means that, in short, the statutory conditions regulating the making of a grant 'must be observed.'[9]

This line of authority was said to support parliamentary control of the disposition of lands held by the Crown in right of the state, and to recognise that the public interest is not well served by allowing non-compliance with a legislative regime to be over-