

## Article Information

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## Landmark Decision in Competition Law in Australia

**On 14 December 2016 the High Court found in favour of the ACCC in proceedings concerning anti-competitive conduct by Flight Centre between the years 2005 and 2009.**

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### The Judgment

A majority of the Court found that Flight Centre contravened the restrictive trade practices provisions of the Trade Practices Act, as it was then called, by attempting to induce airlines Singapore Airlines, Malaysia Airlines and Emirates not to discount the price at which they offered international airline tickets directly to customers.

Flight Centre had, as a marketing strategy, offered a “price beat guarantee”, advertising that it would better the price of an airline ticket offered by any other Australian travel agent or website, including a website operated by an airline, by \$1, and would give the customer a voucher for \$20. Between 2005 and 2009 Flight Centre sent a series of emails to the airlines in which it tried to get each airline to stop offering airline tickets directly to customers at prices lower than the fares published to travel agents. It threatened to stop selling the tickets of each airline if that airline did not agree.

The minority judge, Chief Justice French, found that Flight Centre was not in competition with the airlines in any relevant market, and so therefore the relevant provisions of the Act were not triggered. According to the minority, the proposition that an agent (Flight Centre) and a principal (one of the airlines), both selling the services of the principal, compete with each other in a market for the sale of those services, does not command ready assent.

The majority of the Court had no difficulty with the agency relationship, and found it not to be a bar to Flight Centre and the airlines being in competition with one another. The majority noted that Flight Centre set and produced its own marketing strategy, which involved undercutting the prices not only of other travel agents but of the airlines whose tickets it sold. When Flight Centre sold an international airline ticket to a customer, the airline whose ticket was sold did not.

The judgment shows that the Court is inclined to view anti-competitive conduct broadly, and be flexible in its definition of competitors in a market. The decision has particular relevance to principals and agents who both sell the same products or services, and may therefore be in competition with one another.