HIGH COURT OF AUSTRALIA

KIEFEL CJ,
BELL, KEANE, NETTLE AND GORDON JJ

Matter No S245/2016

AIR NEW ZEALAND LTD — APPELLANT

AND

AUSTRALIAN COMPETITION AND CONSUMER COMMISSION — RESPONDENT

Matter No S248/2016

PT GARUDA INDONESIA LTD — APPELLANT

AND

AUSTRALIAN COMPETITION AND CONSUMER COMMISSION — RESPONDENT

Air New Zealand Ltd v Australian Competition and Consumer Commission
PT Garuda Indonesia Ltd v Australian Competition and Consumer Commission
[2017] HCA 21
14 June 2017
S245/2016 & S248/2016

ORDER

Matter No S245/2016

Appeal dismissed with costs.

Matter No S248/2016

Appeal dismissed with costs.

On appeal from the Federal Court of Australia

Representation

B W Walker SC with N J Owens SC and R A Yezerski for the appellant in S245/2016 (instructed by Norton White Lawyers)

N C Hutley SC with T J Brennan and R J Scheelings for the appellant in S248/2016 (instructed by Norton White Lawyers)

J C Sheahan QC and J A Halley SC with D F C Thomas and H Younan for the respondent in each matter (instructed by Australian Government Solicitor)

CATCHWORDS

Air New Zealand Ltd v Australian Competition and Consumer Commission
PT Garuda Indonesia Ltd v Australian Competition and Consumer Commission

Trade practices – Restrictive trade practices – Price fixing – Market identification – Location of market – Meaning of market "in Australia" – Where airlines competed to supply unidirectional air cargo services from ports of origin outside Australia to destination ports within Australia – Where airlines arrived at understanding to impose various surcharges and fees for supply of air cargo services – Whether market for air cargo services "in Australia" for purposes of *Trade Practices Act* 1974 (Cth).

Trade practices – Restrictive trade practices – Price fixing – Foreign state compulsion – Where airlines contravened s 45 of *Trade Practices Act* 1974 (Cth) – Whether conduct compelled by foreign law or foreign regulator's administrative practices.

Statutory interpretation – Inconsistency – Where s 13(b) of *Air Navigation Act* 1920 (Cth) required airlines to comply with "agreement or arrangement" – Where Australia-Indonesia Air Services Agreement "agreement or arrangement" within meaning of ss 12(2) and 13(b) of *Air Navigation Act* – Where Australia-Indonesia Air Services Agreement required agreement between international airlines on minimum tariffs – Where ss 45 and 45A of *Trade Practices Act* 1974 (Cth) prohibited arriving at understandings concerning prices with competitors – Whether ss 12 and 13 of *Air Navigation Act* inconsistent with ss 45 and 45A of *Trade Practices Act* such that latter did not apply to contravening conduct.

Words and phrases – "competition", "foreign state compulsion", "market identification", "market in Australia", "otherwise competitive with", "practically and operatively inconsistent", "price fixing", "rivalrous behaviour", "substitutability", "supply and demand".

Air Navigation Act 1920 (Cth), ss 12, 13.
Trade Practices Act 1974 (Cth), ss 4, 4E, 45(2), 45(3), 45A.

1 KIEFEL CJ, BELL AND KEANE JJ. The factual background and the legislative provisions relevant to the issues in these appeals are set out in full in the reasons of Gordon J. We gratefully adopt them and her Honour's summary of the decisions of the courts below.

2 It is sufficient for the purposes of these reasons to state a few facts. Air New Zealand Ltd ("Air New Zealand") and PT Garuda Indonesia Ltd ("Garuda") were found by the primary judge to have been parties to understandings which amounted to price fixing. The understandings involved the imposition of surcharges and fees associated with the carriage of air cargo from ports in Hong Kong, Singapore and Indonesia to destination ports in Australia[1].

3 The primary judge found that this conduct would have contravened s 45(2) of the *Trade Practices Act* 1974 (Cth) ("the TPA"), which prohibits a corporation arriving at an understanding which has the purpose, or has or is likely to have the effect, of substantially lessening competition. The competition spoken of, other provisions explain, is competition in a market for goods and services in Australia. His Honour concluded that s 45(2) was not contravened because the competition which took place between the airlines occurred in markets in Hong Kong, Singapore and Indonesia, not in any market in Australia[2].

4 Despite the epic character of this litigation – the trial occupied 57 sitting days and the hearing of the appeal to the Full Court six days – the principal issue is within short compass. It is whether the primary judge was correct to hold that there was not a market in Australia for the air cargo services for which Air New Zealand and Garuda competed. The majority of the Full Court held that this was incorrect and allowed the appeals of the Australian Competition and Consumer Commission from that decision.

5 In our view the findings of fact made by the primary judge lead irresistibly to the conclusion that there was a market in Australia for the airlines' air cargo services, and that the appeals of the airlines should therefore be dismissed.

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1 It may be noted that, for convenience, both the primary judge and the Full Court focused upon routes between Hong Kong and ports in Australia, but their reasoning applied equally to routes from Singapore and Indonesia to Australia. The same approach will be adopted here.

2 *Australian Competition and Consumer Commission v Air New Zealand Ltd* (2014) 319 ALR 388 at 393 [20].

The statutory provisions

6 During the relevant period, s 4E of the TPA provided:

> "For the purposes of this Act, unless the contrary intention appears, ***market*** means a market in Australia and, when used in relation to any goods or services, includes a market for those goods or services and other goods or services that are substitutable for, or otherwise competitive with, the first-mentioned goods or services."

7 The operative provisions of the TPA were contained in s 45(2)(a)(ii) and (b)(ii), which were relevantly in the following terms:

> "A corporation shall not:
>
> (a) … arrive at an understanding, if:
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> …
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> (ii) a provision of the proposed … understanding has the purpose, or would have or be likely to have the effect, of substantially lessening competition; or
>
> (b) give effect to a provision of [an] … understanding … if that provision:
>
> …
>
> (ii) has the purpose, or has or is likely to have the effect, of substantially lessening competition."

8 For the purpose of s 45 of the TPA, s 45A(1) operated to deem a provision of an understanding to have the purpose, or to have or 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 … of fixing … the price for … services supplied … by the parties to the … understanding".

9 For the purposes of the TPA, s 4(1) defined "price" to include "a charge of any description" and defined "services" to include "any rights … benefits, privileges or facilities that are, or are to be, provided, granted or conferred in trade or commerce".

10 Section 45(3) of the TPA provided, for the purposes of ss 45 and 45A, that:

> "***competition***, in relation to a provision of [an] … understanding … means competition in any market in which a corporation that is a party to the … understanding … supplies … or is likely to supply … services".

11 Read epexegetically in the light of ss 4E, 45A and 45(3), s 45(2) operates where a corporation arrives at or gives effect to an understanding to fix prices in any market in Australia in which the corporation competes to supply services[3]. It was not in dispute that the airlines were parties to understandings that would have contravened s 45(2) of the TPA if they were in competition to supply services in a market in Australia.

A market in Australia

12 The authorities confirm that a market, within the meaning of the TPA, is a notional facility which accommodates rivalrous behaviour involving sellers and buyers[4]. In *Queensland Wire Industries Pty Ltd v Broken Hill Proprietary Co Ltd*[5], Deane J, after noting that "[s]ection 4E confines 'market' for the purposes of the Act to 'a market in Australia'", went on to say that "'market' should, in the context of the Act, be understood in the sense of an area of potential close competition in particular goods and/or services and their substitutes". Dawson J agreed[6] generally with Deane J, adding[7]:

> "A market is an area in which the exchange of goods or services between buyer and seller is negotiated. It is sometimes referred to as the sphere within which price is determined and that serves to focus attention upon the way in which the market facilitates exchange by employing price as the mechanism to reconcile competing demands for resources".

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3 *Australian Competition and Consumer Commission v Flight Centre Travel Group Ltd* (2016) 91 ALJR 143 at 156 [65]; 339 ALR 242 at 257; [2016] HCA 49.

4 *Queensland Wire Industries Pty Ltd v Broken Hill Proprietary Co Ltd* (1989) 167 CLR 177 at 188, 195, 199; [1989] HCA 6; *Boral Besser Masonry Ltd v Australian Competition and Consumer Commission* (2003) 215 CLR 374 at 454-455 [247]-[248], 455-456 [252]-[253]; [2003] HCA 5; *Australian Competition and Consumer Commission v Flight Centre Travel Group Ltd* (2016) 91 ALJR 143 at 156 [66], [69], 165-166 [126]; 339 ALR 242 at 257, 258, 270.

5 (1989) 167 CLR 177 at 195.

6 (1989) 167 CLR 177 at 198.

7 (1989) 167 CLR 177 at 199.

13 Similarly, in *Boral Besser Masonry Ltd v Australian Competition and Consumer Commission*[8], McHugh J observed[9]:

> "[T]he market is the area of actual and potential, and not purely theoretical, interaction between producers and consumers where given the right incentive ... substitution will occur. That is to say, either producers will produce another similar product or consumers will purchase an alternative but similar product."

14 Section 4E of the TPA proceeds upon the express footing that, notwithstanding the abstract nature of the concept of a market, it is possible to locate the market where the competition protected by the TPA occurs in Australia. Reconciling the abstract notion of a market with the concrete notion of location, so that they work coherently, presents something of a challenge. Particularly is this so because "competition" describes a process rather than a situation[10]. But given that the TPA regulates the conduct of commerce, it is tolerably clear that the task of attributing to the abstract concept of a market a geographical location in Australia is to be approached as a practical matter of business. It is important that any analysis of the competitive processes involved in the supply of a service is not divorced from the commercial context of the conduct in question[11].

15 It was common ground between the parties that a market in Australia does not cease to be so located because it encompasses other places as well. The issue then is whether the rivalrous behaviour – in the course of which suppliers and acquirers might be matched – occurred in Australia, whether or not it also occurred elsewhere.

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8 (2003) 215 CLR 374.

9 (2003) 215 CLR 374 at 455-456 [252].

10 *Re Queensland Co-operative Milling Association Ltd – Proposed Merger* (1976) 8 ALR 481 at 515.

11 *Australian Competition and Consumer Commission v Flight Centre Travel Group Ltd* (2016) 91 ALJR 143 at 156 [70]; 339 ALR 242 at 258.

The facts about the market

16 The primary judge found[12] that the activity of flying freight to ports in Australia involved: transporting cargo from a port of origin to a port of destination; ground handling services at both origin and destination airports; inquiry services for tracing delayed or lost shipments; and dealing with issues arising from damaged cargo at destination. These services were supplied and acquired as a single package, or suite, of services[13]. These findings of fact were affirmed on appeal[14].

17 In providing these services, the airlines took possession of the cargo to be transported from a freight forwarder at the airport of origin. The range of airlines available to be selected to provide the service was limited by the need for any such airline to have a presence in the port of origin. The service of taking possession of the cargo in the port of origin with a view to flying it to a destination port in Australia could not be performed anywhere but in the port of origin[15].

18 The primary judge found[16] that the markets in which Air New Zealand and Garuda competed were route-specific markets for the service of flying cargo from individual origin ports in Singapore, Hong Kong or Indonesia to individual destination ports in Australia.

19 The primary judge found that the participants in these markets were the airlines, freight forwarders, and shippers – being either exporters at origin or importers at destination – whose cargo volume was sufficiently significant to motivate the airlines to pursue their custom. These shippers often, but not

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12 *Australian Competition and Consumer Commission v Air New Zealand Ltd* (2014) 319 ALR 388 at 445-446 [252]-[256], 459 [336].

13 *Australian Competition and Consumer Commission v Air New Zealand Ltd* (2014) 319 ALR 388 at 456 [321].

14 *Australian Competition and Consumer Commission v PT Garuda Indonesia Ltd* (2016) 244 FCR 190 at 201 [21]-[22], 217 [96], 275 [591]-[593], 283 [638].

15 *Australian Competition and Consumer Commission v Air New Zealand Ltd* (2014) 319 ALR 388 at 456 [319]; *Australian Competition and Consumer Commission v PT Garuda Indonesia Ltd* (2016) 244 FCR 190 at 285-286 [650].

16 *Australian Competition and Consumer Commission v Air New Zealand Ltd* (2014) 319 ALR 388 at 445-446 [252]-[256], 459 [336].

always, made decisions about the choice of airline; and where the shipper was an importer in Australia, that decision was likely to be made in Australia. Where the choice of airline was not made by a shipper, it was usually made by a freight forwarder who also provided necessary ancillary services not provided by the airlines. Smaller shippers who left the choice of carrier to their freight forwarders were not regarded as participants in any of the markets identified by the primary judge[17].

20 Apart from rare occurrences (typically involving live animals), airlines dealt directly only with freight forwarders situated in the port of origin or in nearby environs, and not with shippers[18]. Local cargo sales offices of the airlines, at the port of origin, published from time to time standard rates as "tariff" or "rate" sheets or schedules. Contract and other rates (as opposed to standard rates) were negotiated between freight forwarders and staff of airlines at the local sales office, at the airport of origin[19].

21 Importantly, the primary judge found that the airlines "tousled [sic] to obtain"[20] the custom of those shippers in Australia who were substantial importers. His Honour said that "[a]lthough the contracts of carriage were entered into in Hong Kong by the freight forwarders … as a practical matter, substantial importers in Australia had the capacity to influence or even direct the decision as to which airline was to be used"[21] to transport goods from the airport of origin to Australian airports. His Honour said that the evidence "strongly suggested" that the airlines regarded these shippers both as targets for their

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17 *Australian Competition and Consumer Commission v Air New Zealand Ltd* (2014) 319 ALR 388 at 454 [309].

18 *Australian Competition and Consumer Commission v Air New Zealand Ltd* (2014) 319 ALR 388 at 447 [266]; *Australian Competition and Consumer Commission v PT Garuda Indonesia Ltd* (2016) 244 FCR 190 at 286 [650].

19 *Australian Competition and Consumer Commission v Air New Zealand Ltd* (2014) 319 ALR 388 at 412-413 [94]-[99], 414 [107]; *Australian Competition and Consumer Commission v PT Garuda Indonesia Ltd* (2016) 244 FCR 190 at 285-286 [650].

20 *Australian Competition and Consumer Commission v Air New Zealand Ltd* (2014) 319 ALR 388 at 455 [313].

21 *Australian Competition and Consumer Commission v Air New Zealand Ltd* (2014) 319 ALR 388 at 455 [314].

marketing activities and as the ultimate source of this business[22]. A cursory examination of the cargo magazines produced by the airlines for the cargo trade showed that these larger shippers were regarded by the airlines as objects to be pursued. It was obvious, his Honour said, that the airlines would "compete for volumes of cargo directly from large shippers"[23]. The airlines' marketing magazines were directed to multiple markets. The marketing materials proceeded upon the basis that, regardless of the port of origin, the airlines were focused on shipper activity[24].

Were the airlines competing in Australia?

22 The primary judge treated the place where the ultimate choice of airline was effected (referred to in the courts below as "the switching decision") as the location of the market[25] and so identified Hong Kong, Singapore and Indonesia as markets, but not Australia[26]. In his Honour's view the decision in *Re Queensland Co-operative Milling Association Ltd – Proposed Merger*[27] ("*QCMA*") and s 4E require the place where substitution between competing sources may occur to be used to determine the location of the market[28]. That is to say, the place where the contracts of carriage were made and where the airlines began to carry out their obligations was decisive.

23 This approach, with respect, accords too much significance to the fact that substitution or switching may occur outside Australia. It accords too much

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22 *Australian Competition and Consumer Commission v Air New Zealand Ltd* (2014) 319 ALR 388 at 449 [272].

23 *Australian Competition and Consumer Commission v Air New Zealand Ltd* (2014) 319 ALR 388 at 449 [272].

24 *Australian Competition and Consumer Commission v Air New Zealand Ltd* (2014) 319 ALR 388 at 449 [277].

25 *Australian Competition and Consumer Commission v Air New Zealand Ltd* (2014) 319 ALR 388 at 447 [264].

26 *Australian Competition and Consumer Commission v Air New Zealand Ltd* (2014) 319 ALR 388 at 393 [20].

27 (1976) 8 ALR 481.

28 *Australian Competition and Consumer Commission v Air New Zealand Ltd* (2014) 319 ALR 388 at 455 [317], 456 [321].

weight to what was said in *QCMA* about substitutability of products or services and its place in s 4E.

24 In *QCMA*[29] the Trade Practices Tribunal explained that a market is "the field of actual and potential transactions between buyers and sellers amongst whom there can be strong substitution … if given a sufficient price incentive". Later, in discussing the distinction between markets and sub-markets, it was said[30] that:

> "Where the defining feature of a market is the existence of close substitutes (whether in demand or supply), the defining feature of a sub-market is the existence of still closer and more immediate substitutes."

25 The Tribunal did not say that substitutability will be *the* defining feature of a market in every case. The passage takes as its premise that it is the defining feature for the question at hand.

26 This is not to suggest that substitutability may not be an important, or even a decisive, factor in market definition in some cases, just as barriers to entry may be. It is rather that concepts such as market and cross-elasticity of supply and demand provide no complete solution to the definition of a market, as Dawson J observed in *Queensland Wire Industries*[31]. Much will depend upon the context in which the question arises. The exercise of market definition needs to take into account the conduct in question and its effects, and the statutory terms governing the question[32].

27 The market spoken of in s 4E is a market in Australia. Section 4E treats substitutability as the principal driver of the rivalrous behaviour accommodated by a market. The act of switching or substitution marks the conclusion of that rivalry: one of the rivals has prevailed. The place where that success is formalised by the signing of a contract may often, as a practical matter of business, say something significant about the location of the process of rivalry for the purposes of s 4E of the TPA. But it will not necessarily do so.

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29 (1976) 8 ALR 481 at 517.

30 (1976) 8 ALR 481 at 517.

31 (1989) 167 CLR 177 at 198-199.

32 *Australian Competition and Consumer Commission v Flight Centre Travel Group Ltd* (2016) 91 ALJR 143 at 156 [69]; 339 ALR 242 at 258.

28 The locations of the making of the contractual match and of the performance of the contract may be significant, not in themselves, but as (usually) reliable indicators of the location of the mechanism or facility which accommodates the process of rivalry and matching essential to the concept of a market. In this regard, it is the substitutability of services as the driver of the rivalry between competitors to which s 4E of the TPA looks to identify a market, not the circumstances of the act of substitution itself. The place where the act of substitution occurs does not necessarily locate the geographical area of the rivalry which precedes that act of substitution. Where the service being supplied is the transport of goods between two countries, the place at which the act of substitution is recorded or formalised may say little about where the interplay of supply and demand, driven by the conditions of substitutability, has occurred. Thus, for example, contracts for air freight from Hong Kong to Sydney may be signed at the head office of the airline based in Europe, but that does not locate the geographical dimension of the market in Europe.

29 In the present case, while the circumstance that contracts for supply of air cargo services were made and the performance of those services commenced at locations outside Australia may tend to suggest that suppliers were competing in a market of which these overseas locations are a feature, it does not, of itself, accurately describe the geographical dimension of the market; much less establish that Australia was not within that market. Given that the services to be supplied by the airlines were destined for ports in Australia in answer to demand generated in Australia, it does no violence to the language of s 4E of the TPA to say that, as a matter of commerce, the geographical dimension of the market that accommodates the interplay of that supply and demand includes Australia.

30 That having been said, too much should not be made of the circumstance that the services provided by Air New Zealand and Garuda terminated at destination ports in Australia. For the majority of the Full Court, it was important that "a significant and important part of the operation of the 'suite of services' being provided was in Australia"[33]. But it is not necessarily the case that the place where a freight delivery service terminates identifies the market in which the carrier competes to supply the service. The place of delivery may simply be the "end of the line" of a service supplied from a market in which the ultimate destination has little bearing on the interplay of the forces of supply and demand which generate the service and fix its price. For example, the infrequent and irregular delivery of air freight to an Australian scientific research facility in Antarctica would not be regarded as the supply of services in a market in

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33 *Australian Competition and Consumer Commission v PT Garuda Indonesia Ltd* (2016) 244 FCR 190 at 231 [164].

Antarctica. In this example, the interplay of the forces of supply and demand which generate the service and fix its price would take place, geographically speaking, entirely outside Antarctica.

31 In the present case, Australia was not merely the end of the line for services generated by an interplay of forces of supply and demand occurring outside Australia. The primary judge's findings of fact demonstrate that shippers in Australia were a substantial source of demand for the airlines' services, and that the airlines engaged in rivalrous behaviour seeking to match the supply of their services with that demand. The primary judge found that the airlines appreciated that the large shippers who required air cargo services to ports in Australia were the "economic foundation of the market"[34]. And importantly, the primary judge found that the airlines tussled to obtain the custom of shippers in Australia who were substantial importers[35], and whom the airlines regarded as the ultimate source of their business[36]. To speak of suppliers tussling to obtain orders is to describe the rivalrous behaviour which is the essence of competition.

32 The circumstance that the demand from Australian shippers was usually articulated to suppliers in Hong Kong by freight forwarders does not deny that, as a matter of commerce, the interplay of the forces of supply and demand encompassed Australia. That this was so is confirmed by the fact that, as the primary judge found, the airlines pursued sales and marketing strategies in Australia promoting their services to shippers in competition for orders to provide freight for their cargo[37]. As McHugh J explained in *Boral Besser*,

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34 *Australian Competition and Consumer Commission v Air New Zealand Ltd* (2014) 319 ALR 388 at 451 [287].

35 *Australian Competition and Consumer Commission v Air New Zealand Ltd* (2014) 319 ALR 388 at 455 [313]-[314].

36 *Australian Competition and Consumer Commission v Air New Zealand Ltd* (2014) 319 ALR 388 at 439 [221], 449 [272], 451-452 [291]-[292], 453 [299].

37 *Australian Competition and Consumer Commission v Air New Zealand Ltd* (2014) 319 ALR 388 at 449 [272]-[274], 452 [293].

customer attitudes are relevant to market definition[38] because they bear upon the substitutability of the services of a competitor[39].

33 In the present case, the primary judge's findings establish that the airlines conducted their businesses in a way which recognised the economic reality that Australia was not merely the end of the line for their air cargo services but was also a vital source of demand for those services from customers who were regarded as important to the profitability of their businesses. As a practical matter of business, the rivalrous behaviour in the course of which the matching of supply with demand occurred was in a market which, speaking geographically – as s 4E of the TPA requires – included Australia; and that was so even if the market might also have been said to be in Singapore, Hong Kong or Indonesia.

34 As noted above, a practical focus on the issue is required because the TPA operates upon those engaged in commerce[40]. The airlines were actively engaged in attempting to capture the demand for services emanating from shippers in Australia as an integral part of their business. The airlines' deliberate and rivalrous pursuit of orders emanating from Australian shippers was compelling evidence that they were in competition with each other in a market that was in Australia.

35 For these reasons, we conclude that the airlines' price fixing conduct took place in a market in Australia.

The subsidiary issues

36 We agree with the reasons given by Gordon J on the issues of foreign state compulsion and alleged inconsistency.

Orders

37 The appeals should be dismissed with costs.

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38 *Boral Besser Masonry Ltd v Australian Competition and Consumer Commission* (2003) 215 CLR 374 at 456 [253]-[254]; see also *Re Queensland Co-operative Milling Association Ltd – Proposed Merger* (1976) 8 ALR 481 at 517.

39 See *Boral Besser Masonry Ltd v Australian Competition and Consumer Commission* (2003) 215 CLR 374 at 456 [253].

40 *Boral Besser Masonry Ltd v Australian Competition and Consumer Commission* (2003) 215 CLR 374 at 455-456 [252].

38 NETTLE J. I agree with Gordon J, for the reasons her Honour gives, that the appeals should be dismissed; but I wish to add the following.

39 As the majority in the Full Court of the Federal Court (Dowsett and Edelman JJ) recognised[41], market definition is a question of fact. More precisely, it involves "a fact-intensive exercise centered on the commercial realities of the market and competition"[42]. And, as a consequence, the definition of a market is liable to vary according to the purposes of the exercise undertaken[43].

40 In some cases, a geographic market may logically be understood as the area in which potential buyers look for sellers to supply goods and services, as opposed to the area in which sellers look for buyers to purchase goods and services[44]. That may be so where sellers do not "market" their goods and services, or perceive themselves to be competing[45], outside the area in which they as sellers are located. The facts of *Tampa Electric Co v Nashville Coal Co* provide the paradigm[46]. By contrast, 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[47].

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41 *Australian Competition and Consumer Commission v PT Garuda Indonesia Ltd* (2016) 244 FCR 190 at 219-220 [104]-[106], [109].

42 *EI du Pont de Nemours and Co v Kolon Industries Inc* 637 F 3d 435 at 442 (4th Cir, 2011). See *Eastman Kodak Co v Image Technical Services Inc* 504 US 451 at 481-482 (1992) per Blackmun J (Rehnquist CJ, White, Stevens, Kennedy and Souter JJ agreeing); *Todd v Exxon Corporation* 275 F 3d 191 at 199-200 (2nd Cir, 2001).

43 See *Singapore Airlines Ltd v Taprobane Tours WA Pty Ltd* (1991) 33 FCR 158 at 175, 178 per French J (Spender J and O'Loughlin J agreeing at 159, 185).

44 *Tampa Electric Co v Nashville Coal Co* 365 US 320 at 327, 331-333 (1961); *United States v Grinnell Corp* 384 US 563 at 571-573 (1966); *Tunis Bros Co Inc v Ford Motor Co* 952 F 2d 715 at 726 (3rd Cir, 1991). See generally *Boral Besser Masonry Ltd v Australian Competition and Consumer Commission* (2003) 215 CLR 374 at 455-456 [252] per McHugh J; [2003] HCA 5.

45 See generally *Australian Competition and Consumer Commission v Australia and New Zealand Banking Group Ltd* (2015) 236 FCR 78 at 107-108 [138].

46 365 US 320 at 327, 331-333 (1961).

47 *EI du Pont* 637 F 3d 435 at 442-443, 444-447 (4th Cir, 2011).

41 In cases of the latter kind, it is accepted in United States anti-trust jurisprudence that the geographic market consists of the smallest area of overlap of sellers' and buyers' locations in which sellers are able to increase prices or reduce supply without purchasers turning to alternative suppliers beyond that area[48]. A similar concept has been recognised in Europe[49]. And despite differences between competition law in the Unites States, Europe and Australia, the area of a geographic market is essentially an economic concept and therefore logically to be determined according to similar considerations in each jurisdiction[50].

42 Counsel for Air New Zealand Ltd and PT Garuda Indonesia Ltd (together, "the airlines") called in aid the idea of substitution recognised in *Re Queensland Co-operative Milling Association Ltd – Proposed Merger*[51]:

> "Within the bounds of a market there is substitution – substitution between one product and another, and between one source of supply and another, in response to changing prices."

It was submitted that, because all of the existing suppliers of the relevant cargo services, and all of the possibilities for substitution, were located outside Australia, it necessarily followed that the market was outside Australia.

43 So to conjecture, however, overlooks that, in these appeals, the airlines marketed their services in Australia to potential customers in Australia, and

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48 *In re Southeastern Milk Antitrust Litigation* 739 F 3d 262 at 277 (6th Cir, 2014); Hovenkamp, *Federal Antitrust Policy: The Law of Competition and its Practice*, 2nd ed (1999) at 113 §3.6.

49 See Decision 1999/243/EC relating to a proceeding pursuant to Articles 85 and 86 of the EC Treaty (Case No IV/35.134) at [519]; *Atlantic Container Line AB v Commission of the European Communities* [2003] ECR II-3298 at II-3577-II-3578 [858].

50 See *Australian Competition and Consumer Commission v Liquorland (Australia) Pty Ltd* (2006) ATPR ¶42-123 at 45,243 [429]; *Australian Competition and Consumer Commission v Metcash Trading Ltd* (2011) 198 FCR 297 at 344 [244] per Yates J (Finn J agreeing at 300 [1]); *ACCC v ANZ Banking Group* (2015) 236 FCR 78 at 107-108 [136]-[138]; Donald and Heydon, *Trade Practices Law*, (1978) at 92-94.

51 (1976) 8 ALR 481 at 517. See also *Queensland Wire Industries Pty Ltd v Broken Hill Proprietary Co Ltd* (1989) 167 CLR 177 at 188 per Mason CJ and Wilson J, 199 per Dawson J, 210 per Toohey J; [1989] HCA 6.

perceived themselves to be competing for Australian customers in Australia[52]. Certainly, as the airlines emphasised, each contract of carriage was entered into in Singapore or Hong Kong through one or other freight forwarder acting as a principal. Hence, as was concluded[53] by the primary judge, and by Yates J in the Full Court, Singapore and Hong Kong were the places where the so-called "switching decisions" (that is, decisions to choose one airline over another or to substitute one airline's service for another's) were executed or given effect. But, equally, at least in some cases, those decisions were the result of determinations previously made by Australian customers in Australia in response to the airlines' marketing activities in Australia[54].

44 Counsel for the airlines conceded that the area of a geographic market is not necessarily determined by the place where contracts for the sale of goods and services in the market are entered into. That concession was rightly made. In international commerce, the place of entry into a contract of purchase and sale may be entirely fortuitous and, hence, essentially irrelevant to the location of the geographic market in which goods and services are offered and purchased. Likewise here, at least in those instances where Australian customers were directly involved in making the so-called switching decisions, the place of execution of those decisions could not be determinative and was no more important than the rivalrous behaviour of the airlines to which the decision-makers were subject in Australia.

Conclusion and orders

45 In the result, the appeals should be dismissed with costs.

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52 *ACCC v Garuda* (2016) 244 FCR 190 at 210-211 [59]-[63], [65] per Dowsett and Edelman JJ; *Australian Competition and Consumer Commission v Air New Zealand Ltd* (2014) 319 ALR 388 at 449-451 [272]-[287], 455 [313]-[314].

53 *ACCC v Garuda* (2016) 244 FCR 190 at 291 [675]; *ACCC v Air NZ* (2014) 319 ALR 388 at 457 [323].

54 See *ACCC v Air NZ* (2014) 319 ALR 388 at 447 [263]-[264].

46 GORDON J. The appellants, Air New Zealand Ltd ("Air NZ") and PT Garuda Indonesia Ltd ("Garuda"), operated international air services and carried on business in Australia. Part of their business was to supply unidirectional air cargo services from ports of origin in Hong Kong, Singapore and Indonesia to destination ports in Australia ("the air cargo services"). Their conduct within and outside Australia[55] was subject to Pt IV of the *Trade Practices Act* 1974 (Cth) ("the TPA").

47 At the relevant times, s 45(2) of the TPA, read with ss 4E and 45(3) of the TPA, relevantly provided that a corporation must not arrive at an understanding, or give effect to a provision of an understanding, if a provision of the proposed understanding has the purpose, or would have or be likely to have the effect, of substantially lessening competition in a market, in Australia, in which a corporation that is a party to the understanding supplies, or is likely to supply, services. Section 45A relevantly provided that certain provisions of understandings in relation to prices were deemed, for the purposes of s 45, to have the purpose, effect or likely effect of substantially lessening competition.

48 At trial, Air NZ and Garuda were found to have arrived at, and in most cases given effect to, several understandings containing provisions to impose various surcharges and fees on the supply of the air cargo services[56]. For the purposes of s 45, those provisions were deemed, by s 45A of the TPA, to have the purpose, effect or likely effect of substantially lessening competition because the provisions had the purpose, effect or likely effect of controlling the price for the air cargo services, which were supplied by the airlines in competition with the other parties to the understandings.

49 The primary judge (Perram J) found that if the airlines had competed in a market in Australia, each understanding would have contravened s 45(2)(a)(ii) (about arriving at an understanding) and most of the understandings would also have contravened s 45(2)(b)(ii) (about giving effect to a provision of an understanding). However, his Honour found that there was no contravention of s 45(2) because the purpose, effect or likely effect of each impugned provision was not to substantially lessen competition in a market *in Australia* within the meaning of s 4E[57].

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55 See s 5(1) of the TPA. Parts IVA, V (other than Div 1AA), VB and VC of the TPA also extended to their conduct outside Australia.

56 *Australian Competition and Consumer Commission v Air New Zealand Ltd* (2014) 319 ALR 388; [2014] FCA 1157.

57 At all relevant times, s 4E provided that "[f]or the purposes of this Act, unless the contrary intention appears, ***market*** means a market in Australia and, when used in relation to any goods or services, includes a market for those goods or services and

(Footnote continues on next page)

50 His Honour concluded that the market was not in Australia but in the place where the "switching decision" – the choice of airline – was given effect, and that was where the cargo was delivered to the airline at the port of origin[58]. That is, "[t]he competition which occurred between the airlines and which the surcharges interfered with was competition in markets in Hong Kong, Singapore and Indonesia and not competition in any market in Australia"[59]. In his Honour's view (which the airlines supported on appeal to this Court), a market for the purposes of s 4E of the TPA was to be defined by considerations of substitutability, and because substitution between competing sources of supply could only occur at the port of origin, the place where the complete suite of services that constituted the relevant product was acquired and obtained[60], the market was at the port of origin, not in Australia.

51 The respondent in each appeal, the Australian Competition and Consumer Commission ("the ACCC"), appealed to the Full Court of the Federal Court of Australia[61], which, by majority (Dowsett and Edelman JJ, Yates J dissenting), allowed the appeal. In respect of the market issue, the majority held that defining a "market" for the purposes of the TPA involved a "flexible assessment"[62] of various matters that were not limited to questions of substitutability, and that the better approach to determining whether a market was "in Australia" for the purposes of s 4E was "to 'visualise' the metaphorical market, having regard to all of its dimensions and its content, and then to consider whether it is within Australia, in the sense that at least part (perhaps a substantial or significant part) of it must be in that 'location'"[63].

52 On appeal to this Court, the principal focus of the parties' argument was upon the process of market identification and, in particular, the process of identification of a market "in Australia". The findings of the primary judge that

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other goods or services that are substitutable for, or otherwise competitive with, the first-mentioned goods or services."

58 *Air NZ* (2014) 319 ALR 388 at 447 [264], 456-457 [321]-[323].

59 *Air NZ* (2014) 319 ALR 388 at 393 [20].

60 *Air NZ* (2014) 319 ALR 388 at 456-457 [319]-[323], 459 [336]-[338].

61 *Australian Competition and Consumer Commission v PT Garuda Indonesia Ltd* (2016) 244 FCR 190; [2016] FCAFC 42. A full report of the case appears at (2016) 330 ALR 230.

62 *Garuda* (2016) 244 FCR 190 at 215 [81].

63 *Garuda* (2016) 244 FCR 190 at 230 [156].

Air NZ and Garuda arrived at, and in most cases had given effect to, several understandings containing provisions that controlled the price the airlines charged for the air cargo services, and that those provisions were deemed to have the purpose, effect or likely effect of substantially lessening competition for the air cargo services, were not in dispute. The principal issue was whether the impugned provisions, which were deemed to have substantially lessened competition for the supply of the air cargo services, did so in a market "in Australia". The short answer to that question ("Issue 1 – Market in Australia") is "yes".

53 If the answer was "yes", then the airlines submitted that they were nevertheless exculpated from liability under Pt IV of the TPA. The first basis on which Air NZ and Garuda submitted they were exculpated was that they did not arrive at, or give effect to, certain of the impugned understandings within the meaning of s 45(2) of the TPA because the Air Transport (Licensing of Air Services) Regulations (Hong Kong) ("the Hong Kong Regulations") and the administrative practices of the Hong Kong regulator, the Hong Kong Civil Aviation Department ("the HK CAD"), compelled each of them to arrive at, or give effect to, those impugned understandings ("Issue 2 – Foreign state compulsion"). That submission should be rejected. Neither foreign law nor foreign practice compelled the airlines to arrive at or give effect to the understandings to impose approved surcharges. Each airline acted in the way that contravened s 45(2) because it wanted to, and not because a foreign regulator required it to act in that way.

54 Garuda (but not Air NZ) further submitted that if the impugned provisions substantially lessened competition for the air cargo services in a market in Australia, then ss 12 and 13 of the *Air Navigation Act* 1920 (Cth) – read with Art 6 of the 1969 Air Services Agreement between Australia and Indonesia[64] ("the Australia-Indonesia ASA"), which provided for tariff fixing between international airlines for scheduled international air services over and into Australian territory – and the prohibition in ss 45 and 45A of the TPA on arriving at or giving effect to understandings (or both) concerning prices with competitors were practically and operatively inconsistent, so that ss 45 and 45A of the TPA "did not reach to any of Garuda's conduct" when it carried cargo into Australia in accordance with the Australia-Indonesia ASA ("Issue 3 – Alleged inconsistency"). That submission should also be rejected. The alleged inconsistency between the Air Navigation Act, read with Art 6 of the Australia-Indonesia ASA, and the TPA did not arise. Article 6 was concerned

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64 Agreement between the Government of the Commonwealth of Australia and the Government of the Republic of Indonesia for Air Services Between and Beyond their Respective Territory [1969] ATS 4.

with setting minimum tariffs. Unlike the TPA, it was not concerned with imposing tariffs that would be charged or with imposing fixed tariffs.

55 Each of the three issues being answered adversely to the airlines, both appeals should be dismissed with costs.

56 Each issue will be considered in turn.

Issue 1 – Market in Australia

(1) Approach to market identification

57 Market identification is not a task undertaken at large, or in a vacuum. The task, and the extent of the task, are tailored to the conduct at issue and the statutory terms governing the contravention[65]. The need to identify the market arises only in the context of determining whether the conduct constitutes a particular contravention of the TPA[66]. That is, the question of whether there is a market "in Australia" is to be asked and answered in the statutory context in which that question arises. It is not to be asked or answered in isolation from that context or by looking only at what appears in s 4E of the TPA.

58 The first step is to identify "precisely what it is that is said to have been done in contravention of the section"[67]. As has been rightly said in the Federal Court of Australia, the court begins with the problem at hand and asks "what market identification best assists the assessment of the conduct and its asserted anti-competitive attributes"[68]. Identifying a market is a "focusing process"[69] which is "to be undertaken with a view to assessing whether *the substantive*

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65 *Australian Competition and Consumer Commission v Flight Centre Travel Group Ltd* (2016) 91 ALJR 143 at 156 [69]; 339 ALR 242 at 258; [2016] HCA 49. See also *Queensland Wire Industries Pty Ltd v Broken Hill Proprietary Co Ltd* (1989) 167 CLR 177 at 195, 198; [1989] HCA 6; *Australia Meat Holdings Pty Ltd v Trade Practices Commission* (1989) ATPR ¶40-932 at 50,091, 50,104.

66 See *Queensland Wire* (1989) 167 CLR 177 at 195, 200.

67 *Queensland Wire* (1989) 167 CLR 177 at 195.

68 *Australian Competition and Consumer Commission v Liquorland (Australia) Pty Ltd* (2006) ATPR ¶42-123 at 45,244 [437]. See also Brunt, '"Market Definition' Issues in Australian and New Zealand Trade Practices Litigation", (1990) 18 *Australian Business Law Review* 86 at 123.

69 *Flight Centre* (2016) 91 ALJR 143 at 156 [69]; 339 ALR 242 at 258 quoting *Singapore Airlines Ltd v Taprobane Tours WA Pty Ltd* (1991) 33 FCR 158 at 178.

criteria for the particular contravention in issue are satisfied, in the commercial context the subject of analysis"[70] (emphasis added).

59 That approach recognises that the concept of a "market" is "not susceptible of precise comprehensive definition"[71]. It recognises that 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[72]. It recognises that market identification is "not an exact physical exercise to identify a physical feature of the world"[73] and that there is often little or no utility in debating or identifying "the precise physical metes and bounds of a market"[74]. It recognises that market identification is "not a physical thing, or essence, which can be identified in a manner divorced from the relevant context"[75]. And it recognises that market identification depends upon the issues for determination[76] – the impugned conduct and the statutory provision proscribing anti-competitive behaviour that the conduct is said to contravene.

60 That is not to say that a market can be identified arbitrarily[77]. It must be based on findings of fact[78]. "The premise of that proposition", as the Full Court

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70 *Flight Centre* (2016) 91 ALJR 143 at 156 [69]; 339 ALR 242 at 258 quoting *Australian Competition and Consumer Commission v Australia and New Zealand Banking Group Ltd* (2015) 236 FCR 78 at 107 [137].

71 *Queensland Wire* (1989) 167 CLR 177 at 195.

72 *Liquorland* (2006) ATPR ¶42-123 at 45,243 [429]; *Australian Competition and Consumer Commission v Metcash Trading Ltd* (2011) 198 FCR 297 at 344 [244]; *ANZ Banking Group* (2015) 236 FCR 78 at 107 [136].

73 *Liquorland* (2006) ATPR ¶42-123 at 45,243 [429]; *Metcash* (2011) 198 FCR 297 at 344 [244]; *ANZ Banking Group* (2015) 236 FCR 78 at 107 [136]. See also Breyer, "Five Questions About Australian Anti-Trust Law", (1977) 51 *Australian Law Journal* 28 at 34.

74 *Liquorland* (2006) ATPR ¶42-123 at 45,243 [430].

75 *Liquorland* (2006) ATPR ¶42-123 at 45,245 [438].

76 *Liquorland* (2006) ATPR ¶42-123 at 45,244 [437].

77 See Brunt, "'Market Definition' Issues in Australian and New Zealand Trade Practices Litigation", (1990) 18 *Australian Business Law Review* 86 at 126.

78 *ANZ Banking Group* (2015) 236 FCR 78 at 107-108 [138] citing *Singapore Airlines* (1991) 33 FCR 158 at 174.

of the Federal Court said in *Australian Competition and Consumer Commission v Australia and New Zealand Banking Group Ltd*, is that the identified market "has economic and commercial reality"[79]:

> "It must accordingly not be artificial or contrived. Economists frequently construct economic models to analyse complex commercial or economic events or scenarios. But a model is unlikely to be a useful analytical tool if based on unrealistic assumptions that materially depart from the real world facts and circumstances involving commercial behaviour in which the events to be analysed occur."

61 The identification of the market must therefore "accurately [and] realistically describe and reflect the interactions between, and perceptions and actions of, the relevant actors or participants in the alleged market, that is, the commercial community involved"[80].

62 Embedded in the "focusing process" is the recognition that the substantive criteria for a particular contravention in issue will depend on the particular statutory provisions. That process "may lead to the drawing of different lines in different circumstances depending upon the purpose of the provision in question"[81]. In turn, that process may "lead to different market definitions in relation to the same industry"[82] or even different markets within the same case. That potential was recognised more than 25 years ago by Professor Brunt, who wrote that "[t]here can be more than one 'relevant market' for a particular case, in the sense of markets that will attract liability"[83]. There is nothing odd about that conclusion. As Professor Brunt pointed out, it reflects the fact that market identification "is but a tool to facilitate a proper orientation for the

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79 (2015) 236 FCR 78 at 108 [138]. See also *Flight Centre* (2016) 91 ALJR 143 at 156 [70]; 339 ALR 242 at 258.

80 *ANZ Banking Group* (2015) 236 FCR 78 at 108 [138].

81 *Singapore Airlines* (1991) 33 FCR 158 at 175 citing Breyer, "Five Questions About Australian Anti-Trust Law", (1977) 51 *Australian Law Journal* 28 at 34.

82 *Liquorland* (2006) ATPR ¶42-123 at 45,245 [439].

83 Brunt, "'Market Definition' Issues in Australian and New Zealand Trade Practices Litigation", (1990) 18 *Australian Business Law Review* 86 at 127.

analysis of market power and competitive processes – and should be taken only a sufficient distance to achieve the legal decision"[84].

63 Recognising that market identification is an economic tool has other important consequences. Economics is a social science and "does not furnish a body of settled conclusions immediately applicable to policy. It is a method rather than a doctrine, an apparatus of the mind, a technique of thinking, which helps its possessor draw correct conclusions"[85].

64 The nature of economics as a social science is often highlighted by the existence of conflicting expert opinions about the identification of a relevant market. Deane J acknowledged as much in *Queensland Wire Industries Pty Ltd v Broken Hill Proprietary Co Ltd*, when his Honour said[86]:

> "The economy is not divided into an identifiable number of discrete markets into one or other of which all trading activities can be neatly fitted. One overall market may overlap other markets and contain more narrowly defined markets which may, in their turn, overlap, the one with one or more others."

65 When a court is required to draw its own conclusions about market identification, it is therefore inherent in that task – being one founded on economics as a social science – that the court will be required to make "value judgments about which there is some room for legitimate differences of opinion"[87]. As a result, "[m]arket identification and definition is not an exact science. It is rooted in the analysis of commerce as an aspect of human behaviour"[88].

66 This approach has been referred to as the "functional", "purposive" or "instrumental" approach to market identification. In *Australian Competition and Consumer Commission v Flight Centre Travel Group Ltd*, Kiefel and Gageler JJ

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84 Brunt, '"Market Definition' Issues in Australian and New Zealand Trade Practices Litigation", (1990) 18 *Australian Business Law Review* 86 at 126-127 quoted in *Arnotts Ltd v Trade Practices Commission* (1990) 24 FCR 313 at 328.

85 *Liquorland* (2006) ATPR ¶42-123 at 45,308 [838].

86 (1989) 167 CLR 177 at 196.

87 *Queensland Wire* (1989) 167 CLR 177 at 196.

88 *ANZ Banking Group* (2015) 236 FCR 78 at 107 [135].

noted that there are limits to this approach[89]. It should not be taken beyond its justification by, for example, using analysis of competitive processes "to construct, or deconstruct and reconstruct, the supply of a service in a manner divorced from the commercial context of the putative contravention which precipitates the analysis"[90].

(2) Statutory framework

67 It is therefore necessary, in these appeals, to start with the statutory terms governing the impugned conduct which was said to contravene the TPA – ss 45(2) and 45A within Pt IV.

68 The statutorily defined object of the TPA is "to enhance the welfare of Australians through the promotion of competition and fair trading and provision for consumer protection"[91]. In other words, the purpose of the TPA is "to promote competition, not to protect the private interests of particular persons or corporations"[92]. It is the "flow-on result that is the key – the effect on consumers, not the effect on other competitors"[93].

69 Part IV of the TPA broadly manifests legislative concern with injury to competition by practices apt to keep up prices. And, accordingly, Pt IV of the TPA proscribes various practices in respect of pricing which merit the label "restrictive" in the heading for Pt IV[94].

70 Section 45 is concerned with contracts, arrangements or understandings that restrict dealings or affect competition. These appeals are concerned with the latter – several understandings that contained a provision which had the purpose,

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89 (2016) 91 ALJR 143 at 156 [70]; see also at 165 [123], 171 [150]; 339 ALR 242 at 258, 270, 278.

90 *Flight Centre* (2016) 91 ALJR 143 at 156 [70]; 339 ALR 242 at 258.

91 s 2 of the TPA. See also *Boral Besser Masonry Ltd v Australian Competition and Consumer Commission* (2003) 215 CLR 374 at 429 [159], 458-459 [260]-[261]; [2003] HCA 5.

92 *Boral* (2003) 215 CLR 374 at 411 [87]; see also at 429 [160]. See also *Melway Publishing Pty Ltd v Robert Hicks Pty Ltd* (2001) 205 CLR 1 at 13 [17]; [2001] HCA 13 citing *Queensland Wire* (1989) 167 CLR 177 at 191.

93 *Boral* (2003) 215 CLR 374 at 459 [261]; see also at 431 [164].

94 *Boral* (2003) 215 CLR 374 at 428 [158]; *Flight Centre* (2016) 91 ALJR 143 at 175 [184]; 339 ALR 242 at 284.

effect or likely effect of "substantially lessening competition" because it had the purpose, effect or likely effect of fixing prices.

71 As in force at the relevant times, s 45(2) relevantly provided:

> "A corporation shall not:
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> (a) make a contract or arrangement, or arrive at an understanding, if:
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> …
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> (ii) a provision of the proposed contract, arrangement or understanding has the purpose, or would have or be likely to have the effect, of substantially lessening *competition*; or
>
> (b) give effect to a provision of a contract, arrangement or understanding, … if that provision:
>
> …
>
> (ii) has the purpose, or has or is likely to have the effect, of substantially lessening *competition*." (emphasis added)

72 The ACCC relied upon the deeming provision in s 45A(1), which relevantly provided:

> "Without limiting the generality of section 45, a provision of [an] … 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, … of … controlling … the price for … services supplied … by the parties to the … understanding … *in competition with each other*." (emphasis added)

73 That is, for the purposes of s 45, s 45A(1) deemed a provision of an understanding to have the purpose, effect or likely effect of substantially lessening competition where, relevantly, two conditions were satisfied. First, the provision had the purpose, effect or likely effect of controlling the price for services supplied by one party to the understanding. Second, the services in relation to which the price was controlled were supplied "in competition" with the other party (or parties) to the understanding. There is no dispute in these appeals that both conditions were satisfied in the case of the impugned provisions of each of the several understandings.

74 For the purposes of both s 45 and s 45A, "competition" in relation to an understanding was defined in s 45(3) relevantly to mean:

> "competition *in* any market in which a corporation that is a party to the … understanding … *supplies* … *services*." (emphasis added)

75 For the purposes of s 45(3), the focus is on "competition *in* [a] market", not competition *for* a market, and it is not necessary for all parties to the understanding to supply services in a particular market. It is sufficient if one of them does.

76 "Competition" was not otherwise relevantly defined in the TPA[95]. Like "market", "competition" is a term which is difficult, if not impossible, to define precisely or comprehensively. It is "a very rich concept and there are shades and differences of meaning in customary usage", even by economists[96].

77 However, s 45(3) does explicitly link the concept of "competition" to the concept of "market", as does the definition of "market" in s 4E when it speaks of goods and services being "otherwise competitive". "[W]hether firms compete is very much a matter of the structure of the markets in which they operate"[97]. One cannot be understood without reference to the other[98]. As Burchett J explained in *News Ltd v Australian Rugby Football League Ltd*[99]:

> "The term 'market' encapsulates the area within which competitive forces operate upon an undertaking (the subject of the inquiry), and its use implies the deployment of a method of economic analysis for the better understanding of those forces in order to solve the problem at hand. Just because it is of this nature, the concept can only be understood in relation to the idea of competition, itself a complex notion in this field of law and economics."

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95 Section 4(1) of the TPA provided that competition "includes competition from imported goods or from services rendered by persons not resident or not carrying on business in Australia".

96 Brunt, '"Market Definition' Issues in Australian and New Zealand Trade Practices Litigation", (1990) 18 *Australian Business Law Review* 86 at 98-99. See also *Re Queensland Co-operative Milling Association Ltd – Proposed Merger* (1976) 8 ALR 481 at 514.

97 *QCMA* (1976) 8 ALR 481 at 516. See also *Outboard Marine Australia Pty Ltd v Hecar Investments No 6 Pty Ltd* (1982) 44 ALR 667 at 669-670.

98 cf *Australian Gas Light Company v Australian Competition and Consumer Commission* (2003) 137 FCR 317 at 417 [350].

99 (1996) 58 FCR 447 at 477.

78 Or, as was noted by the Trade Practices Tribunal in *Re Queensland Co-operative Milling Association Ltd – Proposed Merger*, competition is a dynamic process, rather than a situation, which expresses itself as "rivalrous market behaviour" – behaviour that involves "independent rivalry in all dimensions of the [service] offered to consumers"[100]. Competition is the means to protect the interests of consumers, not competitors. This is why it has been rightly said, in later decisions in the Federal Court, that competition may take many forms[101] and that the way competitors behave is likely to tell you something of the market[102]. As has been explained, the functional approach to market identification requires consideration of the alleged anti-competitive conduct. Considering "competition" and identifying the "market" are thus part of the same process; "it is for the sake of simplicity of analysis that the two are separated"[103].

79 Reference should be made to two further sections of the TPA. At all relevant times, s 4E provided that:

> "For the purposes of this Act, unless the contrary intention appears, ***market*** means a market in Australia and, when used in relation to any goods or services, includes a market for those goods or services and other goods or services *that are substitutable for, or otherwise competitive with*, the first-mentioned goods or services." (emphasis in unbolded italics added)

It was common ground that, for the purposes of s 4E of the TPA, the relevant market may be "in Australia" if it is wholly *or* partly in Australia.

80 Section 4(1) contained two further definitions of present relevance. "[S]upply", when used as a verb in relation to services, was defined to include "provide, grant or confer"[104] and "services" was relevantly defined to include any rights or benefits that are, or are to be, provided in trade or commerce including the rights or benefits that are, or are to be, provided under a contract for or in relation to the performance of work[105].

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100 (1976) 8 ALR 481 at 515.

101 See *Seven Network Ltd v News Ltd* (2009) 182 FCR 160 at 307 [670].

102 See *Liquorland* (2006) ATPR ¶42-123 at 45,246 [443]-[444].

103 *Queensland Wire* (1989) 167 CLR 177 at 187.

104 par (b) of the definition of "supply" in s 4(1) of the TPA. See also s 4C of the TPA.

105 par (a)(i) of the definition of "services" in s 4(1) of the TPA.

81 The provisions in Pt IV of the TPA contain varying tests that refer to "competition" or "market power". As Professor Brunt explained, the "unifying subject-matter is market power (or 'monopoly power') and its antithesis, effective competition"[106]. Section 45(2) does not refer to market power or constraints on power[107]. It refers to competition.

82 Thus, the present appeals were concerned with identified anti-competitive behaviour – arriving at and giving effect to understandings that fixed the price of the air cargo services – which had the deemed purpose, effect or likely effect of substantially lessening competition for those services.

83 In these appeals, the task of the Court is to identify where at least one airline that was a party to the impugned understandings (one or more of Air NZ and Garuda) was in competition, or competed, to supply the air cargo services. In particular, did it compete to supply those services in a market in Australia? Or to ask the same questions differently – what was the "area of effective competition in which the [airline] operate[d]"[108]; what was the "area or space" for the occurrence of the relevant transactions[109]?

84 Before turning to consider those questions, it is necessary to refer to three matters that were addressed by the parties in argument – substitutability, the ACCC's submission that market identification involved a two-stage approach and the effects doctrine in the United States.

(3) Substitutability

85 As s 4E of the TPA relevantly provided, a market in relation to services includes a market for those services as well as other services that are substitutable for, or "otherwise competitive with", those first-mentioned services.

86 In *QCMA*, the Tribunal said that "*[w]here* the defining feature of a market is the existence of close substitutes (whether in demand or supply), the defining feature of a sub-market is the existence of still closer and more immediate substitutes"[110] (emphasis added). In *Queensland Wire*, Mason CJ and Wilson J

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106 Brunt, '"Market Definition' Issues in Australian and New Zealand Trade Practices Litigation", (1990) 18 *Australian Business Law Review* 86 at 93.

107 cf s 46 of the TPA. See *Queensland Wire* (1989) 167 CLR 177 at 187.

108 Australia, Trade Practices Commission, *First Annual Report*, (1975) at 60 quoted in *QIW Retailers Ltd v Davids Holdings Pty Ltd (No 3)* (1993) 42 FCR 255 at 267.

109 *Flight Centre* (2016) 91 ALJR 143 at 156 [66]; 339 ALR 242 at 257.

110 (1976) 8 ALR 481 at 517.

referred to that oft-cited passage in *QCMA* as explaining that "the defining feature of a market is substitution"[111].

87 There are a number of points to be made about that statement in *Queensland Wire*. First, as the Tribunal itself recognised in *QCMA*, the existence of close substitutes is not *the* defining feature of every market. Second, as Dawson J pointed out in *Queensland Wire*, "[i]mportant as they are, elasticities and the notion of substitution provide no complete solution to the definition of a market"[112]. Focusing too closely on the concept of substitutability can obscure the proper identification of the market and undermine the purpose of the relevant statutory provisions[113].

88 As noted earlier, s 45 is concerned to promote competition. Relevantly, it is concerned to proscribe contracts, arrangements or understandings that contain a provision which has the purpose, effect or likely effect of "substantially lessening competition" by, for example, controlling the price for services supplied by a party to that contract, arrangement or understanding. And the competition that is to be promoted is competition in any market in which a corporation that is a party to the contract, arrangement or understanding supplies those services. In that context, questions of substitutability may be relevant but are unlikely to be determinative in the process of market identification[114].

89 The proposition that questions of substitutability are not determinative is not limited to s 45. In the context of s 50 of the TPA, a substantial lessening of competition is assessed by reference to a range of matters. The extent to which substitutes are available is just one of those matters[115]. Other matters relevant to an assessment for the purposes of s 50 include the height of barriers to entry to the market[116], the degree of countervailing power in the market[117] and dynamic

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111 (1989) 167 CLR 177 at 188.

112 (1989) 167 CLR 177 at 199.

113 cf *Arnotts* (1990) 24 FCR 313 at 329, 332.

114 See *Queensland Wire* (1989) 167 CLR 177 at 199.

115 s 50(3)(f) of the TPA.

116 s 50(3)(b) of the TPA.

117 s 50(3)(d) of the TPA.

characteristics of the market such as growth, innovation and product differentiation[118].

90 What will be determinative are the conduct at issue and the statutory terms governing the contravention, which together provide the necessary focus for the process of market identification.

(4) Rejection of the ACCC's two-stage approach to market identification

91 The ACCC submitted that, in identifying the market, s 4E operates only *after* the market identification process has occurred. That is, only when the market has been identified does one ask, for the purposes of s 4E, whether that market can be characterised as "in Australia".

92 That submission should be rejected. First, as just noted, the process of market identification starts with the conduct at issue and the statutory terms governing the contravention. In the context of ss 45 and 45A, that necessarily requires reference to s 4E. Section 4E is not excluded, or delayed from consideration, by those sections; rather, it is included, from the outset, as a critical part of the process.

93 Second, and in any event, s 4E offers no textual support for undertaking a two-stage analysis. In its terms, it identifies that it is part of the exercise to be undertaken in the process of market identification.

(5) Effects doctrine in the United States

94 The "functional", "purposive" or "instrumental" approach to market identification, and, relevantly to these appeals, identifying whether the impugned provisions substantially lessened *competition* for the air cargo services in a market *in Australia*, is substantively different from the "effects doctrine" in the United States of America.

95 No party contended that this Court should adopt any form of the effects doctrine or consider whether persons in Australia are or might be adversely affected by the impugned conduct outside Australia. That is unsurprising. The applicable statutory framework in Australia is different and, since the doctrine was first propounded by Judge Learned Hand in *United States v Aluminum Co of America*[119], not only has the statutory framework in the United States been amended to clarify uncertainty and address divergence in the

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118 s 50(3)(g) of the TPA.

119 148 F 2d 416 at 443-444 (2nd Cir 1945).

application of the doctrine[120], the justification for and breadth of the doctrine has been questioned[121], and the courts have not consistently described or applied the doctrine[122].

(6) Relevant factual findings

96 On appeal to this Court, particular findings by the primary judge were not challenged. The facts found are considered under the following headings: (a) the air cargo services; (b) the understandings; (c) other aspects of the impugned conduct; and (d) demand in Australia for the air cargo services and the airlines' response to that demand.

(a) The air cargo services

97 The air cargo services were unidirectional and route-specific – from specific ports of origin in Hong Kong, Singapore and Indonesia, to specific destination ports in Australia. They comprised a suite of services that included[123]:

> "(1) transport services, including special handling requirements, timetabling and also whether or not delivery was by direct or indirect flight;
>
> (2) ground handling services at points of origin and destination; and
>
> (3) enquiry services at airports, noting that the airlines might supply the services themselves, or contract them out to third parties, possibly using an airline based at the airport in question."

For the purposes of market identification, each limb is equally significant.

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120 *Foreign Trade Antitrust Improvements Act of 1982*, 15 USC §6a.

121 See, eg, *F Hoffmann-La Roche Ltd v Empagran SA* 542 US 155 at 165-167 (2004).

122 See, eg, *Timberlane Lumber Co v Bank of America, NT & SA* 549 F 2d 597 (9th Cir 1976); *Mannington Mills Inc v Congoleum Corporation* 595 F 2d 1287 (3rd Cir 1979); *Hartford Fire Insurance Co v California* 509 US 764 (1993); *Hoffmann-La Roche* 542 US 155 (2004); *United States v LSL Biotechnologies* 379 F 3d 672 (9th Cir 2004).

123 *Garuda* (2016) 244 FCR 190 at 201 [22] citing *Air NZ* (2014) 319 ALR 388 at 445-447 [253]-[265]. See also *Air NZ* (2014) 319 ALR 388 at 401 [27], 455 [313], 456 [320].

(b) The understandings

98 Air NZ and Garuda were parties to several understandings containing provisions to impose surcharges and fees for carriage of air cargo from ports of origin in Hong Kong[124], Singapore[125] and Indonesia[126] to destination ports in Australia. Four different kinds of charges were involved: a fuel surcharge, an insurance and security surcharge ("ISS"), a customs fee and a freight charge[127].

(c) Other aspects of the impugned conduct

99 Air NZ and Garuda did not act alone; they acted in the company of a large number of other international airlines which carried air cargo from ports of origin in Hong Kong, Singapore and Indonesia to destination ports in Australia[128]. Each of those international airlines, including Air NZ and Garuda, was a member of separate industry bodies in Hong Kong, Singapore and Indonesia[129].

100 In Hong Kong, the relevant industry body was the Hong Kong Board of Airline Representatives, which established a Cargo Sub-Committee

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124 2002 Hong Kong Lufthansa Methodology Understanding (Air NZ only); Hong Kong Imposition Understanding; First Hong Kong Surcharge Extension Understanding (Garuda only); October 2001 Hong Kong Insurance Surcharge Understanding; December 2002 Hong Kong Insurance Surcharge Understanding. The understandings are referred to in this footnote and elsewhere in this judgment in accordance with how they were described in pleadings and in the courts below.

125 Singapore ISS Understanding (Air NZ only).

126 October 2001 Fuel Surcharge Understanding; April 2002 Fuel Surcharge Understanding; June 2002 Fuel Surcharge Understanding; September 2002 Fuel Surcharge Understanding; January 2003 Fuel Surcharge Understanding; May 2003 Fuel Surcharge Understanding; September 2004 Fuel Surcharge Understanding; April 2005 Fuel Surcharge Understanding; July 2005 Fuel Surcharge Understanding; October 2001 Security Surcharge Understanding; January 2003 Security Surcharge Understanding; May 2003 Security Surcharge Understanding; September 2004 Security Surcharge Understanding; July 2005 Security Surcharge Understanding; October 2001 Air Freight Rate Understanding; May 2004 Customs Fee Understanding (all Garuda only).

127 *Air NZ* (2014) 319 ALR 388 at 391 [2], 393 [15]-[17].

128 See *Air NZ* (2014) 319 ALR 388 at 391 [1], [6], 392 [8], 451 [291], 507 [559], 525 [660]-[661].

129 *Air NZ* (2014) 319 ALR 388 at 391-392 [6]-[7], 479 [429], 614 [1133]-[1134].

("the HK CSC"). In Singapore, the industry body was the Singapore Board of Airline Representatives, which established a Cargo Sub-Committee. In Indonesia, the industry body was the Air Cargo Representative Board ("the ACRB").

101 Although the personnel who represented the airlines on these bodies and the internal mechanics in each jurisdiction were not identical[130], the primary judge found that each industry body or its relevant sub-committee was a forum in which member airlines engaged in price fixing with respect to the imposition of surcharges and fees for the air cargo services[131].

102 In relation to the fuel surcharges, the HK CSC and the ACRB used what was referred to in the parties' pleadings as the "Lufthansa Index", which was coupled with a "methodology" as varied or adapted from time to time. The Lufthansa Index was a fuel price index, initially based on an earlier index published by the International Air Transport Association and reflecting the average of five spot prices for aviation fuel (Singapore, US Gulf, US West Coast, Rotterdam and Italy). The index level was expressed as a percentage of a specified baseline price. The accompanying methodology, which took different forms at various times, specified particular levels of fuel surcharge depending upon the level of the Lufthansa Index. The Lufthansa Index, and the methodology drawing upon it, facilitated price fixing of fuel surcharges by international carriers.

103 In relation to fuel surcharges on air cargo routes between Hong Kong and ports in Australia, the primary judge found that Air NZ was a party, with a large number of other airlines, to an understanding reached at a meeting of the HK CSC in Hong Kong on 23 July 2002 to the effect that they would impose fuel surcharges on the supply of air cargo services from Hong Kong in accordance with the then form of the Lufthansa Index and methodology ("the 2002 Hong Kong Lufthansa Methodology Understanding"), the imposition of which had been previously approved by the HK CAD. Garuda was not a party to that understanding.

104 The terms of the HK CAD's approval required the HK CSC (which included Air NZ and Garuda) to inform the HK CAD of each change in the fuel surcharge mechanism, which fluctuated depending on the price of aviation fuel. In the years that followed the 2002 Hong Kong Lufthansa Methodology Understanding, the HK CSC would write to the HK CAD, informing it of the

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130 *Air NZ* (2014) 319 ALR 388 at 392 [9]; see also at 497 [508]-[510], 532-533 [706]-[713], 613-614 [1129]-[1132].

131 *Air NZ* (2014) 319 ALR 388 at 392 [8]. See also *Garuda* (2016) 330 ALR 230 at 313 [354], 323 [403]-[404], 326 [421], 335 [461], 337 [470], 338-339 [478]-[480].

amount and date of imposition of the fuel surcharge, and the airlines would impose the surcharge in accordance with the amount and date as notified. This was described as the "Hong Kong Imposition Understanding" (to which both Air NZ and Garuda were parties).

105 The primary judge and the Full Court focused their analysis on air cargo routes between Hong Kong and ports in Australia. It was common ground that the reasoning about the understanding affecting those routes applied equally to the other air cargo routes. The understandings that were made about fuel surcharges, together with the other understandings about other charges, controlled the price of the air cargo services on routes from Hong Kong, Singapore and Indonesia to destination ports in Australia.

106 By reason of s 45A of the TPA, the impugned provisions were deemed to have the purpose, effect or likely effect of controlling the price the airlines charged for the air cargo services and thereby substantially lessened competition for those services.

(d) Demand in Australia for the air cargo services and the airlines' response to that demand

107 The primary judge concluded that freight forwarders, large importers or shippers in Australia and exporters in Hong Kong participated in or provided, and affected, the demand for the air cargo services[132]. The primary judge found that large importers or shippers or exporters were those whose size and volume of cargo signified that they were "substantial economic actors"[133]. Indeed, his Honour concluded that the evidence "strongly suggested that airlines, in general, regarded significant importers and exporters both as targets for their marketing activities and also as the ultimate source of business"[134].

108 Other characteristics of these large shippers, and the airlines' behaviour in relation to them, are relevant to the process of market identification in these appeals.

109 There were large or substantial shippers in Australia[135]. Those large shippers were regarded by the airlines as not only a potential source of demand, but the ultimate source of demand, for their supply of the air cargo services from

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132 *Air NZ* (2014) 319 ALR 388 at 447 [263].

133 *Air NZ* (2014) 319 ALR 388 at 448 [270].

134 *Air NZ* (2014) 319 ALR 388 at 449 [272].

135 *Air NZ* (2014) 319 ALR 388 at 455 [313]-[314].

ports in Asia to ports in Australia[136]. Certain shippers had particular preferences and were able to influence the choice of airline and flight[137]. As a result, the issue of which airline to use need not have arisen at the port of origin; the decision of the large shippers in Australia was likely to be made in Australia[138].

110 Freight forwarders offered to supply and, when engaged, did supply consignors or consignees (or both) with services associated with the transport of cargo from a place of origin to a place of destination[139]. But, the primary judge concluded, as a matter of economic substance, the freight forwarders were intermediaries having only fluctuating control over the cargo whose carriage they arranged[140]. The airlines entered into tripartite arrangements with freight forwarders and shippers; typically such arrangements referred to specific products and would identify the carrier, shipper and freight forwarder, and provided for meetings between the airline and shipper and for the shipper to provide to the airline projected tonnages and frequencies[141]. For example, in a letter from Singapore Airlines to WDM International dated 28 September 2000, the airline said that it was "more than happy to sit down and discuss set contracts/rate with [the] shippers" and that it could "lock in said contracts for a 6 or 12 month period however this must be agreed and signed by all parties" including the shippers[142].

111 The airlines regarded the cargo as belonging to the shippers[143] and considered that they were carrying loads or volumes for particular shippers[144]. Thus, the airlines competed for the custom of particular shippers, and the

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136 *Air NZ* (2014) 319 ALR 388 at 450 [284].

137 *Air NZ* (2014) 319 ALR 388 at 451 [290].

138 *Air NZ* (2014) 319 ALR 388 at 447 [264], 454 [309].

139 *Air NZ* (2014) 319 ALR 388 at 403 [38].

140 *Air NZ* (2014) 319 ALR 388 at 447 [263]-[264], 451 [290], 453 [299]; *Garuda* (2016) 244 FCR 190 at 209 [54].

141 *Air NZ* (2014) 319 ALR 388 at 452 [294].

142 *Air NZ* (2014) 319 ALR 388 at 452 [296].

143 *Air NZ* (2014) 319 ALR 388 at 453 [300]; *Garuda* (2016) 244 FCR 190 at 209 [54].

144 *Air NZ* (2014) 319 ALR 388 at 449 [274], 453 [300].

evidence led at trial included several internal reports of various airlines referring to the airline losing custom from one shipper to another airline[145].

112 In addition, the airlines designed their unidirectional air cargo services according to the demand for particular scheduling, handling and storage requirements of specified shippers[146].

113 As the primary judge found, the airlines recognised that the large shippers were the "economic foundation of the market"[147]. Where the shippers or importers were in Australia, the airlines took note of the shippers' businesses[148]. The airlines actively followed the position of shippers in various ways, including by receiving regular cargo reports and cargo information, albeit how the information was obtained was not clear on the evidence[149].

114 So, to take one example, an internal Air NZ memorandum dated 11 March 2003 from the Manager of Global Cargo Sales stated[150]:

> "Many major exporters have stated that volumes will diminish if the surcharge in [sic] instated on top of current rates ... [Air NZ] is currently viewed as playing our part and taking responsibility in assisting exporters through tough times ... Many exporters have passed comment regarding [net profit results in press] and I believe that it will be extremely difficult to justify a surcharge on the back of our half year profit statement."

115 In the Full Court, the majority considered evidence given by representatives of four market participants – Robert Bosch (Australia) Pty Ltd, Qantas, BAX Global and Toshiba (Australia) Pty Ltd – in relation to the interactions between airlines, shippers and freight forwarders. Their Honours said[151]:

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145 *Air NZ* (2014) 319 ALR 388 at 452 [298].

146 *Air NZ* (2014) 319 ALR 388 at 451 [289], 455 [313].

147 *Air NZ* (2014) 319 ALR 388 at 451 [287].

148 *Air NZ* (2014) 319 ALR 388 at 450 [283]; *Garuda* (2016) 244 FCR 190 at 210 [57].

149 *Air NZ* (2014) 319 ALR 388 at 450-451 [283]-[285].

150 *Air NZ* (2014) 319 ALR 388 at 452 [295].

151 *Garuda* (2016) 244 FCR 190 at 210-211 [60]-[63].

"There was evidence from the Customs and Shipping Manager of Robert Bosch (Australia) Pty Ltd who was responsible for monitoring the performance of Robert Bosch's freight forwarders. He said that where perishables needed to be shipped within a tight timeframe, Robert Bosch would enter into tri-partite arrangements with its freight forwarder and the airline in the form of a memorandum of understanding which would guarantee Robert Bosch its required capacity on a particular airline and priority over other shippers' cargo.

The former Group General Manager (Freight) at Qantas, also described the existence of some tri-partite arrangements between Qantas, freight forwarders and shippers. These arrangements were usually recorded in memoranda of understanding after face-to-face meetings attended by all three parties. Negotiations related to price, capacity and service standards. The Group General Manager (Freight) observed that the memorandum of understanding allowed Qantas to, 'establish a relationship directly with a shipper. Qantas Freight would then be in a position to use its relationship with the shipper to reduce the risk of the freight forwarder taking the shipper's freight to another airline'.

Evidence from one freight forwarder, Burlington Northern Air Freight (subsequently BAX Global), by the State Manager of its Perth, Adelaide and Sydney offices, … was also that:

> 'BAX Global's major multi-national customers would regularly hold meetings with employees of BAX Global and representatives of the airlines to review our performance against these KPI's and to ensure that there was sufficient airline capacity available. In order to maintain the relationship, it was necessary for there to be dialogue between all three parties, so that the airline knew when the customer was likely to require capacity and so the customer knew of any expected capacity constraints on the airline.'

There was also evidence from Ms Cluff who was employed by Toshiba (Australia) Pty Ltd as a Logistics Import Specialist. … [S]he said that, 'On occasions, there have been tri-partite discussions between Toshiba Australia, the freight forwarder and Qantas'. She also said that on numerous occasions she liaised with Qantas directly." (citations omitted)

116 In short, the evidence to which the primary judge and the majority in the Full Court referred showed that the airlines dealt directly with some shippers and sought to establish and maintain relationships with those shippers[152]. As the

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152 *Garuda* (2016) 244 FCR 190 at 210 [59]. See also *Air NZ* (2014) 319 ALR 388 at 450-451 [285].

primary judge said, "there were substantial importers in Australia whose custom the airlines [tussled] to obtain"[153]. The airlines physically competed in Australia to obtain the custom of these shippers[154]. And the airlines marketed their unidirectional air cargo services to these large shippers in Australia[155].

117 As the primary judge concluded, the airlines competed against each other in providing the air cargo services and that competition physically took place in Australia[156] in the sense that representatives of the airlines met with representatives of Australian users of the air cargo services to discuss the terms on which the airlines would provide the services. Although the contracts of carriage were entered into in Hong Kong by freight forwarders with a particular airline, as a practical matter substantial importers in Australia both sought, and had the capacity, to influence and in some cases direct the decision about which airline was to be used[157].

118 As a result, although the supply of the air cargo services usually involved participation by a consignor, an origin freight forwarder, an airline, a destination freight forwarder and a consignee, participation was not always vertical[158]. Large shippers or importers would often instigate a particular shipment and could influence or direct which airline would provide the air cargo services for that shipment[159].

(7) Market identification

119 In relation to the impugned provisions of each understanding, the questions posed by the interaction of s 45(2) with ss 4E, 45(3) and 45A are: what were the services supplied or to be supplied; and what was the market in which each airline competed to provide those services? The services have been

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153 *Air NZ* (2014) 319 ALR 388 at 455 [313].

154 *Air NZ* (2014) 319 ALR 388 at 455 [313].

155 *Air NZ* (2014) 319 ALR 388 at 449 [273], 449-450 [277]-[279], 450 [284], 452 [293], 453 [301]. See also *Garuda* (2016) 244 FCR 190 at 210-211 [60]-[63].

156 *Air NZ* (2014) 319 ALR 388 at 455 [313].

157 *Air NZ* (2014) 319 ALR 388 at 455 [314].

158 *Air NZ* (2014) 319 ALR 388 at 448 [268]-[269].

159 *Air NZ* (2014) 319 ALR 388 at 448 [268]-[269], 451 [290]. See also *Garuda* (2016) 244 FCR 190 at 211 [64].

identified – namely, as unidirectional air cargo services from ports of origin in Hong Kong, Singapore and Indonesia to destination ports in Australia[160].

120 If "competition" can be seen as the "striving or potential striving of two or more persons or organisations against one another for the same or related objects"[161], did the airlines compete to supply the air cargo services in a market in Australia?

121 The identification of a market in Australia for the supply of the air cargo services accurately and realistically describes and reflects the interactions between, and perceptions and actions of, one or more of the relevant actors and participants in the market for those services[162]. The interactions between, and perceptions and actions of, one or more of the relevant actors and participants in the market in Australia for the air cargo services included that:

(1) there was an economically significant demand for the air cargo services, in the form of demand from large shippers, and that demand physically existed in Australia[163];

(2) the airlines met, negotiated and partnered directly with shippers in Australia[164];

(3) the airlines tracked the shippers' activities in the market for provision of the air cargo services from Asia to Australia[165];

(4) the airlines marketed the services to large importers in Australia (as well as to large exporters from Asia) because the airlines regarded those significant importers (and exporters) both as targets

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160 *Air NZ* (2014) 319 ALR 388 at 455 [313], 459 [336].

161 Australia, Independent Committee of Inquiry, *National Competition Policy*, (1993) at 2 quoting Dennis, *'Competition' in the History of Economic Thought*, (1977).

162 See *ANZ Banking Group* (2015) 236 FCR 78 at 108 [138].

163 *Air NZ* (2014) 319 ALR 388 at 451 [287]-[289], 453 [305], 454-455 [311], 455 [313]-[314], 457 [325]-[326]; *Garuda* (2016) 244 FCR 190 at 203 [28], 205 [33], [35], 207-208 [45].

164 *Air NZ* (2014) 319 ALR 388 at 451-452 [291]-[293].

165 *Air NZ* (2014) 319 ALR 388 at 449 [272], 451 [287].

for their marketing activities and also as the ultimate source of business[166]; and

(5) the airlines designed their products according to the demand for particular scheduling, handling and storage requirements of specified shippers[167].

That list is not exhaustive. But it is sufficient to demonstrate that the airlines, as parties to the several understandings, were in competition. And it is sufficient to demonstrate that they competed to supply the air cargo services in a market in Australia. Or, to put the matter differently, in relation to the air cargo services, an "area of effective competition in which [each airline] operate[d]"[168] was in Australia and the airlines engaged in "rivalrous market behaviour" in Australia – behaviour that involved "independent rivalry in all dimensions of the [services] offered to consumers"[169].

122 That conclusion is unsurprising when set against the purposes of the TPA. The purpose of the TPA is to "enhance the welfare of Australians through the promotion of competition and fair trading and provision for consumer protection"[170]. The TPA seeks in Pt IV to protect Australian consumers from restrictive trade practices. Air NZ and Garuda carried on business in Australia and their impugned conduct substantially lessened competition for the air cargo services – services that customers in Australia (large shippers) used and paid for at a price fixed between those who would otherwise have competed on price as well as quality.

(8) Inflexible aspects of the market

123 Air NZ and Garuda placed considerable emphasis on what they described as "inflexible aspects" of the market as found by the majority in the Full Court, in support of their submission that there was not a market in Australia for the purposes of s 4E of the TPA. Air NZ referred to the fact that "[a]ll sources of supply were located at the port of origin … [and] the only places at which substitution between competing suppliers could occur was in those places. There

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166 *Air NZ* (2014) 319 ALR 388 at 449 [272], 451 [289], 452 [293], 453 [301]; *Garuda* (2016) 244 FCR 190 at 204 [31], 211 [65], 231-232 [167]-[168].

167 *Air NZ* (2014) 319 ALR 388 at 451 [289].

168 *QIW* (1993) 42 FCR 255 at 267.

169 *QCMA* (1976) 8 ALR 481 at 515.

170 s 2 of the TPA.

was no place in Australia to which any person wishing to acquire relevant air cargo services could turn to acquire those services".

124 Garuda referred to several features of the dealings between the actors: the demand from shippers was for door to door delivery; that demand was satisfied by freight forwarders, which paid the airlines for delivery whether or not the freight forwarders had been paid by the shippers; the airlines regarded the freight forwarders, not the shippers, as customers; and, finally, freight forwarders and shippers had differing roles.

125 As the process of market identification in these appeals has revealed, the facts and matters relied on by Air NZ and Garuda are not irrelevant. But they are not determinative. Having regard to the impugned anti-competitive behaviour and the terms of ss 45(2) and 45A, the facts and matters relied on by Air NZ and Garuda do not, standing alone, "accurately or realistically describe and reflect the interactions between, and perceptions and actions of, the relevant actors or participants in the alleged market, that is, the commercial community involved"[171].

126 Once all of the facts and matters that do describe and reflect the conduct of the airlines in the air cargo services market are identified, those facts and matters demonstrate that the airlines, as parties to the several understandings, were in competition, and competed, to supply the air cargo services in a market in Australia. It is necessary to explain why that is so.

(9) Other market indicia

127 A market is commonly described by reference to four dimensions – product (here, the types of services supplied), function (where within the supply chain the services are supplied), geography (the physical area in which the services are supplied) and time (the period in which the supply occurs)[172]. Those dimensions, and that form of analysis, are tools. They are not the starting point of the process of market identification for the purposes of considering the application of particular provisions of the TPA. A court begins with the problem at hand (the impugned conduct) and asks: what market identification best assists in the assessment of that conduct and its asserted anti-competitive attributes? What process best assists in that assessment is determined by "the substantive

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171 *ANZ Banking Group* (2015) 236 FCR 78 at 108 [138].

172 *Flight Centre* (2016) 91 ALJR 143 at 156 [67]; 339 ALR 242 at 257.

criteria for the particular contravention in issue … in the commercial context the subject of analysis"[173].

128 The significance of one or more of the four identified dimensions (product, function, geography and time) in that process of market identification will necessarily vary depending on the impugned conduct, the asserted anti-competitive attributes of that conduct, the statutory criteria for the alleged contravention and the factual and legal issues in dispute. That is shown in these appeals.

129 For example, the services at issue in this litigation have geographical characteristics: they are the services of providing carriage of cargo by air from one place to another. Those geographical aspects of the services may suggest that there might be a market for provision of the services at either or both of the places of intended dispatch and intended receipt. But the geographical characteristics of the services did not and could not conclude the question whether, in these cases, there was a market, in Australia, for the air cargo services to Australian destinations from one or more places in Asia. That question required consideration of whether a party to the impugned understandings (a supplier of the services) competed, in Australia, to provide the services to those who wished to acquire the services.

130 To look at the matter from another perspective, the conclusion that there was a market in Australia for the air cargo services says nothing about the metes and bounds of the market for those services, or whether there were other markets for those services. Those questions are not relevant for the purposes of s 45(2). The question posed by s 45(2) was whether one party to the impugned understandings competed to supply the air cargo services in Australia. Was there an Australian demand for the air cargo services and, if so, did one party to the impugned understandings compete to secure that Australian demand for those services? As the factual analysis above demonstrates, the answer to each of those questions is "yes".

131 Observing that there are places outside Australia where suppliers or acquirers of the air cargo services competed to provide or acquire the services does not deny that there is a market in Australia. It shows only that there were perhaps also markets for the air cargo services in places outside Australia or that there was a market partly in and partly outside Australia. That is, contrary to a premise implicit in much of the airlines' arguments in this Court, and in the courts below, a finding that there was a market in Hong Kong (or elsewhere in Asia) in which the airlines competed for the provision of the air cargo services

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173 *Flight Centre* (2016) 91 ALJR 143 at 156 [69]; 339 ALR 242 at 258 quoting *ANZ Banking Group* (2015) 236 FCR 78 at 107 [137].

from places in Asia to places in Australia does not demonstrate that there was not a market in Australia for the provision of those services.

132 A similar limitation can be seen in the interaction of the geographical dimension with the product dimension – the air cargo services, which comprised a suite of services[174]. Given the nature of those services, there was no necessary direct or perfect correlation between the location of the services and the location of the buyers of those services. Demand for those services could be located anywhere around the world. And, as seen earlier, there was no necessary correlation between the location of the services and the location of the field of transactions between buyers and sellers in respect of those services[175].

(10) European authorities

133 The majority in the Full Court referred to a number of European authorities[176], including a decision of the Court of First Instance of the European Communities (Third Chamber) in *Atlantic Container Line AB v Commission of the European Communities*[177] concerning sea-transport services between ports in northern Europe and ports in the United States and Canada.

134 On appeal to this Court, the airlines and the ACCC each submitted that the decision in *Atlantic Container*, and in particular the following passage concerning the geographical scope of the services, supported their respective submissions as to the process of market identification[178]:

> "[The] question [of the determination of the points of origin and of destination of the transport services] is separate from the question of the definition of the relevant geographic market, ... which is intended to determine the territory on which the undertakings concerned are engaged in the supply of the services in question, on which conditions of competition are also sufficiently homogeneous and which may be distinguished from neighbouring geographical areas because, in particular, the conditions of competition there are significantly different".

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174 See Section (6)(a) above at [97].

175 See also *Garuda* (2016) 244 FCR 190 at 283 [637].

176 *Garuda* (2016) 244 FCR 190 at 227-228 [140]-[147], 232 [169].

177 [2003] ECR II-3298.

178 *Atlantic Container* [2003] ECR II-3298 at II-3576 [853].

135 The anti-competitive conduct and the applicable regulatory framework in *Atlantic Container* were different. At its highest, *Atlantic Container* demonstrates that, not unlike the process of market identification necessary in these appeals, the question of market identification in *Atlantic Container* could not be concluded solely by reference to the geographical component or characteristics of the services in question.

(11) Conclusion on Issue 1

136 For those reasons, the impugned provisions substantially lessened competition for the air cargo services in a market "in Australia".

Issue 2 – Foreign state compulsion

137 The airlines submitted that where particular conduct is compelled by a law or valid administrative practice of a foreign state, a person acting in accordance with that law or practice cannot make "a contract or arrangement", or arrive at an "understanding", having the purpose, effect or likely effect of substantially lessening competition for the purposes of s 45(2) of the TPA.

138 In particular, the airlines submitted that they did not arrive at, or give effect to, certain impugned understandings[179] within the meaning of s 45(2) of the TPA because the Hong Kong Regulations and the administrative practices of the HK CAD compelled each of them to arrive at, or give effect to, those impugned understandings.

139 The airlines' submissions were based on the premise that establishing a contravention of s 45(2) required demonstrating that the airlines chose to engage in the impugned conduct, and that the question of compulsion had to be addressed at the point at which the airlines sought to pursue an "otherwise lawful and legitimate objective" – being the charging of a fuel surcharge calculated by reference to an index mechanism. The airlines' submission was that, at the point at which they decided to pursue the lawful objective, they did not have any choice as to whether to comply with the relevant legal obligations.

140 Those submissions were rightly rejected by the primary judge[180] and by the majority in the Full Court[181].

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179 2002 Hong Kong Lufthansa Methodology Understanding (Air NZ only); Hong Kong Imposition Understanding (Air NZ and Garuda); First Hong Kong Surcharge Extension Understanding (Garuda only).

180 *Air NZ* (2014) 319 ALR 388 at 483-484 [447]-[448]; see also at 470-483 [390]-[446].

141 The submissions are contrary to the unchallenged findings of the primary judge that: first, foreign law or administrative practice did not impose any requirement on the airlines to impose or agree to impose a fuel surcharge; second, foreign law or practice did not impose any requirement on the airlines to impose or agree to impose an approved fuel surcharge; and, finally, foreign law or practice did not impose any requirement on the airlines seeking approval of an index mechanism for a surcharge to file a joint application with the HK CAD[182].

142 This section of the judgment will consider the relevant foreign law (the Hong Kong Regulations) and the relevant practices of the HK CAD and address, in each context, the airlines' contentions that their conduct was not voluntary but compelled by foreign law or practice.

(1) The Hong Kong Regulations

143 Regulation 3(1) of the Hong Kong Regulations relevantly prohibited a person from using an aircraft for the carriage of air cargo between Hong Kong and other places "except under and in accordance with" the provisions of an operating permit.

144 Each airline's operating permit was granted subject to a condition, among others, that the airline could charge only those tariffs for which approval had been obtained from the HK CAD[183]. It was not in dispute at trial that "tariff" took its meaning from the relevant Air Services Agreements ("ASA")[184]: the Hong Kong-New Zealand ASA for Air NZ[185]; and the Hong Kong-Indonesia ASA[186] and the Australia-Indonesia ASA[187] for Garuda. On appeal to the Full Court and to this Court, it was accepted that a fuel surcharge, the subject of each of the three impugned understandings, was such a "tariff"[188].

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181 *Garuda* (2016) 244 FCR 190 at 249-250 [242]-[251]; see also at 246-249 [231]-[241].

182 *Air NZ* (2014) 319 ALR 388 at 483 [446]-[447].

183 See *Air NZ* (2014) 319 ALR 388 at 470-471 [395]-[396].

184 See *Air NZ* (2014) 319 ALR 388 at 471 [396]-[399].

185 See *Air NZ* (2014) 319 ALR 388 at 471-475 [401]-[412].

186 See *Air NZ* (2014) 319 ALR 388 at 475-477 [413]-[414].

187 See *Air NZ* (2014) 319 ALR 388 at 477 [415]-[417].

188 See *Garuda* (2016) 244 FCR 190 at 247 [236(1)].

145 The primary judge's findings were that, under the Hong Kong Regulations, if the airlines were going to impose a fuel surcharge, they needed to obtain approval from the HK CAD and that the only surcharge that could be imposed would be the one approved by the HK CAD[189].

146 The airlines accepted that the Hong Kong Regulations did not impose any requirement on the airlines to impose, or agree to impose, a fuel surcharge and that the Hong Kong Regulations did not impose any requirement on the airlines to impose, or agree to impose, an *approved* fuel surcharge. As the ACCC submitted, there was no compulsion. There could be no compulsion where the airlines could choose not to impose a fuel surcharge at all or could choose to seek approval from the HK CAD for a surcharge but choose not to impose the approved surcharge[190]. The airlines chose to do both – to seek approval to impose a surcharge and to impose that approved surcharge – and to do so collectively.

147 That the only surcharges that could be imposed by an airline were those that had been approved by the HK CAD[191], and that an airline that had obtained approval from the HK CAD to charge a fuel or other surcharge was required to charge the approved amount and was not permitted to charge a lesser[192] or different amount, are conclusions that do not assist the airlines. They do not assist because the Hong Kong Regulations did *not* impose any requirement on the airlines to impose (or agree to impose) a fuel surcharge or to impose (or agree to impose) an approved fuel surcharge. The airlines' contention that an airline that had obtained approval from the HK CAD to charge a fuel or other surcharge was required to charge the approved amount specifically, and was not permitted to charge a lesser amount, proceeds on two false premises – that approval for a fuel surcharge had to be obtained and that an approved fuel surcharge had to be imposed. Both were contrary to the facts. Each airline had to decide whether to apply for approval of the surcharge and, once the surcharge was approved, to decide whether to impose the approved surcharge. At both stages, each airline decided "yes".

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189 See *Air NZ* (2014) 319 ALR 388 at 477 [418]-[419]. See also *Garuda* (2016) 244 FCR 190 at 247 [236(2)-(3)].

190 See *Air NZ* (2014) 319 ALR 388 at 479 [426], 511 [578], 524 [653].

191 See *Air NZ* (2014) 319 ALR 388 at 477 [419]; *Garuda* (2016) 244 FCR 190 at 247 [236(3)].

192 See *Air NZ* (2014) 319 ALR 388 at 478-479 [425]; *Garuda* (2016) 244 FCR 190 at 247 [236(4)].

(2) The HK CAD's practices

148 The airlines further contended that it was a "requirement" of the HK CAD that all airlines seeking approval of a fuel index mechanism file a joint application. That contention is incorrect.

149 In relation to the 2002 Hong Kong Lufthansa Methodology Understanding, the primary judge found that[193]:

> "each airline, including Air NZ, had decided to use the ... Lufthansa methodology because they actively wished to do so; that the HK CAD approval did not require them to levy the surcharge; that the decision to do so was a collective one between the airlines; and that the approval had bound them, once that decision was made, to do no more than they wished to do. ... Firms who procure the creation of foreign legal requirements as a cloak for their own motives do not take themselves outside of s 45".

150 In relation to the Hong Kong Imposition Understanding, the primary judge found[194]:

> "Air NZ was not compelled to do anything. It did not have to include itself within the HK CAD filing. It chose to do that because it wished to impose the surcharge using the index mechanism. The HK CAD approval thereafter merely provided it with the permission to act in accordance with its own desires.
>
> ... Rather than being the entity which made the arrangement, the application to the HK CAD was the device by which the airlines facilitated their own collusive behaviour."

151 His Honour concluded[195]:

> "The process revealed by the various changes in index levels does not reveal a group of airlines slavishly obeying the dictates of a regulator. Rather, it reveals a group of airlines using the notification process as the springboard for collusive behaviour."

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193 *Air NZ* (2014) 319 ALR 388 at 514 [598].

194 *Air NZ* (2014) 319 ALR 388 at 524 [651]-[652].

195 *Air NZ* (2014) 319 ALR 388 at 525 [657].

152 In relation to the First Hong Kong Surcharge Extension Understanding, the primary judge found[196]:

> "[T]he initial approval of the … Lufthansa methodology … expired on 19 July 2003. As the time of expiry approached it became necessary for the airlines to seek to extend its operation. …
>
> ...
>
> On 5 June 2003, as the end of the 1 year approval approached, the chair of [the HK CSC] wrote to the members of [the HK CSC] indicating that the approval was soon to expire and that if a justification for an extension in its duration could be worked out a meeting would be called to consider whether to apply for it. … Thereafter, on 9 June 2003, the airlines were summoned to a meeting to be held on 12 June 2003. The topics to be discussed included extending the fuel surcharge approval granted on 19 July 2002."

153 The primary judge found that, at a meeting on 12 June 2003, the airlines that were present agreed they would submit an application to the HK CAD to extend the current fuel surcharge mechanism[197]. The primary judge found that Garuda was present at that meeting, but Air NZ was not[198]. His Honour found that the First Hong Kong Surcharge Extension Understanding was reached. His Honour concluded[199]:

> "It was an agreement to apply to the HK CAD but that was not inconsistent with also being an agreement to fix or control prices. In truth, it was both.
>
> …
>
> I also conclude that Garuda gave effect to the understanding by subsequently implementing fuel surcharge increases and decreases in accordance with the ... Lufthansa methodology during the extended period."

154 None of these findings were contested in this Court.

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196 *Air NZ* (2014) 319 ALR 388 at 525 [659], 526 [662].

197 *Air NZ* (2014) 319 ALR 388 at 526 [664].

198 *Air NZ* (2014) 319 ALR 388 at 526 [664].

199 *Air NZ* (2014) 319 ALR 388 at 526 [665], [667].

155 The airlines' contention that it was a "requirement" of the HK CAD that all airlines seeking approval of a fuel index mechanism file a joint application is inconsistent with those uncontested findings of the primary judge as well as the following uncontested findings:

(1) The HK CAD did not require the airlines to submit a joint application for any fuel index mechanism[200]. There was never any written requirement to do so. The HK CAD encouraged such an approach, but did not require it[201].

(2) The HK CAD's processes of accepting individual applications for static surcharges and joint applications for surcharges using a fuel index mechanism were no more than a matter of convenience[202] – there was never any direction to lodge joint applications but, practically, it was "ungainly" for the HK CAD "to have to deal with more than one fuel index and it would [have] perhaps promote[d] confusion among the shippers"[203].

(3) Although there was an informal "practice" on the part of the HK CAD to proceed on the basis of a single application submitted by all airlines in relation to a fuel index mechanism, this was an informal policy incapable of rising to the level of a mandatory requirement[204] and, as the majority in the Full Court noted, there was nothing preventing the HK CAD from departing from it[205].

156 The primary judge also found that the airlines were "free to lodge individual applications albeit there may have been commercial reasons why they did not wish to"[206]. But, again, the fact that it might have been commercially inconvenient for each airline to individually apply to the HK CAD for approval

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200 *Air NZ* (2014) 319 ALR 388 at 479 [428], 483 [446].

201 *Air NZ* (2014) 319 ALR 388 at 483 [446].

202 *Air NZ* (2014) 319 ALR 388 at 482 [443], 483 [446].

203 *Air NZ* (2014) 319 ALR 388 at 482 [441]. See also *Garuda* (2016) 244 FCR 190 at 247-248 [237].

204 *Air NZ* (2014) 319 ALR 388 at 482 [443], 483 [446]. See also *Garuda* (2016) 244 FCR 190 at 247 [236(6)], 248 [238], 249-250 [247], 250 [250].

205 *Garuda* (2016) 244 FCR 190 at 250 [248].

206 *Air NZ* (2014) 319 ALR 388 at 481 [436].

cannot and does not elevate an administrative practice to a requirement that compelled an airline to do anything.

157 As the majority in the Full Court stated[207], the administrative practice of the HK CAD was not tantamount to a requirement to do anything. Rather, it was accepted, as a matter of Hong Kong domestic law, that: (a) if the airlines were going to impose a fuel or insurance surcharge or a customs fee, they needed to obtain approval; and (b) the only surcharges that could be imposed were the ones that had been approved by the regulator[208]. Neither of those matters imposed any requirement on an airline, in seeking approval of an index mechanism for a surcharge, to file a joint application with the HK CAD.

158 Contrary to the submissions of the airlines, there was no point at which a requirement or compulsion to make any application, let alone a joint application, was ever imposed by the HK CAD on the airlines. Put another way, at all relevant times, each airline was able to pursue the otherwise lawful and legitimate objective of imposing a surcharge, without acting in contravention of the TPA, so long as *it* applied *on its own* to the HK CAD for approval of its own lawful and legitimate objective. Neither airline did so.

(3) Conclusion on Issue 2

159 Neither foreign law nor foreign regulatory practice required the conduct constituting the contraventions, namely the understandings to impose approved surcharges. Each airline acted in the way that contravened the TPA because it wanted to and not because of the requirements of a foreign regulator.

Issue 3 – Alleged inconsistency

160 At all relevant times, s 12(2) of the Air Navigation Act relevantly provided that an international airline licence could not be granted to an international airline of a country other than Australia unless that country and Australia were, among others, parties to "some other agreement or arrangement, whether bilateral or multilateral" (ie, an ASA) under which scheduled international air services of that other country could be operated over or into Australian territory.

161 When the TPA was enacted, the Australia-Indonesia ASA was one of a number of ASAs that provided for tariff fixing between international airlines for scheduled international air services over and into Australian territory.

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207 *Garuda* (2016) 244 FCR 190 at 249-250 [247].

208 See *Air NZ* (2014) 319 ALR 388 at 477 [418]-[419]; *Garuda* (2016) 244 FCR 190 at 247 [236(3)].

162 Garuda submitted that the TPA did not apply to the Australia-Indonesia ASA. It further contended that the Air Navigation Act and the prohibition in ss 45 and 45A of the TPA on making agreements concerning prices with competitors were practically and operatively inconsistent. As a result, it contended that ss 45 and 45A of the TPA "did not reach to any of Garuda's conduct" when it carried cargo into Australia in accordance with the Australia-Indonesia ASA[209].

163 International air transport of passengers and goods has been the subject of many international agreements over many years. Reference was made by Garuda in argument in this Court to some of these arrangements and their history[210]. For present purposes, it is sufficient to focus on Garuda's conduct (and that of the airlines who acted with Garuda) and the terms of the Air Navigation Act and the Australia-Indonesia ASA. It is that conduct and those instruments that are determinative of this issue.

164 This section of the judgment will deal first with the Air Navigation Act and the Australia-Indonesia ASA, then with the decisions below and finally with the parties' arguments in this Court.

(1) The Air Navigation Act

165 In 1974, when the TPA was enacted, the Air Navigation Act contained ss 12[211] and 13 as follows:

> "12. International airline licences.
>
> (1) An international airline of a country other than Australia shall not operate a scheduled international air service over or into Australian territory except in accordance with an

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209 Garuda could only fly to Australia pursuant to the Australia-Indonesia ASA. When it carried cargo from Hong Kong to Australia, it flew from Hong Kong to Denpasar pursuant to the Hong Kong-Indonesia ASA, then from Denpasar to Australia pursuant to the Australia-Indonesia ASA. See also *Air NZ* (2014) 319 ALR 388 at 471 [397], [399].

210 See, eg, Agreement between the Governments of Australia and Canada for Air Services between Australia and Canada [1951] ATS 17; Agreement between the Government of the Commonwealth of Australia and the Government of New Zealand relating to Air Services [1961] ATS 19. See also *Air NZ* (2014) 319 ALR 388 at 418-423 [131]-[148].

211 Subsequent amendments to s 12 are not material or relevant and may be put to one side: see, eg, Sched 1 to the *Air Navigation Act* 1974 (Cth).

international airline licence issued by the Director-General in accordance with the regulations.

(2) An international airline licence shall not be granted to an international airline of a country other than Australia unless that country and Australia are parties to the Air Transit Agreement, *or to some other agreement or arrangement*, whether bilateral or multilateral, under which scheduled international air services of that other country may, subject to the *agreement or arrangement*, be operated over or into Australian territory.

13. Suspension or cancellation of international airline licences.

The Minister may suspend or cancel an international airline licence issued to an international airline of a country other than Australia if and only if—

(a) the airline or any aircraft operated by the airline fails to comply with a provision of this Act or the regulations or the terms of its licence; or

(b) the airline fails to conform to, or comply with, any term or condition of the relevant *agreement or arrangement* referred to in the last preceding section." (emphasis added)

(2) The Australia-Indonesia ASA

166 The Australia-Indonesia ASA was an "agreement or arrangement" within the meaning of ss 12(2) and 13(b) of the Air Navigation Act. The Australia-Indonesia ASA relevantly provided the rights for designated airlines (including Garuda) to make stops in cities (including Darwin, Sydney and Melbourne) for the purpose of putting down and taking on international cargo[212].

167 Article 6 of the Australia-Indonesia ASA provided:

"(1) The tariffs on any agreed service shall be established at reasonable levels, due regard being paid to all relevant factors including cost of operation, reasonable profit, characteristics of service (such as standards of speed and accommodation) and the tariffs of other airlines for any part of the specified route. These tariffs shall be fixed in accordance with the following provisions of this Article.

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212 Art 2 of, and s II of the Annex to, the Australia-Indonesia ASA.

(2) Agreement on the tariffs shall, whenever possible, be reached by the designated airlines concerned through the rate-fixing machinery of the International Air Transport Association. When this is not possible, tariffs in respect of each of the specified routes shall be agreed upon between the designated airlines concerned. In any case the tariffs shall be subject to the approval of the aeronautical authorities of both Contracting Parties.

(3) If the designated airlines concerned cannot agree on the tariffs, or if the aeronautical authorities of either Contracting Party do not approve the tariffs submitted to them in accordance with the provisions of paragraph (2) of this Article, the aeronautical authorities of the Contracting Parties shall endeavour to reach agreement on those tariffs.

(4) If agreement under paragraph (3) of this Article cannot be reached, the dispute shall be settled in accordance with the provisions of Article 9 of this Agreement.

(5) No new or amended tariff shall come into effect unless it is approved by the aeronautical authorities of both Contracting Parties or is determined by a tribunal of arbitrators under Article 9 of this Agreement. Pending determination of the tariffs in accordance with the provisions of this Article, the tariffs already in force shall apply."

168 "Tariff" was not defined in the Australia-Indonesia ASA. The primary judge's findings that "tariff" included the fuel surcharges relevant in these appeals[213] and that "tariffs" are the minimum amounts that can be charged[214] were not contested on appeal.

169 Article 9 of the Australia-Indonesia ASA relevantly provided:

"(1) If any dispute arises between the Contracting Parties relating to the … application of the present Agreement, the Contracting Parties shall in the first place endeavour to settle it by negotiation between themselves.

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213 *Air NZ* (2014) 319 ALR 388 at 477 [415]-[417]. See also *Garuda* (2016) 244 FCR 190 at 234 [180].

214 *Air NZ* (2014) 319 ALR 388 at 477-478 [421], 478-479 [425]. See also *Garuda* (2016) 244 FCR 190 at 247 [236(4)].

> (2) If the Contracting Parties fail to reach a settlement by negotiation, the dispute may at the request of either Contracting Party be submitted for decision to a tribunal of three arbitrators …
>
> (3) The Contracting Parties undertake to comply with any decision of the tribunal given under paragraph (2) of this Article."

(3) Decisions below

170 The primary judge relevantly held that the practical operation of ss 12 and 13 of the Air Navigation Act, operating with the Australia-Indonesia ASA, was to require Garuda "to comply with the terms of any relevant ASA"[215] and to "require collusive behaviour by [Garuda] of the very kind prohibited by Pt IV" of the TPA[216]. As a result, the primary judge held that the Air Navigation Act and the prohibition in ss 45 and 45A of the TPA on arriving at understandings concerning prices with competitors were inconsistent in their practical operation[217]. That inconsistency, according to the primary judge, was to be resolved by construing s 13 of the Air Navigation Act so as not to authorise the relevant Minister to cancel or suspend an international airline licence for breach of an ASA where the conduct constituting the breach was required by Pt IV of the TPA[218].

171 On appeal to the Full Court, the majority[219] agreed with the primary judge that there was no inconsistency in the terms of the Air Navigation Act and the TPA[220] but held that there was no conflict between the terms of the TPA and the effect or operation of the Air Navigation Act because of Art 6(2) of the Australia-Indonesia ASA[221]. Their Honours held that Art 6(2) of the Australia-Indonesia ASA did not require the airlines to engage in price fixing, that the risk that their licences would be cancelled under s 13 of the

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215 *Air NZ* (2014) 319 ALR 388 at 424 [152].

216 *Air NZ* (2014) 319 ALR 388 at 427 [165].

217 *Air NZ* (2014) 319 ALR 388 at 427 [165].

218 *Air NZ* (2014) 319 ALR 388 at 431 [185] citing *Commissioner of Police (NSW) v Eaton* (2013) 252 CLR 1 at 18-19 [45], 19-20 [48]; [2013] HCA 2.

219 Yates J did not address this issue: see *Garuda* (2016) 244 FCR 190 at 293 [682]-[683].

220 *Garuda* (2016) 244 FCR 190 at 237 [188], [191].

221 *Garuda* (2016) 244 FCR 190 at 239-240 [198]-[205]. cf *Air NZ* (2014) 319 ALR 388 at 427 [165].

Air Navigation Act did not arise and that, in any event, it would not be reasonable for the Minister to cancel an airline's licence under s 13 of the Air Navigation Act for failure to comply with Art 6(2) of the Australia-Indonesia ASA where the failure was required by Australian law[222].

(4) Alleged inconsistency does not arise

172 The alleged inconsistency between the Air Navigation Act, read with the Australia-Indonesia ASA, and the TPA does not arise.

173 As has been seen, it was not contested on appeal that Art 6 of the Australia-Indonesia ASA was concerned with reaching agreement on tariffs, which included fuel surcharges, and that a tariff was the minimum amount that could be charged. Put another way, Art 6 of the Australia-Indonesia ASA was concerned with setting minimum tariffs, not imposing fixed tariffs.

174 But that was not the *conduct* the subject of the contraventions under the TPA. The impugned understandings the subject of the contraventions under the TPA were 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.

175 So, what was the *conduct* and what were the relevant findings of the primary judge? They may be summarised as follows.

176 As noted above, Garuda (along with Air NZ and other international airlines) was a member of industry representative bodies in Hong Kong and Indonesia, being the HK CSC and the ACRB respectively[223]. Garuda participated in various meetings of the HK CSC and the ACRB, at which Garuda and other airlines engaged in price fixing to fix fuel and other surcharges[224].

177 Next, and no less importantly, the primary judge found that the airlines did not engage in that conduct at those meetings pursuant to the tariff procedures in any ASA, but engaged in that conduct at those meetings independently of any tariff procedures or requirements. The airlines did not understand themselves to be engaged in tariff procedures under any ASA at those meetings of the HK CSC or the ACRB; rather, they understood only that they were attending meetings of

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222 *Garuda* (2016) 244 FCR 190 at 239-240 [200]-[203].

223 *Air NZ* (2014) 319 ALR 388 at 391-392 [6]-[7], 479 [429], 614 [1133].

224 See footnotes 124 and 126 above.

the HK CSC or the ACRB[225]. Those findings were not challenged on appeal to this Court.

178 The conclusion that the airlines were not making tariff agreements under any ASA is fortified by another of the primary judge's findings concerning an authorisation granted by the Trade Practices Commission to Qantas[226] under s 88 of the TPA, which permitted Qantas to give effect to existing tariff arrangements Qantas had reached with particular airlines and to make tariff arrangements of a like type with other airlines[227]. That authorisation drew a distinction between an agreement on a tariff (which was permitted) and an agreement to impose a tariff or to impose a tariff in a particular amount (which was not permitted). Qantas' authorisation was granted on condition that there was "no requirement on carriers or agents … to charge the fares (or pay the commissions) in Australia that [had] been set by the agreements" and "no requirement on carriers or agents … not to advertise in Australia tariffs they [were] actually charging"[228].

179 The alleged inconsistency between the Air Navigation Act, read with Art 6(1) of the Australia-Indonesia ASA, and the TPA does not arise. They were dealing with different subject matters. Article 6(1) was concerned with setting minimum tariffs. It was not concerned with imposing tariffs or imposing fixed tariffs. Garuda's appeal grounds should be rejected.

(5) No textual or other inconsistency

180 Given that the alleged inconsistency does not arise, it is unnecessary to address the aspects of the parties' arguments that were predicated on this Court concluding that Art 6(1) of the Australia-Indonesia ASA was concerned with imposing fixed tariffs.

Conclusion and orders

181 For those reasons, each appeal should be dismissed with costs.

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225 *Air NZ* (2014) 319 ALR 388 at 639 [1257], 641 [1268].

226 *Qantas Airways Ltd* (1987) ATPR (Com) ¶50-056.

227 See *Air NZ* (2014) 319 ALR 388 at 640 [1261]-[1262].

228 *Air NZ* (2014) 319 ALR 388 at 640 [1261].