FEDERAL COURT OF AUSTRALIA

Australian Competition and Consumer Commission v P T Garuda Indonesia Ltd [2016] FCAFC 42

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| Appeal from: | *Australian Competition and Consumer Commission v Air New Zealand Limited* (2014) 319 ALR 388; [2014] FCA 1157 |
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| File numbers: | NSD 1330 of 2014NSD 1331 of 2014 |
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| Judges: | **DOWSETT, YATES AND EDELMAN JJ** |
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| Date of judgment: | 21 March 2016 |
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| Catchwords: | **TRADE PRACTICES** – price fixing – meaning of a market “in Australia” – whether markets for airborne cargo out of Hong Kong, Singapore and Indonesia to ports in Australia were markets “in Australia” within s 4E of the *Trade Practices Act 1974* (Cth)**STATUTORY INTERPRETATION** – whether inconsistency exists between *Trade Practices Act 1974* (Cth)and *Air Navigation Act 1920* (Cth)  |
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| Legislation: | *Acts Interpretation Act* (*1901*) (Cth) s 15B*Air Navigation Act 1920* (Cth) ss 12, 12(2), 13, 13(b), 22(1)*Air Navigation Amendment Regulations 2000* *(No 3)* (Cth)*Air Navigation Regulations 1947* (Cth) reg 106A, 258*Commerce Act 1986* (NZ) ss 3(1), 3(1A)*Commonwealth of Australia Constitution Act 1901* (Cth) s 109*Competition and Consumer Act 2010* (Cth)*Competition Policy Reform Act 1995* (Cth)*Crown Suits Act 1898* (WA) ss 33, 37*Evidence Act 1995* (Cth) s 63(2)*Extradition Act 1988* (Cth)*Federal Aviation Act of 1958,* 49 USC 1301 (1958)*Industrial Relations Act 1996* (NSW) s 84(1)*Limitation of Actions Act 1958* (VIC) s 5(6)*Police Act 1990* (NSW) s 80(3)*Sherman Antitrust Act* 15 USC (1890)*Trade Practices (Misuse of Trans–Tasman Market Power) Act 1990* (Cth)*Trade Practices Act 1974* (Cth) ss 2, 4, 4(1), 4E, 45, 45(2), 45(3), 45(2)(a)(ii), 45(2)(b)(ii), 45A, 45A(1), 46, 50(1), 51, 51(1), 51(1A), 51(1C), 51(1C)(a), 76, 77, 77(1), 77(2), 82, 82(1), 82(2), 88, 88(1)(c)-(e); Pt IV*Trade Practices Amendment Act 1977* (Cth)*Trade Practices Bill 1974* (Cth)*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 Territories*. 7 March 1969. Australia–Indonesia. [1969] ATS 4 Arts 2, 6, 6(2), 6(3), 6(4)*Consolidated Version of the Treaty on the Functioning of the European Union*. 13 December 2007. European Union. 2008 O.J. C 115/47 Art 102*Convention on International Civil Aviation*. Signed 7 December 1944. 15 UNTS 295 (entered into force 4 April 1947) (Chicago Convention)*Trans–Atlantic Conference Agreement* [1959–1962] O.J. Spec. Ed. 87*Treaty Establishing the European Community (Consolidated Version), Rome Treaty*. 25 March 1957. European Union Art 82*Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Communit*y. Signed 13 December 2007. European Union. 2006 O.J. C 321 E/37 (entered into force 1 December 2009) |
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| Cases cited: | *Application by Services Sydney Pty Ltd* [2005] ACompT 7; (2005) 227 ALR 140*Associated Minerals Consolidated Ltd v Wyong Shire Council* [1975] AC 538*Atlantic Container Line AB v Commission (TAA)* [2005] 4 CMLR 20*Atlantic Container Line AB v European Commission* [2002] All ER (EC) 684*Australian Competition and Consumer Commission v Air New Zealand Limited* (2014) 319 ALR 388; [2014] FCA 1157*Australian Competition and Consumer Commission v April International Marketing Services Australia Pty Ltd (No 7)* [2010] FCA 902*Australian Competition and Consumer Commission v Australia and New Zealand Banking Group Ltd* (2015) 324 ALR 392; [2015] FCAFC 103*Australian Competition and Consumer Commission v Cement Australia Pty Ltd* [2013] FCA 909; (2013) 310 ALR 165*Australian Competition and Consumer Commission v Eurong Beach Resort Ltd* [2005] FCA 1134*Australian Competition and Consumer Commission v Leahy Petroleum Pty Ltd* [2007] FCA 1844*Australian Competition and Consumer Commission v Liquorland (Australia) Pty Ltd* [2006] ATPR 42-123; [2006] FCA 826*Australian Competition and Consumer Commission v Metcash Trading Ltd* (2011) 198 FCR 297; [2011] FCAFC 151*Australian Competition and Consumer Commission v The Australian Medical Association Western Australia Branch Inc* [2003] FCA 686; (2003) 199 ALR 423*Australian Consumer and Competition Commission v CC (NSW) Pty Ltd* (1999) 92 FCR 375*Australian Meat Holdings Pty Limited v Trace Practices Commission* [1989] ATPR 40-932; [1989] FCA 25*Cabal v United Mexican States (No 3)* [2000] FCA 1204; (2000) 186 ALR 188*Commerce Commission v Air New Zealand Ltd* (2011) 9 NZBLC 103*Commerce Commission v Air New Zealand Ltd* (2011) 9 NZBLC 103,318; [2011] NZHC 1285*Commerce Commission v Ophthalmological Society of NZ Inc* (2010) TCLR 994*Commissioner of Police for New South Wales v Eaton* [2013] HCA 2; (2013) 252 CLR 1*Cook v Pasminco Limited* (2000) 99 FCR 548; [2000] FCA 677*CPCF v Minister for Immigration and Border Protection* [2015] HCA 1; 316 ALR 1; 143 ALD 443, 449; (2015) 89 ALJR 207*Dandy Power Equipment Pty Ltd v Mercury Marine Pty Ltd* (1982) 64 FLR 238*Davids Holdings Pty Ltd v Attorney General of the Commonwealth* (1994) 49 FCR 211*Elna Australia Pty Ltd v International Computers (Aust) Pty Ltd (No. 2)* [1987] ATPR 40-795; (1987) 16 FCR 410*Emirates v Australian Competition and Consumer Commission* [2009] FCA 312; (2009) 255 ALR 35*Firebird Global Master Fund II Ltd v Republic of Nauru* [2015] HCA 43; (2015) 326 ALR 396*Fox v Percy* [2003] HCA 22; (2003) 214 CLR 118*GTK Trading Pty Ltd v Export Development Grants Board* (1981) 4 ALD 389;40 ALR 375*International Harvester Co of Australia Pty Ltd v Carrigan’s Hazeldene Pastoral Co* [1958] HCA 16; (1958) 100 CLR 644*Jones v Dunkel* [1959] HCA 8; (1959) 101 CLR 298*Jumbunna Coal Mine NL v Victorian Coal Miners’ Association* [1908] HCA 95; (1908) 6 CLR 309*Kish Glass* v *Commission* [2000] ECR II‑1885*Maloney v The Queen* [2013] HCA 28; (2013) 252 CLR 168*Mayne Nickless Ltd v Multigroup Distribution Services Pty Ltd & Ors* [2001] FCA 1620; (2001) 114 FCR 108*Minister for Immigration and Citizenship v Li* [2013] HCA 18; (2013) 249 CLR 332*Minister of State for Immigration & Ethnic Affairs v Teoh* [1995] HCA 20; (1995) 183 CLR 273*Pearce v The Queen* [1998] HCA 57; (1998) 194 CLR 610*Port Nelson Ltd v Commerce Commissio*n [1996] 3 NZLR 554*QIW Retailers Limited v Davids Holdings Pty Limited (No 3)* (1993) 42 FCR 255; [1993] FCA 287*Queensland Wire Industries Pty Ltd v Broken Hill Proprietary Co Ltd* [1989] HCA 6; (1989) 167 CLR 177*R v Halton; Ex parte AUS Student Travel Pty Ltd* [1978] HCA 26; (1978) 138 CLR 201*Radio 2UE Sydney Pty Ltd v Stereo FM Pty Ltd* [1983] ATPR 40-367; (1983) 68 FLR 70*Re Application by Concrete Carters Association (Victoria)* (1977) 31 FLR 193; (1977) 16 ALR 387*Re Fortescue Metals Group Ltd* (2010) 271 ALR 256; [2010] ACompT 2*Re Idylic Solutions Pty Ltd; Australian Securities and Investments Commission v Hobbs* [2013] NSWSC 106; (2013) 93 ACSR 421*Re Ku‑ring‑gai Co‑operative Building Society (No 12) Ltd* (1978) 36 FLR 134*Re Queensland Co‑operative Milling Association Ltd* (1976) 8 ALR 481*Re Tooth & Co Ltd* (1979) 39 FLR 1*Schellenberg v Tunnel Holdings* [2000] HCA 18; (2000) 200 CLR 121*Sent v Jet Corporation of Australia Proprietary Limited* [1986] HCA 35; (1986) 160 CLR 540*Seven Network Ltd v News Ltd* [2009] FCAFC 166; (2009) 182 FCR 160*Singapore Airlines Limited v Taprobane Tours WA Pty Ltd* [1991] FCA 808; (1991) 104 ALR 633*State of Western Australia v Wardley Australia Limited* *& Ors* [1991] ATPR 41-131; (1991) 30 FCR 245*Taylor v Owners* – *Strata Plan No 11564* [2014] HCA 9; (2014) 253 CLR 531*The Commonwealth of Australia v Verwayen* [1990] HCA 39; (1990) 170 CLR 394*The* *Crown v McNeil* [1922] HCA 33; (1922) 31 CLR 76*Trade Practices Commission v Parkfield Operations Pty Ltd* [1985] ATPR 40-526; (1985) 5 FCR 140*Trade Practices Commission v Parkfield Operations Pty Ltd* [1985] ATPR 40-639; (1985) 7 FCR 534*Trade Practices Commission v Service Station Association Ltd* (1992) ATPR 41-179; (1992) 109 ALR 465*Trade Practices Commission v Service Station Association Ltd* [1993] ATPR 41-260; (1993) 44 FCR 206*United Brands v Commission* [1978] ECR 207*United States v Aluminum Co of America* 8 F 2d 416 (2d Cir 1945)Australian Competition and Consumer Commission, *Merger Guidelines–November 2008* (Commonwealth of Australia, Canberra, 2011)Commonwealth, *Parliamentary Debates*, House of Representatives, 8 December 1976Dal Pont GE, *Law of Agency* (3rd ed, LexisNexis Butterworths, 2014)Heydon JD, *Trade Practices Law* (Lawbook Co., subscription service)Jennings R and Watts R, *Oppenheim’s International Law* (9th ed, Oxford University Press, 1992) Vol 1*Macquarie Dictionary* (6th ed, Macquarie Dictionary Publishers, 2013)*Oxford English Dictionary* (2nd ed, Oxford University Press, 1989)Trade Practice Act Review Committee, *Report to the Minister for Business and Consumer Affairs* (Australian Government Publishing Service, Canberra, 1976)Breyer S, “Five Questions About Australian Antitrust Law” (1977) 51 *Australian Law Journal* 28Brown GW, “Relevant Geographic Market Delineation: The Interchangeability of Standards in Cases arising under Section 2 of the Sherman Act and Section 7 of the Clayton Act” (1979) *Duke Law Journal* 1152Harris RG and Jorde TM, “Market Definition in the Merger Guidelines: Implications for Antitrust Enforcement” (1983) 71(2) *California Law Review* 464Stigler GJ and Sherwin RA, “The Extent of the Market” (1985) 28(3) *Journal of Law and Economics* 555 |
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ORDERS

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|  | NSD 1330 of 2014 |
|  |  |
| BETWEEN: | AUSTRALIAN COMPETITION AND CONSUMER COMMISSIONAppellant |
| AND: | P T GARUDA INDONESIA LTD (ARBN 000 861 165)Respondent |
|  |  |
| JUDGES: | DOWSETT, YATES AND edelman JJ |
| DATE OF ORDER: | 21 March 2016 |

THE COURT ORDERS THAT:

1. By 24 March 2016, the parties file a minute of proposed orders to give effect to these reasons.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

ORDERS

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|  | NSD 1331 of 2014 |
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| BETWEEN: | AUSTRALIAN COMPETITION AND CONSUMER COMMISSIONAppellant |
| AND: | AIR NEW ZEALAND LIMITED (ARBN 000 312 685)Respondent |
|  |  |
| JUDGE: | DOWSETT, YATES AND edelman JJ |
| DATE OF ORDER: | 21 march 2016 |

THE COURT ORDERS THAT:

1. By 24 March 2016, the parties file a minute of proposed orders to give effect to these reasons.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

REASONS FOR JUDGMENT

DOWSETT AND EDELMAN JJ:

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| TABLE OF ABBREVIATIONS |
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| **2002 Hong Kong Lufthansa Methodology** | A tariff unilaterally created by Lufthansa when it altered its worldwide fuel index. The index could go down as well as up and had multiple trigger points. |
| **2002 Hong Kong Lufthansa Methodology Understanding** | An allegation by the Commission of an understanding reached between a number of airlines on 23 July 2002 containing provisions to replace the pre‑2002 Hong Kong methodology with a revised methodology based on the Lufthansa Methodology. |
| **ACRB** | Air Cargo Representative Board in Indonesia. Committee of the industry representative body for the airlines in Indonesia. |
| ***Air Navigation Act*** | *Air Navigation Act 1920* (Cth) |
| ***Air Navigation Regulations*** | *Air Navigation Regulations 1947* (Cth) |
| **Air NZ** | Air New Zealand Ltd |
| **Airlines or The Airlines** | Air NZ and Garuda |
| **ASA** | Air Services Agreement |
| **Australia‑Indonesia ASA** | An 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 Territories, 7 March 1969, [1969] ATS 4. |
| **Commission** | Australia Competition and Consumer Commission |
| **December 2002 Hong Kong Insurance Understanding** | An allegation by the Commission that on 16 December 2002 Air NZ and Garuda reached an arrangement or understanding with other airlines that they would impose a reduced insurance surcharge of HKD.025/kg from 11 January 2003. |
| **Extension Understandings** | The First Hong Kong Surcharge Extension Understanding through to the Eighth Hong Kong Extension Understanding. |
| **First Hong Kong Extension Understanding** | The arrangement that Garuda made on or about 12 June 2003 containing provisions that the HK BAR‑CSC should apply to the CAD to extend the approval for the Hong Kong Lufthansa Methodology, and those international airlines would continue to apply surcharges in accordance with that methodology. |
| **Garuda** | P T Garuda Indonesia Ltd |
| **HK CAD** | Hong Kong Civil Aviation Department |
| **HK BAR CSC** | Hong Kong Board of Airline Representatives Cargo Sub‑Committee. Committee of the industry representative body for the airlines in Hong Kong. |
| **Hong Kong Imposition Understanding** | The understanding reached betweenBAR CSC and its member airlines, or some of them including Garuda, that the airlines in question would impose fuel surcharges fixed in accordance with the methodology approved by HK CAD. |
| **IATA** | International Air Transport Association. This is the international trade association for airlines, and an association to which many airlines belong. |
| **Imposition Provision** | The provision to impose surcharges in accordance with the revised Hong Kong Lufthansa methodology. |
| **ISPs** | Implemented Selling Prices |
| **ISS** | Insurance and security surcharge |
| **October 2001 Hong Kong Insurance Understanding** | The alleged understanding or arrangement made between Air NZ, Garuda and other HK BAR CSC member airlines on 3 October 2001. The understanding was that they would all impose an insurance surcharge from 11 October 2001 at the level of HKD0.50/kg. |
| ***QCMA*** | *Re Queensland Co-operative Milling Association Ltd* (1976) 8 ALR 481 |
| **Replacement Provision** | The replacement of the pre‑2002 Hong Kong Lufthansa Methodology with a revised methodology. |
| **RSPs** | Recommended Selling Prices |
| **Singapore BAR CSC** | Singapore Board of Airline Representatives Cargo Sub‑Committee. Committee of the industry representative body for the airlines in Hong Kong. |
| **Singapore ISS Understanding** | An understanding alleged by the Commission that Air NZ made an arrangement with other airlines containing a provision that the parties would continue to charge (and would not reduce) the amount that they were currently charging their customers for the ISS on the supply of air freight services from Singapore including Australia. |
| **SSNIP** | Small but Significant Non-Transitory Increase in Price |
| **TACT** | TheAir Cargo Tariff |
| **TC1** | IATA Cargo Tariff Conferences – Area 1 |
| **TC2** | IATA Cargo Tariff Conferences – Area 2 |
| **TC3** | IATA Cargo Tariff Conferences – Area 3 |

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#

# INTRODUCTION

1. This is an appeal from a trial which ran for fifty-seven days. The issues were not complex but the parties raised every imaginable point and tendered huge volumes of material. The central point raised by the Australian Competition and Consumer Commission (the “Commission”) on the appeal was a very short one: what is the meaning of a market “in Australia”? But the respondent airlines to the appeal continued a scorched earth policy. The notice of contention filed by P T Garuda Indonesia Ltd (“Garuda”) raised 94 issues. And almost the entire record of the trial proceedings was electronically reproduced on appeal. A handful of issues in the notices of contention were abandoned, but there were others which were not abandoned but about which no submissions were made. Some of the other issues raised in the notices of contention depended upon factual findings by the primary Judge about which we were referred to only a snapshot of the evidence. This introduction focusses upon the main issue on the appeal. As we explain, we would allow the appeal on that issue.
2. One matter in Garuda’s notice of contention was conceded, although it is unclear whether it will have any substantial effect, and another (concerning limitation) may require further submissions in light of these reasons. Otherwise, we reject the issues raised in contention by the respondent airlines.
3. At first instance in these proceedings, the central issue arose in the context that the Commission sought to establish that Air New Zealand Ltd (“Air NZ”) and Garuda had engaged in collusive behaviour. The Commission asserted that Air NZ and Garuda’s collusive behaviour consisted of fixing surcharges and fees on the carriage of air cargo from Hong Kong, Singapore and Indonesia into Australia. That conduct was said to be unlawful because it was contrary to s 45 (read with s 45A) of the *Trade Practices Act 1974* (Cth) (the “*Trade Practices Act*”) (as it was named before being rebadged as the *Competition and Consumer Act 2010* (Cth)). The primary Judge rejected that case. The Commission now appeals against that decision.
4. The primary Judge found that the markets for airborne cargo out of Hong Kong, Singapore and Indonesia were not markets “in Australia” within s 4E of the *Trade Practices Act*. At some stage a party or freight forwarder wishing to send cargo to Australia by air would have to choose the airline which would carry that cargo. The market in question was that in which air cargo services were supplied and acquired. His Honour concluded that the market was located at the point at which the choice of airline (a “switching decision”) took effect. That point was, in his Honour’s view, the point at which the cargo was delivered to the airline for carriage.
5. For the reasons below, and with genuine respect to his Honour’s meticulous judgment, we would allow the appeal on this point. The question to be asked is not whether a switching decision is given effect in Australia but whether a *market* is in Australia. All aspects of the market are relevant in determining whether it is in Australia. For instance, the presence of importers (customers) in Australia is not, as the primary Judge concluded at [263]‑[264], irrelevant to the determination of whether the market is in Australia.
6. Both the text and purpose of s 4E require identification of whether a market is in Australia by (i) identification of the market; and (ii) location of that market. It has been customary to identify the market by reference to its “product dimension”, “geographic dimension”, and “functional dimension”. These dimensions are not independent of one another, nor are they unrelated to the location of the market. This is particularly so because the “market” concept does not refer to only a physical marketplace or market square where buyers come to purchase from sellers.
7. Ultimately, the determination of whether a market is “in Australia” is an evaluative exercise, which should not exclude any aspect of the market from consideration. In this case, Air NZ and Garuda supplied a suite of air cargo services to each port in Australia, *commencing* the provision of those services outside Australia. But (i) the suite of services they provided included important components which were provided in Australia; (ii) the services were marketed and ultimately supplied to customers, including significant customers in Australia; and (iii) there were Australian barriers to entry into the market. Wherever else the market might also have been located, the market was “in Australia”. This conclusion is based on the legislative text of s 4E of the *Trade Practices Act* when read with ss 45 and 45A. It is a conclusion which is consistent with the purpose of s 4E and the overarching purpose of the *Trade Practices Act*,being “to enhance the welfare of Australians through the promotion of competition and fair trading and provision for consumer protection”. It is also consistent with Australian authorities to which we refer later in these reasons. Those authorities emphasise matters other than the physical location of a supplier, or where any substitution is given effect, as relevant factors in the identification of the market. It is also consistent with the conclusions which have been reached upon similar fact patterns in New Zealand and in Europe.

# THE COMMISSION’S APPEAL

## The “market in Australia” issue

### The Commission’s pleaded case

1. The Commission’s pleaded case against Air NZ and Garuda was that each airline contravened ss 45(2)(a)(ii) and 45(2)(b)(ii) of the *Trade Practices Act* in various ways. Alternatively, the Commission said that each contravention occurred, “only insofar as the provisions of the pleaded arrangements and understandings applied to the supply of air freight services on direct and indirect services to and from Australia, and on all substitutes for those services or any sector of those services”. Although the air freight services supplied by Air NZ and Garuda involved different points of origin (Hong Kong, Singapore and Indonesia), it was common ground in this appeal that the application of legal principle would lead to the same result in both cases (app ts 125).

### The relevant provisions of the Trade Practices Act

1. At the relevant times, s 45(2) of the *Trade Practices Act* provided as follows:

**45. Contracts, arrangements or understandings that restrict dealings or affect competition**

(2) A corporation shall not:

(a) make a contract or arrangement, or arrive at an understanding, if:

(i) the proposed contract, arrangement or understanding contains an exclusionary provision; or

(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, whether the contract or arrangement was made, or the understanding was arrived at, before or after the commencement of this section, if that provision:

(i) is an exclusionary provision; or

(ii) has the purpose, or has or is likely to have the effect, of substantially lessening competition.

1. In its case against Air NZ and Garuda concerning ss 45(2)(a)(ii) and 45(2)(b)(ii), the Commission relied upon the deeming provision in s 45A(1):

**45A. Contracts, arrangements or understandings in relation to prices**

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

1. The effect of s 45A is to *deem* a provision of a contract, arrangement or understanding (or one that is proposed) to satisfy the s 45 requirement (purpose, effect, likely effect etc) in relation to substantially lessening competition. Relevantly to this case, the deeming will occur where the provision has the purpose, effect, or is likely to have the effect of, “fixing, controlling or maintaining … the price for … goods or services supplied … by the parties to the contract, arrangement or understanding … in competition with each other”.
2. The Commission fastened upon the words of s 45A “in competition with each other” and then directed attention to the definition of “competition” in s 45(3):

For the purposes of this section and section 45A, competition, in relation to a provision of a contract, arrangement or understanding or of a proposed contract, arrangement or understanding, means competition in any market in which a corporation that is a party to the contract, arrangement or understanding or would be a party to the proposed contract, arrangement or understanding, or any body corporate related to such a corporation, supplies or acquires, or is likely to supply or acquire, goods or services or would, but for the provision, supply or acquire, or be likely to supply or acquire, goods or services.

1. The reference to “competition in any market” then invites attention to the definition of “market” in s 4E which we consider in detail below. It provides that the term “market” means a “market in Australia”.
2. Air NZ and Garuda submitted that the Commission was required to prove that they had engaged in the relevant conduct including “fixing, controlling or maintaining” the prices of their air cargo services. The Commission did not dispute that the definition in s 4E was engaged. In particular, the Commission did not submit that the words “in competition with each other” in s 45A(1) did not engage s 4E because those words concern the competition between the *parties* to the contract, arrangement or understanding rather than competition in relation to a *provision* of a contract, arrangement or understanding. Such a submission would have required attention to be given to whether the deeming provision could have been intended to travel beyond the geographical restriction upon the concept of market in s 45, or whether ss 45 or 45A had provided for a “contrary intention” within s 4E. It suffices to proceed on the basis, which was common ground, that the Commission was required to prove that the relevant conduct occurred in a “market in Australia”.

### The primary Judge’s reasons, grounds of appeal and notices of contention

1. In Pt 4 of his judgment, the primary Judge considered the identification of the market, under the heading, “Was there a market in Australia?”. His Honour’s detailed reasons for concluding that there was no relevant market in Australia focus on cargo services out of Hong Kong, upon the basis that the relevant circumstances are the same as those in Singapore and Indonesia. His Honour noted that the respondent airlines argued for a narrow construction of s 4E, asserting that such an approach would observe the requirements of international comity. As we consider that the meaning of s 4E is clear, that consideration has no real weight with respect to the construction question. However we do not see that our approach to s 4E offends against any aspect of international comity.
2. His Honour also noted that the operation of the requirement that a market be in Australia had not been authoritatively settled, although some cases had suggested that the whole of a market need not be in Australia. His Honour observed that these cases may not authoritatively state the law in this regard. In *Emirates v Australian Competition and Consumer Commission* [2009] FCA 312; (2009) 255 ALR 35 at 50‑53 [55]‑[74] Middleton J discussed the question, having regard to earlier decisions of Hill and Lindgren JJ. That discussion, and his Honour’s conclusions closely resemble our own approach to s 4E.
3. At [212]‑[219], the primary Judge considered the content of the relevant market or “field of rivalry”. At [212], his Honour’s conclusion was that, “In this field or area substitution in response to competitive pressures occurs”. His Honour also observed that:

Movements in price or the standard of goods or services which take place outside the field or area will induce no significant competitive consequences inside it.

This proposition tacitly assumes that relevant movements in price or the standard of goods and services supplied are located within the relevant market. We agree with that proposition. However it seems to be inconsistent with his Honour’s conclusions concerning the location of a market.

1. His Honour then discussed substitution, observing that it was basic to the process of market definition, and that it was necessary to consider both demand side and supply side substitution. He next asked, “How strong must the substitution effect be?”. At [214] his Honour considered that it must be “strong” and that:

Underlying these notions is the idea that the existence of substitutes operates to restrain the market power of those who are in the market.

1. At [217] the primary Judge said:

The product dimension is the ‘what’ question; the geographical dimension is the ‘where’ question; and the functional dimension is concerned with the location of market participants along the supply chain.

1. Under the heading, “The product dimension”, his Honour considered the following matters:
2. the relevant routes;
3. whether mail was included in the relevant markets;
4. whether chartered flights were included in those markets; and
5. whether the use of integrators was included in those relevant markets.

We need not consider any of those matters.

1. At [252] his Honour said:

I conclude that the product dimension for each market consisted of the services of flying cargo from Hong Kong to individual ports in Australia. None of these markets included mail carriers, charter flight operators or integrators.

1. At [253]‑[265] the primary Judge considered the geographical dimension, by first examining the services provided by the airlines, namely:
2. transport services, including special handling requirements, timetabling and also whether or not delivery was by direct or indirect flight;
3. ground handling services at points of origin and destination; and
4. 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.

His Honour observed that each of these services had a geographical element. Payment was generally made at the point of origin, that is, Hong Kong. Payment at the destination was rare and therefore not included in the analysis.

1. Concerning the identification of market participants, his Honour said that the primary issue was whether or not the market included as participants, only the airlines and freight forwarders, or also included some shippers. This issue involved two aspects, namely:
2. how persons might choose to switch patronage in the face of a small but significant and non-transitory increase in price (“SSNIP”) in a relevant market; and
3. who made the switching decisions, and where they were made.
4. His Honour explained the SSNIP at [220]. His explanation of the concept was not in dispute. In 1977, Professor (now Justice) Breyer summarised an early version of what is now the SSNIP test as “the notion of drawing a circle around a set of sales. Within the circle one should find sales with the following characteristic: were *all* those sales in the hands of a single seller, that seller would have the power to raise price significantly above the competitive level [and maximise profits]”: Breyer S, “Five Questions About Australian Antitrust Law” (1977) 51 *Australian Law Journal* 28, 34. The SSNIP approach has been traced to the United States Justice Department 1892 Merger Guidelines, based on the work of Mr Werden. It has not been without controversy: Stigler GJ and Sherwin RA, “The Extent of the Market” (1985) 28(3) *Journal of Law and Economics* 555; Harris RG and Jorde TM, “Market Definition in the Merger Guidelines: Implications for Antitrust Enforcement” (1983) 71(2) *California Law Review* 464 cited in *Re Fortescue Metals Group Ltd* [2010] ACompT 2; (2010) 271 ALR 256, 421 [1033] (Full Tribunal).
5. Concerning the first aspect at (1) above, the respondent airlines asserted that only airlines and freight forwarders based in Hong Kong were within the market, on the basis that, “any withdrawal [of] patronage from one airline to another had to occur necessarily in Hong Kong”. As to the second issue, the Commission submitted that in the case of large importers to Australia, the choice of carrier might be made by the importer rather than by the freight forwarder. In such a case, the Commission contended, the switching decision occurred where the importer was located, which location might well be in Australia. Such importers might be characterised as market participants because of their capacity to impose discipline on the upstream air cargo market. His Honour accepted that in some cases, decisions as to choice of airline might be made by persons other than freight forwarders in Hong Kong, including large importers (who might be in Australia) or large exporters (who would generally not be in Australia). Such shippers might continue to use freight forwarders, notwithstanding the fact that the latter would not be involved in choosing relevant airlines. His Honour concluded at [263] that:

The market participants in the various markets into Australia therefore included air carriers, freight forwarders and some large importers in Australia and exporters in Hong Kong.

1. The primary Judge considered that although some importers might have been located in Australia, others might well have been located at international headquarters in Europe or, presumably, elsewhere in the world. His Honour said at [264]:

I accept that it is quite possible in the case of significant shippers that the actual decisions about importation, including when it arises, the issue of which carrier to use, need not occur at the origin.

His Honour went on to say:

Because it will be relevant when examining the functional aspects of the relevant markets it is to be observed, however, that regardless of where the event consisting of the subjective decision to switch from one airline to another might be made, the only place in which it could be given effect would be Hong Kong. The range of choices from amongst which a person might choose an airline to fly cargo from Hong Kong to Sydney is inherently limited to those firms having operations in Hong Kong. Even if there were a supply side substitute it would still have to be provided in Hong Kong.

1. Thus his Honour accepted that a decision as to choice of airline might be made somewhere other than Hong Kong, but considered that such a decision could only be given effect in Hong Kong. This conclusion led his Honour to the proposition that the only airlines which could be chosen were airlines having operations in Hong Kong. Having regard to the evidence concerning regulation of air services entering Australia, one might equally have said that it was necessary to use an airline “having operations in” the relevant destination ports as well as in Hong Kong. In our view that proposition was mandated by the geographical aspect of the product dimension. His Honour seems to have attributed significance to the airlines being present in Hong Kong and not to their necessary presence in Australia. This approach reflected his Honour’s view that a switching decision could only be made in Hong Kong.
2. The primary Judge seems not to have drawn any general conclusions as to the geographical dimension of the market, save for identifying the services provided and their geographical locations, and the market participants and their geographical locations. His Honour seems rather to have deferred further consideration of the matter until his consideration of the question as to whether the market was a market in Australia. On the evidence, and having regard to his Honour’s observations concerning it, we infer that the geographical dimensions were as follows:
3. the suppliers of air cargo services were airlines presently providing cargo services between Hong Kong and Australia;
4. the purchasers of such services were freight forwarders in Hong Kong, some large importers in Australia and exporters in Hong Kong; and
5. the services were provided in Hong Kong, at the relevant ports in Australia and on the routes flown between those locations.
6. As we understand the respondent airlines’ submissions, they would exclude the third proposition from any consideration of the geographical dimension on the basis that it adds nothing to the economic analysis. However, in this case, geographical considerations are closely linked to the other dimensions. The product dimension involves the delivery of goods in Australia from Hong Kong. Similarly, the functional dimension reflects geographical considerations. Geographical considerations are also concerned with the right to fly into, out of and over various places. These issues loom large in this case. That geographical considerations arise in connection with the product and functional dimensions demonstrates that the consideration of each dimension cannot be undertaken in isolation.
7. His Honour then turned to the functional dimension. In effect, his Honour sought to identify those entities in the supply chain, between manufacturer and ultimate consumer, which might be sufficiently able to influence switching behaviour in connection with the supply of the relevant cargo services. He identified the “vertical structure” of the industry as:
8. Consignor;
9. Origin freight forwarder;
10. Airline;
11. Destination freight forwarder; and
12. Consignee.

His Honour recognised that either the consignor (an exporter of goods) or the consignee (an importer of goods) might be the instigator of the shipment, and that the services provided by freight forwarders were necessary accompaniments to the services provided by the airlines.

1. The primary Judge noted that the “nature” of consignors and consignees might “vary significantly”. Some might be involved in single exportation or importation transactions, involving individual chattels, such persons having only transitory connection with the international air cargo system. Others might be “significant” exporters and importers of chattels in size and volume. The evidence indicated that airlines, in general, regarded significant importers and exporters as targets for marketing activities, and as the ultimate source of business. His Honour considered that it was obvious that airlines would compete to obtain volumes of cargo directly from large shippers. At [287] his Honour concluded that:

[A]cross the Asia Pacific area the airlines recognised that shippers had demand for capacity. Indeed, they actively followed the position of shippers, recognising that these were the economic foundations of the market.

1. At [309] his Honour said:

Accordingly, I draw the following conclusions about the functional dimensions of the market:

(a) the participants in the relevant markets were airlines, freight forwarders and shippers (be they exporters at origin or importers at destination) whose cargo volume was sufficiently significant for the airlines to be commercially motivated to pursue it;

(b) shippers of that kind often (but not always) made decisions about which airlines they would use. Where the shipper was an importer in Australia this decision was likely to be made in Australia;

(c) shippers of that kind continued (aside from the situation of integrators) to use freight forwarders who provided an indispensable set of services for dealing with the ancillary transport issues which the airlines themselves would notdeal with. Relationships erected in the case of shippers of this kind were often tripartite. In some cases the tripartite nature of what was taking place was consummated with a contract but this was not a necessary nor even particularly common feature;

(d) shippers of that kind, wherever located were therefore capable, at least in theory, of operating as a constraint on airlines’ cargo rates because of their ability, again in theory, to switch to alternate sources of supply and to outflank any exercises of market power at the relevant origin airport; and

(e) smaller shippers who had no view about which airline to use and who left matters entirely to their freight forwarders were not participants in any of these markets.

1. The primary Judge then addressed the specific question of “Market in Australia?” At [311] his Honour identified the economic issues for determination as:

(a) whether the fact that the airlines competed against each other in Australia in the provision of:

(i) carriage through Australian airspace;

(ii) ground handling services in Australia; and

(iii) handling enquiries about lost and damaged cargo in Australia;

was sufficient to locate the markets in Australia;

(b) whether the fact that the source of some of the demand for the services was ultimately in Australia was sufficient to locate part of each market in Australia;

(c) whether the market in Hong Kong was constrained by the abilities of importers in downstream markets in Australia to switch to alternate sources of supply, and if so, whether it was appropriate to characterise the downstream markets as part of the upstream market; and

(d) whether, in light of the foregoing, the market was in Australia.

1. Issues (a) and (b) are framed so as to suggest that the question is whether the relevant factor, alone, would be sufficient to locate the markets in Australia. We note that issue (a) is distinguished from issue (b) in that the former addresses the location of the markets, whilst the latter addresses the locations of parts of the markets.
2. His Honour dealt with issues (a) and (b) together, under the heading “Source of demand in Australia”. At [313]‑[314], his Honour said:

313 As I have already said I accept that a separate market for air cargo services existed for the carriage of cargo between Hong Kong and each airport in Australia. Part of the service provided was provided in Australia in the form of carriage through Australian airspace, ground handling services at destination airports and the service of handling enquiries about lost and damaged cargo. There is no doubt that the airlines competed against each other in providing these services and that the competition physically took place in Australia. Further there were substantial importers in Australia whose custom the airlines tousled to obtain.

314 Although the contracts of carriage were entered into in Hong Kong by the freight forwarders with each airline, 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. On the other hand, less substantial importers had no such influence.

1. At first instance the Commission submitted that the area of close competition or the field of rivalry extended to Australia where destination services were provided, “in a competitive environment”. In contrast, the respondent airlines submitted that the relevant activity within a market was substitution, the market being the area in which sellers of the product operate, and to which purchasers may practicably turn for such product.
2. The primary Judge considered that the central thrust of “*QCMA*” concerned substitution, and “through that prism”, the present problem was to be analysed. The reference to “*QCMA*” is to the decision of the Trade Practices Tribunal in *Re Queensland Co‑operative Milling Association Ltd* (1976) 8 ALR 481. Below, we discuss that decision in some detail.
3. His Honour had previously rejected the existence of any supply side substitutes. With respect to demand side substitution, he considered that the choice would have to be from amongst airlines which had a presence in Hong Kong where possession of the cargo would be transferred. This view reflects the proposition that such transfer for carriage to an Australian port could not occur at any place other than Hong Kong. One might also say that because the purpose for which the service is acquired is delivery of the cargo to an identified port in Australia, that service could not be delivered anywhere other than at that port, so that service could only be supplied by an airline which could fly into that port. The Commission submitted that the relevant service was provided, not only at Hong Kong, but also along all points on the route between Hong Kong and the relevant Australian airport including, we infer, the services provided at that airport. The Commission submitted that a repeat customer might decide to switch airlines in order to obtain superior ground handling services at the relevant Australian destination airport. His Honour accepted at [320] that there was competition in respect of ground handling, “although of a somewhat constrained nature given that ground handling was very often only provided by the home carrier in a particular port”.
4. Paragraphs [321]‑[326] contain the major thrust of his Honour’s reasoning concerning s 4E. Given his satisfaction that there was competition in respect of ground handling, his Honour said at [321] that the relevant enquiry was:

… not about switching in some loose sense but rather, as the text of section 4E requires, substitution. The correct question is where are the relevant substitutable services provided to consumers of those services.

1. His Honour then pointed out that ground handling services provided in Sydney were not, themselves, a substitute for air cargo services from Hong Kong to Sydney, a proposition which we accept. However, acceptance of cargo by the airline in Hong Kong would not, in itself, be a substitute for such air cargo services. His Honour went on to observe that if there were “true substitutes” in Sydney, namely ground handling services, this would lead to the proposition that a person wishing to move cargo from Hong Kong to Sydney could do so by giving possession of the cargo to the airline at Sydney, an obviously absurd proposition. We understand this proposition to mean that if ground handling services in Sydney were a true substitute for the supply of the whole suite of cargo services, the result would be that the customer could move cargo to Hong Kong by delivering it to the airlines in Sydney. We agree that the result is absurd. However we do not understand the Commission to submit that the fact that the airlines compete in the supply of ground services in Australia leads, of itself, to the finding that the market is in Australia, and only in Australia. His Honour’s approach seems to be that for the purposes of s 4E, a market must be either entirely in Australia or not in Australia at all. He then sought to identify one incident in the overall provision of cargo services which might be the single factor which determined that location. The apparent anomaly referred to at [322] is based on the same approach.
2. At [323] the primary Judge queried the “analytical significance” of the Commission’s submission that there was a market participant in Australia. By this, his Honour seems to have meant that the location of market participants in Australia had no significance in the analysis required by ss 45, 45A and 4E. His Honour understood the Commission to have submitted that if switching decisions were made in Australia by such a participant, then those decisions would not be made in Hong Kong “where the airplanes were”. His Honour observed that:

However, the question is not where the switching decision is subjectively made as an act of cognition but, instead and in contradistinction, where it is given effect. If that be correct, the location of some importers in Australia is irrelevant … .

1. His Honour then proceeded on the basis that the proposition was correct, and that the Commission’s reliance on the presence of market participants in Australia was of no assistance in establishing the location of the market. His Honour’s view as to such correctness seems to be based upon his observations at [319]‑[321] as follows:
* the range of airlines available to be selected in a relevant, route‑specific market is limited by the need that such airlines have a presence in Hong Kong where they will take possession of the cargo from a freight forwarder;
* in every cargo transaction there is a “legal moment” when possession is transferred, and that event can only occur in Hong Kong;
* the place where a customer chooses between airlines is “strictly limited to Hong Kong”;
* the relevant inquiry is as to where the relevant substitutable services are provided to the consumers of those services; and
* that question is not to be answered by reference to the location at which some of the services are delivered.
1. We suspect that two assumptions underlie this reasoning. They are:
* that the relevant market cannot be partly in Australia; and
* that delivery of the cargo to the airlines in Hong Kong in some way affects supply by the airlines of the whole suite of services which comprises the product.
1. At [211] his Honour seemed to doubt the correctness of the assumption made in various cases that a market may be partially in Australia for the purposes of s 4E, and that such partial presence is sufficient to satisfy the requirements of that section. However we do not discern, in his Honour’s reasons, any justification for the apparent rejection of that possibility. As to the second assumption, we accept that delivery of possession of the cargo may have legal consequences as between the parties but so, too, may the making of the contract for the provision of cargo services, wherever that event occurs. It is difficult to see why the delivery of possession, rather than the making of the contract should be identified as the effective delivery of the whole suite of services, assuming that it is necessary to identify one discrete location as being the location of the market.
2. His Honour also rejected the proposition that the “ultimate demand” for cargo services was in Australia, or that such proposition was sufficient to locate the market in Australia. His Honour acknowledged that Professor Church, an economist who gave expert evidence at trial, had accepted that demand for air cargo services to Australia was driven by a demand for imported goods in this country. The primary Judge accepted Professor Church’s comment that:

the demand in the market for air cargo is located in large part in Australia and there will be economic effects of an increase in the price of air cargo to Australia in Australia.

However his Honour did not understand Professor Church to be locating the relevant markets in Australia.

1. The remaining point concerned the extent to which the Hong Kong market might be constrained by importers in downstream markets in Australia. His Honour dismissed this proposition on the basis that there was no evidence to support it.
2. At [335] and [336]‑[338] his Honour concluded that the relevant Hong Kong markets were not in Australia. His Honour also concluded that, for the same reasons, the Singapore and Indonesian markets were not in Australia.
3. Concerning the primary Judge’s reasoning, we make a number of points. First, his Honour seems to have moved from the proposition at [212] that substitution occurs in a market to the proposition or assumption that the market contains only substitution decisions, and not the circumstances on which such decisions are based. Secondly, his Honour has chosen the point at which effect is given to a “switching decision” as alone governing the question of whether the relevant market was in Australia for the purposes of s 4E. This choice presumably reflects the view that the market consists only of such decisions. The reason for selecting the location at which the decision is given effect as answering the s 4E question, rather than the place at which the decision was made, appears to be that it is the latest time at which the decision can be changed. At one level his Honour’s reasons seem to treat the question concerning the geographical dimension of the market as being the same question as is posed by s 4E. However, at another level, his Honour seems to treat it as a narrower question. Whilst the locations at which services are supplied, and customers are located are treated as relevant matters in connection with the geographical dimension, they are completely discounted in considering whether the market is in Australia. This outcome seems to be the result of his Honour’s view that the only content of the market is substitution.

### The grounds of appeal

1. The primary Judge’s decision concerning “market issues” was the subject of four of the Commission’s grounds of appeal against both Air NZ and Garuda, Air NZ’s notice of contention grounds 1‑5; and Garuda’s notice of contention, grounds 1‑5. Grounds 6‑9 of Garuda’s notice of contention were abandoned.
2. Put briefly, the Commission challenged the primary Judge’s finding that:
3. although parts of the service were performed in Australia (flying through Australian air space, ground handling services in Australian cities, and handling enquiries) and although there was constrained competition in respect of ground handling, these matters only formed part of a suite of services ([313], [320]‑[321]); and
4. the relevant question is where a switching decision is given effect ([323]); the only place where a decision to switch from one airline to another could be given effect would be Hong Kong ([264]); that is the place where the airline takes possession of the cargo from the freight forwarder ([319]).
5. However an important aspect of the Commission’s case, at trial and on appeal, was and is that there were, as his Honour found, major shippers in Australia which dealt directly with the airlines, although they may also have retained their freight forwarders. By their notices of contention, the respondent airlines challenge that finding. As it is of some importance to the Commission’s case, we should deal with it before considering that case.

### The respondent airlines’ challenge to the finding that large importing shippers were part of the market

1. The respondent airlines challenged the finding by the primary Judge that some large importers (shippers) in Australia were market participants in the relevant markets. They submitted that the relevant markets should have been limited to transactions between airlines and freight forwarders. There are five difficulties with this submission.
2. The first difficulty is that it did not engage to any extent with questions of agency. We did not receive any submissions from the respondent airlines concerning the proper characterisation of the relationship between the freight forwarders and the shippers in Australia and, in particular, why the freight forwarders could not be characterised as agents for the shippers. If the freight forwarders were the agents of the shippers in Australia for the purpose of the relevant transactions then the market could not be limited to transactions between the airline and an agent, excluding the principal. The same point could be made if they were agents of the airlines.
3. Although the primary Judge did not reach a conclusion concerning agency, he did conclude that (i) as a matter of economic substance the freight forwarders were intermediaries having fluctuating control over the cargo whose carriage they arranged at [299]; and (ii) the airlines regarded the goods that they carried as belonging to the shippers at [300]. These findings were not challenged by the respondent airlines.
4. The term “agent” can be slippery but it is usually used to “connote an authority or capacity in one person to create legal relations between a person occupying the position of principal and third parties”: *International Harvester Co of Australia Pty Ltd v Carrigan’s Hazeldene Pastoral Co* [1958] HCA 16; (1958) 100 CLR 644, 652 (the Court). In this sense, an intermediary is not necessarily an agent: Dal Pont GE, *Law of Agency* (3rd ed, LexisNexis Butterworths, 2014) 55 [2.23].
5. It is impossible to generalise from the evidence in this case to reach a conclusion as to whether every shipper engaged a freight forwarder as an agent. Questions of agency fall to be considered in the context of particular relationships. Indeed there was evidence that suggested that some airlines described the freight forwarders as agents for the airlines in the airlines’ relationship with the customer importers. Ultimately, although some relationships between shippers and freight forwarders may properly have been characterised as relationships of agency, others might not. Nevertheless, there was significant evidence, at least in some cases, of relationships of agency within the market. For instance, evidence from one freight forwarder (Mr Chan for National Freight Corporation, trading as Exel) described how the freight forwarder would receive blank master air waybills from the air cargo carriers prior to delivering the cargo with space left blank for the signature of the “shipper”. The freight forwarder (Exel) often listed itself as, and signed as, the shipper only because it had consolidated shipments from a number of shippers ( [51]).
6. The seconddifficulty with the respondent airlines’ submission is the finding of the primary Judge that airlines took note of the shippers’ businesses, even if the airlines denied doing so. As the primary Judge said at [283]:

Oral testimony given during the trial suggested that airlines were interested in what the shippers were doing even if they denied that there was any direct contact with them. Mr Gregg’s evidence was to this effect in relation to Air NZ, and Mr Haddad gave similar evidence for Garuda.

1. Mr Gregg’s evidence was that he paid close regard to the weekly and monthly reports he received from his cargo managers. And Mr Haddad, the Australian Cargo Manager for Garuda Indonesia, agreed in cross‑examination that it was a “fairly commonplace occurrence for [him] to have discussion with freight agents in relation to the flight that the shipper wanted their cargo on”.
2. The thirddifficulty with the respondent airlines’ submission is the evidence that in some significant cases the airlines did not merely take note of the shippers’ business but dealt directly with shippers, and not merely with freight forwarders. Although this was not always the case, and although the shippers would often defer to the freight forwarders, as long as the requirements of the shippers were met, the desire of some airlines to establish and maintain relationships with the shippers is a strong indicator of the participation of the shippers in the market.
3. 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 (affidavit of Gunther Ressig at [106]‑[107]).
4. The former Group General Manager (Freight) at Qantas, also described the existence of some tri‑partite arrangements between Qantas, freight forwarders and shippers (affidavit of Stephen Michael Cleary at [53], [61]‑[70], [78]‑[81]). These arrangements were usually recorded in memoranda of understanding after face‑to‑face meetings attended by all three parties ([61]‑[62]). Negotiations related to price, capacity and service standards ([62]). 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” ([68]).
5. Evidence from one freight forwarder, Burlington Northern Air Freight (subsequently BAX Global), by the State Manager of its Perth, Adelaide and Sydney offices, (affidavit of Dennis Ian Nelson at [62]), 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.

1. There was also evidence from Ms Cluff who was employed by Toshiba (Australia) Pty Ltd as a Logistics Import Specialist. In her affidavit, at [126], she 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. Ms Cluff said ([99]) that on occasions Toshiba even considered bypassing the freight forwarder altogether. The reason this never eventuated was that Toshiba Australia decided it would be difficult to handle all of the services provided by the freight forwarder, and Toshiba Australia thought it would be able to obtain a better price from the airline when it contracted a freight forwarder, given the greater total volume of goods when Toshiba Australia’s goods were combined with those of the freight forwarder.
2. The fourthdifficulty with the respondent airlines’ submission is the conclusion of the primary Judge at [269], described above, that the functional dimension of the market was not a strictly vertical one, and that in some cases the consignee as importer would instigate the transaction. This finding was not challenged. Where the consignee was a large shipper who was a “significant economic actor” (to use the phrase of the primary Judge at [305]) the inference drawn by the primary Judge is irresistible. That inference is that it is hard to imagine a universe of discourse in which a rational business would ignore the role of such a shipper.
3. The fifth difficulty with the respondent airlines’ submission is that it was essentially based upon an assertion of a lack of evidence to support a conclusion that large shippers imposed a real constraint on airlines operating out of Hong Kong and Singapore. The primary Judge’s conclusion on this point was by inference based upon the evidence before him. He referred to documentary evidence and testimony that airlines regarded significant importers and exporters as targets for their marketing activities; he referred to direct contact that airlines had with customers; he referred to the *tri‑*partite arrangements made by airlines not *bi‑*partite arrangements with freight forwarders which excluded importers; he referred to internal Air NZ emails which recognise price pressure from exporters; he referred to internal reports of airlines about losing the custom of particular shippers ([272]‑[308]). On appeal there was very little analysis by the respondent airlines of this considerable body of evidence which was before the primary Judge. This is an excellent example of a circumstance where, “the appellate court does not typically get taken to, or read, all of the evidence taken at the trial” and where the primary Judge, “has advantages that derive from the obligation at trial to receive and consider the entirety of the evidence and the opportunity, normally over a longer interval, to reflect upon that evidence and to draw conclusions from it, viewed as a whole”: *Fox v Percy* [2003] HCA 22; (2003) 214 CLR 118, 126 [23] (Gleeson CJ, Gummow and Kirby JJ).
4. We reject these grounds of contention.

### The submissions concerning the market issues

1. Senior counsel for the Commission orally summarised his market submissions as involving two issues (app ts 4). First, the primary Judge used an incorrect test to determine whether the relevant markets were markets in Australia. Secondly, the findings by the primary Judge in respect of (i) the product dimension; (ii) the locus of competition; and (iii) the functional dimension of the relevant markets, established that the relevant markets were markets in Australia for the purposes of the relevant sections of the *Trade Practices Act*.
2. The Commission alleged that the primary Judge focussed erroneously upon where the switching decision was given effect (app ts 8). At [24]‑[32] it submitted that this approach was erroneous because:
3. it erroneously focussed upon one aspect of the transaction, the transfer of possession or the place of contracting;
4. it erroneously assumed that there is a demand for *mere commencement* of the service at origin;
5. it was falsely premised upon the availability of the airlines in Hong Kong, where there is also a need for supply of the service at destinations in Australia;
6. contrary to the decision in *Re Fortescue Metals Group Ltd*, the test erroneously excluded factors relevant to the location of the market including the place where the customers are located, the place where the airlines direct their marketing, and the place where the airlines maintain their operations; and the test erroneously excluded the temporal dimension of the market and that competition is a “process and not an outcome”, when the competition was for the carriage of air cargo on multiple flights over periods of time.
7. On numerous occasions,the Commission submitted that the place where the services were provided to consumers was relevant in determining whether the market was in Australia (eg [4.4], [29], [34], [36]‑[38]). Senior counsel submitted (app ts 8) that by focussing on the place where switching decisions were given effect, the test ignores the location of customers. He gave the example of a situation where all customers for a product were located in Australia but the product was supplied from overseas. He submitted that such a situation would surely be a market in Australia. He submitted that this was the situation in the present case because all the shippers could be in Australia (ie the consignees requesting the carriage of cargo to them) and, “the freight forwarder would be entering into the contractual arrangement with the shipper at origin, but the demand would be solely located in Australia”.
8. The Commission submitted that whether or not a switching decision was given effect in Australia, the market must be a market in Australia, since the product dimension of the market was the supply of air cargo services from an overseas port to a port in Australia ([4.1], [8]). Senior counsel for the Commission submitted that the service of carrying the cargo from an origin to a destination has no meaning in economics if it is focussed solely at the origin (app ts 10). He submitted that the expert evidence of Professor Church (on a point where Professor Gilbert disagreed), should be accepted as supporting the conclusion that wherever the product description includes a geographic place (app ts 23‑27), the geographic dimension of the market will be located at that place.
9. In support of this submission, the Commission also submitted that the services which made up the product involved geographic elements so that there was a “one to one” correspondence between the product (or “price‑product‑service”) dimension of the market and the geographic dimension ([16]) and that competition physically took place in Australia ([17]). These geographic elements of the product description included: (i) delivery to a destination port; (ii) ground handling services at destination ports; and (iii) enquiry services at destination. The Commission observed that an exercise of market power might occur in Australia by an airline withdrawing those services provided in Australia, diminishing their quality or introducing collection charges ([23]).

### The proper approach to whether a market is “in Australia”

1. In broad summary, our approach to whether a market is “in Australia” involves two related issues. The first issue involves defining the market. As we have explained, the established approach to market definition is to consider three “dimensions” of the market: the product, geographic, and functional dimensions. This approach is simply a heuristic tool to assist in understanding the market. The *Trade Practices Act* does not divide the market in this way, and in the exercise of market definition the three dimensions are not mutually independent.
2. The second issue involves characterising whether the defined market is “in Australia”. In many cases, a determination of the geographic dimension of the market will reveal whether the market is “in Australia”. But the question is not whether the “geographic dimension of the market” is in Australia. Nor is it whether the effect of a switching decision is in Australia. The question is whether, as a matter of characterisation, the *market* is in Australia. For this reason, all of the matters identified by the Commission should properly be considered.
3. This approach is textual. It is supported by the legislative background to s 4E. It is also contextual and purposive. And it is supported by authority. Our consideration of the issue below is divided into the following sections:
4. legislative background;
5. the flexibility of the concept of a “market in Australia” and purposive considerations;
6. difficulties with the primary Judge’s approach;
7. the proper approach to the words “market in Australia”;
8. identification of the market; and
9. characterisation of whether the identified market is “in Australia”.
10. One significant area of authority which is not considered below is the body of antitrust decisions from the United States. The primary Judge held that United States authorities were not of any assistance because there is a substantial difference in the “effects doctrine” under the *Sherman Antitrust Act* 15 USC (1890), a doctrine which was developed as early as the decision of Learned Hand J in *United States v Aluminum Co of America* 8 F 2d 416 (2d Cir 1945). The Commission did not challenge this. Neither at trial nor on this appeal did the Commission submit that the appropriate approach to whether a market was “in Australia” was to test whether the relevant effect of anti‑competitive conduct was felt in Australia. The parties all avoided any reference to, or discussion of, the copious United States authority on this issue. That authority is, however, not uniform: Brown GW, “Relevant Geographic Market Delineation: The Interchangeability of Standards in Cases arising under Section 2 of the Sherman Act and Section 7 of the Clayton Act” (1979) *Duke Law Journal* 1152.

### (1) Legislative background

1. Section 4E provides:

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.

1. When the *Trade Practices Act* was first enacted, the term “market” was defined in s 4 as follows:

“market” means a market in Australia.

1. According to the explanatory memorandum which accompanied the draft Bill at [87]:

The extent to which the legislation will operate extra‑territorially is indicated in clause 5. The definition of market in clause 4 is also relevant in this regard.

1. The *Trade Practices Amendment Act 1977* (Cth) repealed that definition and inserted s 4E in its present form, save that the words, “unless the contrary intention appears”, were not present. Those words were inserted by the *Trade Practices (Misuse of Trans*–*Tasman Market Power) Act 1990* (Cth) to allow for the existence of trans‑Tasman markets.
2. At [4] of the explanatory memorandum which accompanied the 1977 Bill, it was said that:

A “market” for goods and services has been defined to include substitutable or competitive goods or services … .

In the second reading speech, the Hon John Howard MP, as he then was, referred to an earlier Bill introduced in 1976. It had lapsed when Parliament was prorogued: see Commonwealth, *Parliamentary Debates*, House of Representatives, 8 December 1976, 1476 (John Howard). In the second reading speech in connection with the 1976 bill, Mr Howard referred to a committee report, saying that the bill would implement some of its recommendations. The report in question was the *Swanson Report*: see Trade Practice Act Review Committee, *Report to the Minister for Business and Consumer Affairs* (Australian Government Publishing Service, Canberra, 1976). Concerning the meaning of the term “competition”, the committee adopted the language used by the Trade Practices Tribunal in *QCMA*. The committee said:

4.20 The concept of market involves the performance of a function in relation to a product, being goods or services, within a geographical area. Markets within the chain of distribution, from manufacturing to wholesaling and retailing, depend upon factors internal to the industry concerned, and distinction may in particular cases be blurred or non–existent. Product and geographic markets, on the other hand, depend upon factors extraneous to the industry. Their boundaries are determined by the relationship between such factors as price, product substitutability, desired use and distance from supply, to name some. Because of the variable nature of such factors, the boundaries of product and geographic markets are necessarily flexible.

4.21 The Committee considers that no advantage would be gained by attempting to define exhaustively the term ‘market’. No definition could produce a formula capable of certainty, having regard to the variable nature of the factors discussed in the paragraph above. Importantly also, the Committee has regard to the fact that persons involved with particular cases wish the matters in dispute to be judged on the particular facts, as they may present them, and not by artificial rules designed to achieve what we would suggest is an illusory certainty.

4.22 There is, however, one aspect of the definition of ‘market’ about which we consider the Act should give useful legislative guidance; namely, in relation to product substitution. The Committee therefore recommends that the Act should require that, in the determination of a ‘market’ for particular purposes, regard shall be had to substitute products, being products which have a reasonable interchangeability of use and which have high cross‑elasticity of demand, i.e. where a small decrease in the price of a particular product would cause a significant quantum of demand for a similar product to switch to the product in question.

1. We have set out the history of the definition of the word “market” in order to demonstrate that the enactment in 1977 of s 4E was not intended to change the meaning of the term “a market in Australia”, save to the extent that the amendment may have extended the concept of “market” by the addition of the inclusory provision which requires that regard be had to substitute products as *one* of the factors to be considered in the flexible assessment of the factors comprising a market. In other words, the amendment seems to have been intended to extend the range of goods or services to be taken into account in the market identification exercise.

### (2) The flexibility of the concept of a “market in Australia” and purposive considerations

1. The reference to a “market” in s 4E is to an abstract concept, not to a physical place. In one sense the description is a metaphor. It conjures an image of a “marketplace” involving a single location where buyers and sellers meet. But the legislation is plainly not limited to this narrow conception which developed well before the era of global commerce in which the *Trade Practices Act* was enacted. Moreover, the history of s 4E, and its purpose, manifest Parliament’s intention that the section be interpreted flexibly and in light of the purposes of the *Trade Practices Act*.
2. The Swanson Committee recognised the flexibility of the boundaries of product and geographic dimensions of a market due to the variable nature of factors such as price, product substitutability, desired use and distance from supply ([4.20]). One reason why the evaluative exercise contemplated by the Swanson Committee was intended to be flexible is that the Committee was conscious of the dangers of definitions that are too wide or too narrow. At [4.19] the Committee said:

If the market is too widely defined it may be that the requisite effect upon competition cannot ever be shown, to the detriment of those seeking relief from a restrictive agreement or practice. Alternatively, if the market is too narrowly defined it may result in hardship to and unnecessary limitations upon business actions … .

1. Air NZ submitted ([26]) that defining a market too widely would have the result that the requisite effect upon competition would never be shown, citing French, Spender and O’Loughlin JJ agreeing in *Singapore Airlines Limited v Taprobane Tours WA Pty Ltd* [1991] FCA 808 [167]; (1991) 104 ALR 633, 642. This can be accepted. But, equally, the narrower the approach that is taken to whether a market is “in Australia”, the less likely it will be that any effect on competition, no matter how significant to Australians, would fall within ss 45 and 45A.
2. The need to avoid too narrow an approach to whether a market is “in Australia” for the purposes of s 4E is reinforced by the objective of the *Trade Practices Act* as set out in s 2: “to enhance the welfare of Australians through the promotion of competition and fair trading and provision for consumer protection”.
3. The explanatory memorandum to the *Trade Practices Bill 1974* (Cth) indicated that the words “in Australia” were intended to limit the extraterritorial operation of the *Trade Practices Act*: Explanatory Memorandum, *Trade Practices Bill 1974* (Cth) 19 [87]. However, the explanatory memorandum does not indicate the extent to which those words were intended to constrain. In a submission to the Dawson Committee for Trade Practices Reviewin 2002, Professor Brunt submitted that one feature of the *Trade Practices Act* that is “glaringly inappropriate to the global challenge” is s 4E. She said that a more expansive definition was required because the current definition failed to take into account “international forces”. In cases involving mergers she thought that the courts should take account of the international forces by considering the impact of actual and potential behaviour of *overseas* buyers and sellers upon Australian transactions. Hence, she proposed an amendment that “market” should mean a market *in relation to* Australia.
4. The expanded definition proposed by Professor Brunt was not adopted. It may be, therefore, that the *Trade Practices Act* does not protect consumers from the effects of international forces upon Australian consumers of international buyers and sellers. If so, then whether it should do so as a matter of policy would be a question for Parliament. But this case directs attention to a considerably greater restriction upon the protection given by the *Trade Practices Act* to the welfare of Australians. This case concerns the direct participation of Australians in the relevant transactions, including (as a matter of economic substance) Australian shippers through the intermediaries of freight forwarders, and it concerns the performance of important elements of the services in Australia.

### (3) The proper approach to the words “market in Australia”

1. As the primary Judge pointed out, there has been virtually no judicial consideration of the requirement in s 4E that a market be “in Australia”. In those circumstances, it is surprising that in argument before us, little or nothing was said concerning the proper construction of that section. The respondent airlines tended to assume that the location of the market in Australia would depend upon its geographical dimension. The Commission took a somewhat different view, looking to both the product dimension and the geographical dimension, although it also made a submission that there needed to be a one‑to‑one correspondence between these two dimensions. Thus, at [18] of its written submissions, the Commission submitted that the fact that part of the services that formed the product dimension of the relevant markets was provided in Australia, and that competition for the supply of those services took place in Australia, led to the conclusion that the market was in Australia.
2. Neither of these approaches accords with the text or purpose of s 4E. In our view, properly construed, the exercise required by s 4E is twofold. First, as the Commission submitted, it requires identification of the relevant market. That identified market will *include*, “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”. Section 4E does not prescribe the process by which the market is to be identified. We have already discussed the traditional way in which the process is approached by reference to three inter‑related “dimensions”, having regard to the economic analysis in question, in this case, that posed by ss 45 and 45A.
3. Secondly, s 4E requires characterisation of whether or not the identified market is in Australia. In many cases the geographical dimension of a market might easily resolve the characterisation issue of whether the market is “in Australia”. But it would be an error to approach the question of characterisation simply by asking whether one dimension of the market was “in Australia”. The entire market must be considered, and the other dimensions may be relevant to the question.
4. The identification of the “market” and the characterisation of whether it is in Australia are therefore flexible questions which require evaluative judgement in light of the purpose of the relevant provision.

### (4) Difficulties with the approach of the primary Judge

1. There are six difficulties with applying the respondent airlines’ (and the primary Judge’s) approach as a test to determine whether the market is “in Australia”.
2. The **first problem**, which we have already identified, is the lack of any textual foundation in s 4E for this approach. Section 4E is not concerned only with whether the supplier is located in Australia. Nor is it concerned only with whether the effect of a substitution is located in Australia. It is concerned with whether a *market* is located in Australia.
3. The **second problem** is understanding what is meant by locating the place where a substitution decision is given effect.
4. The primary Judge found, and the respondent airlines submitted, that substitution took effect where possession was taken of the cargo. We can see only two possible explanations for adopting that point as determining the location of the market. The first is that it is the point at which the airline commences to supply the relevant services as this is where the choice of supply takes effect. The second is that it is said to be the last point at which any change of mind can occur (app ts 110). We find neither of these explanations to be convincing.
5. As to the first explanation, almost inevitably a choice for supply of the service will have been made prior to both the making of the contract for carriage and delivery of possession. The product is a complete suite of services. There is no basis for treating the delivery of possession as being more important than any other part of the supply. In any event, the customer will be, for all practical purposes, committed to the choice for supply of the service before delivery of the cargo. Delivery of the cargo to the carrier will inevitably follow the choice. There was no reference to any evidence that shippers or freight forwarders frequently resile from a choice which had been notified to the chosen carrier, let alone after a contract had been made. Hence there is no logical basis for describing the point of delivery to the carrier as the point at which the choice took effect.
6. As to the second possible explanation, it assumes that the first act of performance becomes the point of no return. But it is hard to see why the place of loading the cargo is the point of no return rather than, for instance, the place where the customer becomes irrevocably bound to pay for the services of the airline, subject to repudiating the contract and paying damages. From a commercial, legal, and moral point of view, the point of no return is the making of the contract, or possibly communication of the choice. The location of the making of the contract evidenced by the air waybill might bear no relationship to any of the underlying economic realities of the transaction. Nor did the respondent airlines submit that the place where the switching was given effect was that of the proper law of the contract.
7. His Honour’s approach seems to be based upon the proposition that the process of substitution necessarily provides the answer to the enquiry prescribed by s 4E. The process of substitution may be relevant to market identification, and may therefore have an effect on whether the market is “in Australia” but s 4E is not confined to substitution. Further, as we have explained, significant difficulties attend the identification of the point at which substitution occurs or may occur. These difficulties flow from the quite arbitrary choice of the criterion for deciding the s 4E question.
8. Ultimately, the respondent airlines submitted that the place where the switching decision is given effect is the location of the supplier. Although the location of the supplier need not correspond with the point of no return for a switching decision by a customer, the respondent airlines’ submissions assimilated the primary Judge’s test of the place where a substitution is given effect with the question of the location of the supplier.
9. The assimilation of the place where substitution is given effect and the location of the supplier may have reflected the emphasis placed on the latter by the experts Professor Church and Professor Gilbert. We put to one side the evidence of Dr Williams upon whose evidence the Commission did not rely in this appeal. He had accepted that his approach to market definition was based on a test which had been rejected by the Australian Competition Tribunal (ts 2407‑2408): see *Application by Services Sydney Pty Ltd* [2005] ACompT 7; (2005) 227 ALR 140, 169‑170 [122] (Gyles J, Keane and Walker). Air NZ pointed to the agreement between Professors Church and Gilbert that the, “geographic dimension of a … market identifies the location and identity of competing suppliers in the relevant product market”, and that the, “geographic dimension of a market describes the locations of the suppliers of the products that consumers consider to be close substitutes for each other” (Air NZ submissions [49]).
10. Any attraction of this test (which focusses upon the location of the suppliers) is dispelled when one attempts to apply it. Where is an international airline that supplies a service located? Is it the place of its incorporation? Is it the location of its international head office? Is it the location of all of its operations? Is it, as the respondent airlines submitted, as simple as pointing to Hong Kong (or “the vicinity of the Hong Kong airport”: app ts 103) as the place where the service *begins* because at that place the planes will be loaded with cargo? Or is it, as the Commission submitted, all the places where significant parts of the service are performed in circumstances where the airlines have, and require, permits to operate in Australia and do, in fact, operate in Australia?
11. The experts who gave evidence at trial were divided in their answers to this question. The approach of Professor Gilbert (ts 2458), appeared to be that the supplier is located at the origin of the service it provides, or the region in which the product is supplied. The approach of Professor Church (ts 2366‑2367), appeared to be that it is located at all points between origin and destination of the service it provides.
12. In summary, the second problem with the primary Judge’s approach is that if the location of the market were to be defined solely by reference to the location of the supplier, it would still be necessary to determine that location. It is difficult to understand why a supplier could not be located at any place at which it operates.
13. The **third problem** with a test which focusses upon the location of the supplier, or place where substitution takes place, is that as a matter of principle it is hard to see why these should be the only relevant matters. Once it is accepted that the concept of a market is an abstract concept, or possibly a metaphor, rather than a description of an activity which takes place in a physical location or marketplace, then the concept of a test based upon a single factor which identifies a physical location appears inapt. In a world where commerce is often electronic, customers rarely travel to a marketplace where the seller is physically located. Indeed, suppliers may have very little physical presence at all. The physical location of an itinerant supplier could be a website which might be located on a server, or series of servers, anywhere. Or a location might be large warehouses in a country wholly unknown to any customer in another country who places an electronic order. In some cases, the location of a seller, as a matter of economic reality, might be the location of the customer.
14. The **fourth problem** with an attempt to find a single “location of the seller”, or a single place where a switching decision is given effect is that this approach is contrary to the legislative history of the provision and the desire for flexibility. It treats this matter as the sole criterion for locating the market, contrary to the flexibility which was intended in the definition in s 4E. The place of substitution or switching is a consideration in determining the dimensions of the market and may therefore have an effect in determining whether a market is “in Australia”. But it is not the only consideration.
15. As we have explained, s 4E was introduced following the *Swanson Report* in August 1976. The Swanson Committee recognised the flexibility of the boundaries of product and geographic dimensions of a market due to the variable nature of factors such as price, product substitutability, desired use and distance from supply ([4.20]). The Committee concluded that no advantage would be gained by attempting an exhaustive definition since, “persons involved with particular cases wish the matters in dispute to be judged on the particular facts, as they present them, and not by artificial rules designed to achieve what we would suggest is an illusory certainty” ([4.21]).
16. The **fifth problem** with a test which searches only for a single “location of the seller” or a single place where a switching decision is given effect is that in situations in which this test is most easily applied it can give rise to a meaning which is so narrow that it creates results which are contrary to the policy of the *Trade Practices Act* as set out in s 2: “to enhance the welfare of Australians through the promotion of competition and fair trading and provision for consumer protection”. As we have explained above, the narrower the meaning that is given to a “market in Australia” the less likely it is that any effect on competition, no matter how significant, will fall within ss 45 and 45A.
17. The **sixth problem** with a test which searches for a single “location of the seller” or a single place where a switching decision is given effect is that it is not consistent with the authorities which we discuss below. Rather, the authorities suggest that many other considerations are relevant to the question.
18. Ultimately, to the extent that it is meaningful to speak of a “location of a seller” or a “place where switching is given effect” such considerations will be relevant factors in determining the geographic dimension of a market. But they will not be conclusive. The abstract concept of a market involving buyers and sellers does not require that a seller have a single location. Nor does the language or the purpose of s 4E require this. We will return to this question. Other relevant factors may include the location of customers, the place where the goods or services are marketed (as in *Atlantic Container Line AB v European Commission* [2002] All ER (EC) 684) or even the sphere of geographic operation of a service which delimits possible customers. The determination of the geographic dimension of a market for the purposes of ss 4E, 45, and 45A is an evaluative exercise to be conducted consistently with the words of those sections, and their purpose. It cannot be reduced to a single monolithic test based only on one factor.

### (5) Identification of the market: authority and application

1. Identification of a market is closely related to the concept of competition. As a framework for economic analysis, the market will be defined in a way which reflects the nature of the problem to be solved. In connection with alleged anti‑competitive conduct contrary to a provision of the *Trade Practices Act*, the chosen market will be the framework in which the case will be decided. For present purposes, the impugned conduct is said to be contrary to ss 45 and 45A of the *Trade Practices Act*. Broadly speaking s 45 prohibits a corporation from entering into, or giving effect to, a contract, arrangement or understanding which has, or is likely to have the purpose, effect or likely effect of substantially lessening competition. Section 45A provides that a contract, arrangement or understanding which provides for price fixing is to be deemed to have the proscribed purpose, effect or likely effect. Section 45(3) provides that for the purposes of ss 45 and 45A, the word “competition” means competition in any market in which a relevant corporation supplies or acquires goods or services. Hence s 4E is engaged.
2. We have emphasised the point that, contrary to the respondent airlines’ submissions and the approach taken by the primary Judge, the identification of a market, and even the identification of its geographic dimension, is not determined by a single component such as “location of a seller” or “the place where a substitution is given effect”. The course of Australian authority supports this approach. It is also supported by the approach taken to similar questions in analogous fact scenarios in New Zealand and Europe.

#### Australian authority

1. Both competition and markets are discussed in detail in the decision of the Trade Practices Tribunal in *QCMA*. In *QCMA* at 517, the Tribunal said that a market is the field of actual and potential transactions between buyers and sellers, amongst whom there can be strong substitution, at least in the long run, if given a sufficient price incentive. Inherent in this proposition is the assumption that a transaction may include an agreement to supply and acquire goods or services, and the actual supply and receipt of the goods or services. In our view, both aspects occur within the market. The choice might be evidenced by the contract, but performance is an essential aspect of competition in that market. It is part of the transaction. It follows that the geographic dimension of the market is not confined to the location of the seller or the place where a substitution is given effect.
2. In other words, the identified market will contain all of those matters which comprise the “richness” of the concept of competition, including transactions and potential transactions, and the circumstances and conduct which lead to the possibility of further transactions and to the transactions themselves.
3. As appears from the reasons of Spender J in *QIW Retailers Ltd v Davids Holdings Pty Ltd (No 3)* (1993) 42 FCR 255 at 267‑268:

A market may be seen as having three dimensions: the product market, the geographic market, and the relevant functional level. This was explained by the Trade Practices Commission in its *Second Annual Report (1975)*:

“The process of market definition consists in seeking to isolate the area of effective competition in which the parties operate. This requires the Commission to assess three dimensions – the product market, the geographic market and the functional level.

The product market consists of the goods or services supplied by the parties, together with competing goods or services which could reasonably be used by most customers as substitutes for them …

The geographic market can be described as the geographic area or areas in which sellers of the particular product operate and to which purchases can practicably turn for such goods or services. The geographic market is a function of a variety of factors, including the pattern of demand and the value of commodity in relation to the cost of transporting it or, in the case of services, the degree of inconvenience involved in obtaining them from another source …

In industries where functional levels are clearly distinct, the levels on which the parties respectively operate are a dimension to consider when determining the relevant market.”

The dimensional character of markets was also acknowledged in [*Singapore Airlines Ltd v Taprobane Tours W.A. Pty Ltd* (1991) 33 FCR 158] at 174‑175 per French J.

Professor Brunt at 102 states that a market has product, space, function and time dimensions. The time dimension relates to “how much time is needed for customers and suppliers to make their adjustments in response to economic incentives”. Professor Brunt also notes that these dimensions may not be independent.

The relevant market for the purposes of the economic analysis in question will be defined by reference to those dimensions.

1. In *Queensland Wire Industries Pty Ltd v Broken Hill Proprietary Co Ltd* [1989] HCA 6; (1989) 167 CLR 177 Mason CJ and Wilson J referred to *QCMA* at 188 as, “explaining that the defining feature of a market is substitution”. At 195, Deane J said:

Section 4E confines “market” for the purposes of the Act to “a market in Australia” and provides that, when the word “market” is used in relation to any goods or services, it “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”. Section 46(4) provides that a reference in s 46 to a market is a reference to a market for goods and services. The Act does not otherwise seek to define what is meant by the word “market”. That is not surprising since the word is not susceptible of precise comprehensive definition when used as an abstract noun in an economic context. The most that can be said is 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 … .

1. At 199, Dawson J said:

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 the exchange by employing price as the mechanism to reconcile competing demands for resources … .

1. In *Queensland Wire*, the relevant question was whether there was a market, rather than whether an identified market was “in Australia”. We accept that, as Mason CJ and Wilson J observed, market definition primarily addresses substitution. However it does not follow that a market is comprised only of substitution or substitution possibilities. The description of competition in *QCMA* demonstrates the width of the concept of competition which takes place in the market. A decision as to substitution is the outcome of such competition. The views expressed by Deane J are similar to those expressed in *QCMA*.
2. At first blush, it may seem that Dawson J was focussing upon actual transactions, rather than upon the circumstances leading to each transaction, and the decision to enter into it. However his Honour’s focus was not on the transaction, but upon the negotiation leading to the transaction. Negotiation, and the transition from negotiation to choice, and from choice to acquisition of the relevant product, is the consequence of the competition which occurs in the market, not the sole manifestation of such competition. His Honour’s reference to the determination of price should be similarly understood.
3. In *Seven Network Ltd v News Ltd* [2009] FCAFC 166; (2009) 182 FCR 160 at 283‑284 [585], Dowsett and Lander JJ (Mansfield J concurring), noted eight propositions concerning competition in a market, which propositions emerge from a consideration of the various decisions, as follows:
4. competition in a market is the sum of activity engaged in by persons in promoting the sale of the goods or services with which the market is concerned;
5. competition may express itself as rivalrous conduct in any aspect of the “price product services” package or in all of them;
6. in particular, firms may compete by devising new products or services, new technology, more effective service or improved cost efficiency;
7. the most important aspect of market structure is the height of barriers to entry;
8. in identifying and examining a market it is necessary to consider the extent of product differentiation and promotion;
9. it is also necessary to consider “vertical relationships” and any “formal, stable and fundamental” arrangements between firms which restrict their capacities to function as independent entities;
10. market participants may expect competition from other market participants, from other existing entities, or from entities “as yet unborn”; and
11. a market may exist where there is a potential for close competition even if there is no actual competition at the relevant time.
12. The following passage from Heydon JD, *Trade Practices Law* (Lawbook Co., subscription service) at [30.245] has frequently been cited with apparent approval:

The dimensions of a market are real, not theoretical. To define those dimensions the best evidence will come from the people who work in the market: the marketing managers and salesmen, the market analysts and researchers, the advertising account executives, the buyers or purchasing officers, the product designers and evaluators. Their records will establish the dimensions of the market; they will show the figures being kept of competitors’ and customers’ behaviour and the particular products being followed. They will show the potential customers whom salesmen are visiting, the suppliers whom purchasing officers regularly contact, products against which advertising is directed, the price movements of other suppliers which give rise to intra‑corporate memoranda, the process by which products are bought, what buyers must seek in terms of quantities, delivery schedules, price flexibility, why accounts are won and lost.

1. At [30.240], the author put that same proposition in a different way as follows:

The market is where sellers meet buyers. It is the mechanism accommodating the transactions which pass goods and services from one person to another. It also encompasses the events leading up to those transactions. There are two streams of prior conduct meeting at the point of final transaction: the conduct of the seller and the conduct of the buyer. Both streams must be considered in order to form a picture of the market.

See also *Australian Competition and Consumer Commission v Cement Australia Pty Ltd* [2013] FCA 909; (2013) 310 ALR 165 at 215 [249] (Greenwood J).

1. In *Singapore Airlines Ltd v Taprobane Tours WA Pty Ltd* the Full Federal Court considered whether Singapore Airlines had abused market power contrary to s 46 of the *Trade Practices Act* by (i) restricting sales to Taprobane (a Western Australian travel wholesaler) of wholesale flights to the Maldive Islands; and (ii) charging Taprobane prices for Singapore Airlines’ services that were higher than prices charged to other wholesalers. An issue for the Full Court was whether Singapore Airlines had a substantial degree of power in the relevant market. Justice French (Spender and O’Loughlin JJ concurring) said at 174:

The concept of “market” has long involved elements of both activity and location. The ordinary meanings set out in the *Shorter Oxford English Dictionary* include “the meeting together of people for the purchase and sale of provisions or livestock, publicly exposed at a fixed time and place”, and the “action or business of buying and selling”. At common law it was a “franchise right of having a concourse of buyers and sellers to dispose of commodities in respect of which the franchise was given” … .

In competition law it has a descriptive and a purposive role. It involves fact finding together with evaluative and purposive selection. In any given application it describes a range of economic activities defined by reference to particular economic functions (eg manufacturing, wholesale or retail sales), the class or classes of products, be they goods or services, which are the subject of those activities and the geographic area within which those activities occur. In its statutory setting the market designation imposes on the activities which it encompasses, limits set by the law for the protection of competition. It involves a choice of the relevant range of activity by reference to economic and commercial realities and the policy of the statute. To the extent that it must serve statutory policy, the identification will be evaluative and purposive as well as descriptive.

The descriptive element is seen in the discussion of “market” in the report of the US Attorney‑General’s National Committee to study the Anti‑Trust Laws (1955), p 222:

“For purposes of economic analysis the ‘market’ is the sphere of competitive rivalry within which the crucial transfer of buyer’s patronage from one supplier of goods to another can take place freely.”

Clearly, his Honour understood the term “market” to describe not just “manufacturing, wholesale and retail sales” but rather a range of economic activities defined by reference to those functions.

1. At 175, French J said:

An early commentary on the *Trade Practices Act* from an American perspective described the notion of the market as designed to assist the court to determine whether the conduct in issue is likely to be anti-competitive in fact and, if so, whether it is likely to be sufficiently anti‑competitive to fall within the statutory prohibition. The possible markets in any given case might encompass a continuum of product and geographic ranges, the selection of the outer limits of which would depend, in a s 46 context, on how much market power is thought to be significant … . [Professor Breyer] (now Judge Breyer) suggested that the word “market” is best understood not as denoting an objective feature of the world but as designed to set in motion a process related to the effective application of the particular statutory provision under consideration. That process may lead to the drawing of different lines and different circumstances depending upon the purpose of the provision in question.

1. The present case does not concern s 46, but these observations are nonetheless relevant. In *QCMA,* the Trade Practices Tribunal said at 516 that, “[c]ompetition is a process rather than a situation”. In our view this means that competition is the conduct of buyers and sellers and the myriad circumstances in which such conduct occurs. When the Tribunal spoke of a market being the “area of close competition”, the “field of rivalry”, or the “field of actual and potential transactions between buyers and sellers”, it meant that the market, properly identified and defined, is the “space” in which the competitive process takes place. As French J said in *Singapore Airlines* at 174, in competition law, the term “market” describes a range of economic activities defined by reference to particular economic functions, the class or classes of products and the geographic area within which those activities occur.
2. Justice Heydon put the same proposition in a slightly different way when he said, extracurially, that the market is the mechanism which accommodates transactions which pass goods and services from one person to another, and the events leading up to those transactions. These are the streams which meet at the point of the final transaction. Thus the market contains much more than contracts and performance of contracts. It also includes much more than choices or substitution.
3. Another decision relied upon by the Commission was the decision of the Trade Practices Tribunal in *Re Application by Concrete Carters Association (Victoria)* (1977) 31 FLR 193; (1977) 16 ALR 387. It is a case where the definition of the market for a product was limited by the geographic area within which the suppliers (concrete carters) could travel.
4. In that case, the applicants, members of the Concrete Carters Association (Victoria), applied to the Tribunal for review of a decision of the Trade Practices Commission. The Trade Practices Commission had refused to grant them authorisation to make a contract or enter into an arrangement or understanding with producers of pre‑mixed concrete in certain areas of Victoria. The Tribunal was required to consider whether the benefit to the public would outweigh the detriment constituted by any lessening of competition. Determination of the relevant market was the “essential first step” (216).
5. The normal practice was for delivery of pre‑mixed concrete from fixed plants to varying construction sites. Since the plants were not normally mobile, the delivery or cartage service involved the use of trucks containing a “barrel” which kept the mix in constant movement. The Tribunal considered the average and maximum radius of a journey (201‑211) and concluded that the geographic dimension of the cartage market was the Greater Melbourne region. The geographic boundaries of the market had been limited by the capacity of the trucks with a product that must be kept volatile.
6. Definition of the geographic dimension of a market also arose in *Davids Holdings Pty Ltd v Attorney General of the Commonwealth* (1994) 49 FCR 211. The context in which the issue arose was whether the acquisition of Queensland Independent Wholesalers by Davids Holdings meant that Davids Holdings would be in a position to “dominate a market for goods or services” contrary to s 50(1) of the *Trade Practices Act.* Davids Holdings was the holding company for a group of companies whose activities included wholesaling and distribution of grocery products in Queensland and northern New South Wales. The independent retailers for whose business they competed were Coles, Woolworths and Franklins. Davids Holdings argued that the geographic dimension of the market was all of Australia or, alternatively, the eastern States of Australia.
7. At first instance, the primary Judge defined the geographic dimension of the market as the market for the supply of grocery products by independent wholesalers to independent retailers in Queensland and northern New South Wales. See *QIW Retailers Limited v Davids Holdings Pty Limited (No 3)* above. At 267, his Honour quoted from an annual report of the Trade Practices Commission which said:

The geographic market can be described as the geographic area or areas in which sellers of the particular product operate and to which purchasers can practicably turn for such goods or services. **The geographic market is a function of a variety of factors, including the pattern of demand and the value of the commodity in relation to the cost of transporting it, or in the case of services, the degree of inconvenience involved in obtaining them from another source**. (Emphasis added).

1. The Full Court of the Federal Court upheld his Honour’s approach and conclusions. Justice Von Doussa (with whom O’Loughlin and Drummond JJ agreed) said that the finding had flowed essentially from findings of fact which included that the geographical extent of the market is essentially a function of transport costs and the need for distribution centres to be close to their customers (227). The Full Court also emphasised that in Queensland and northern New South Wales each of the two companies competed fiercely with the other including conduct which “targets customers of the other and offers incentives to induce a change of supplier” (228).

#### The position in New Zealand: Commerce Commission v Air New Zealand Ltd

1. Both the Commission and the respondent airlines relied upon the decision of Asher J in the High Court of New Zealand, *Commerce Commission v Air New Zealand Ltd* (2011) 9 NZBLC 103, 318. That case was tried on agreed facts by Asher J, sitting with a lay member, economist Professor Richardson. The decision demonstrates that in considering the question of market identification, the geographic dimension of the market is not limited to some deemed location of the supplier or deemed place of substitution.
2. The underlying facts in the *Commerce Commission* case bear some similarity to those in this case. The Commission alleged that a number of airlines had colluded to raise the price of air cargo by charging fuel and security surcharges on the cargo shipments in and out of New Zealand. In the course of addressing a series of issues, the High Court held that the airlines had supplied services in competition with each other in New Zealand. One of the central reasons for the decision was that the demand for the cargo would often emanate from a New Zealand importer ([189]). A significant part of the demand for the services was in New Zealand ([190]). There are, however, two substantial differences between the *Commerce Commission* decision and this case.
3. First, there is a different emphasis on substitutability in the market definition process. In the *Commerce Commission* case, the High Court observed at [118] that s 3(1) of the *Commerce Act 1986* (NZ) defined a “market” as a “market for goods and services that may be distinguished as a matter of fact and commercial common sense”. The High Court also followed authority in the New Zealand Court of Appeal that, “the test is not substitutability as such, although that will ordinarily be an important consideration” ([119]). At [188] the High Court rejected substitutability as a necessary determinant of geographical boundaries. Instead, the Court preferred an approach which generally identified a market by reference to the, “activities of those engaged in commerce, the structures underlying their activities and the perceived susceptibility to change in the medium‑term future” ([189]). As the Australian authorities above demonstrate, this is a departure from the role of substitutability in s 4E as applied in Australia.
4. Secondly, as the primary Judge observed at [334], the Court in *Commerce Commission* was prepared to infer a number of matters concerning downstream substitution effects (such as those arising from consumers seeking to locate a different source of supply of the goods imported through freight forwarders). In this case there was no basis upon which a conclusion could be reached that sufficient downstream substitution had occurred (or could be aggregated) such that it would operate as a constraint upon the upstream air cargo market ([333]).
5. Despite the substantial differences between the New Zealand decision in *Commerce Commission* and Australian authority, one aspect of the New Zealand High Court’s decision is worthy of note. It is the relevance it placed upon customers in the assessment of the geographic dimension of the market, relying upon the decision of the Australian Competition Tribunal in *Re Fortescue Metals Group Ltd*. In particular, the New Zealand High Court relied upon the following passage at [1022]:

The geographic market is the area of effective competition in which sellers and buyers operate. What is relevant, as a starting point, are actual sales patterns, **the location of customers** and the place where sales take place, and any geographical boundaries that limit trade. (Emphasis added)

1. As the High Court explained at [184], “while the starting point for the geographic market definition exercise is the location of the points of supply, the boundaries of the geographic market are drawn to include customer locations”. The same conclusion had been reached by the High Court in *Commerce Commission v Ophthalmological Society of NZ Inc* (2010) TCLR 994 [192(d)]. In that case, it was the locations of customers for cataract surgery that determined the boundary of the geographic dimension of the market rather than the location of the supply.

#### The approach in Europe

1. As with the New Zealand authority to which the parties referred, a comparison may also be drawn with the approach taken by the European courts to Article 82 of the *Treaty Establishing the European Community (Consolidated Version), Rome Treaty*, 25 March 1957, European Union(now Article 102 of the *Consolidated Version of the Treaty on the Functioning of the European Union*, 13 December 2007, European Union, 2008 O.J. C 115/47as amended by the *Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Community*, signed 13 December 2007, European Union, 2006 O.J. C 321 E/37 (entered into force 1 December 2009)). That Article includes the following:

Any abuse by one or more undertakings of a dominant position within the common market or in a substantial part of it shall be prohibited as incompatible with the common market insofar as it may affect trade between Member States.

1. Article 82 therefore requires that an undertaking have a dominant position “within the common market or in a substantial part of it”. An integral issue is whether the undertaking has a dominant position “within the common market or in a substantial part of it”.
2. In *Atlantic Container Line AB v Commission (TAA)* [2005] 4 CMLR 20, the Court of First Instance (third chamber) considered an agreement (the Trans-Atlantic Conference Agreement [1959–1962] O.J. Spec. Ed. 87) reached between shipping companies on the fixing of prices for inland transport services provided within the Community. The Trans‑Atlantic Conference Agreement contained a number of rules concerning other aspects of transport including the remuneration of freight forwarders.
3. One defence raised by the companies was that they did not have a dominant position within the common market or in a substantial part of it. The Commission rejected this submission. The Commission concluded that the relevant market for sea‑transport services was, “the market for containerised liner shipping ... between ports in northern Europe and ports in the United States and Canada” ([84]). The Commission considered the geographic dimension of the relevant market for maritime transport services as follows ([519]):

The geographic [dimension of the] market [consists] of the area in which the maritime transport services defined above are marketed, that is, in this case, the catchment areas of the ports in northern Europe. Such a geographic market is commensurate with the scope of the [Trans‑Atlantic Conference Agreement’s] inland tariff and constitutes a substantial part of the common market.

1. In other words, even at the stage of determining the geographic dimension of a market, the Commission was not concerned with the physical location of a supplier or the location of a place of substitution, but with the area in which the services were marketed.
2. The Commission held that the geographic dimension of the market was limited to the catchment areas of the ports in northern Europe and did not extend to the Mediterranean ports of southern Europe even though northern European ports were for some (but very few) shippers substitutable for some Mediterranean ports. The principal catchment areas were Ireland, the United Kingdom, Denmark, the Netherlands, Belgium, Luxembourg, most of Germany, and northern and central France ([67]‑[68]).
3. On appeal, the Court of First Instance (third chamber) upheld the decision of the Commission that the geographic dimension of the market was limited to the catchment areas of the ports in northern Europe ([855]‑[857]). The Court explained at [852]‑[853], that there is a difference between the, “geographical component of the *transport services* constituting the relevant market” and, “the definition of the relevant geographic market [ie the geographic dimension of the market]”.
4. The Court of First Instance at [852]‑[853] also explained that the geographic component of the *transport services* was, “the points of origin and of destination of the transport services concerning the transatlantic route”. But the geographic dimension of the *market* (described as the “geographic market”) was as the Commission had defined it (and as we have quoted above) limited to the catchment areas of the ports in northern Europe. The Court explained at [853] (by reference to Case 27/76 *United Brands* v *Commission* [1978] ECR 207 [11], and Case T‑65/96 *Kish Glass* v *Commission* [2000] ECR II‑1885 [81]) that the definition of the geographic dimension of the market:

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.

1. Another argument by the liner companies before the Court of First Instance was (as described at [884]) that inland transport services between northern Europe and the United States should have been included as part of the market for maritime transport services. The liner companies alleged that these inland transport services should have been included because they alleged that the Commission had found at [84] of its decision that the geographic dimension of the market was, “sea routes between the ports of northern Europe and those of the United States of America and Canada”. Hence, the liner companies argued, they did not occupy a dominant position in the market as so defined.
2. This argument was also rejected by the Court of First Instance. The Court reiterated the fallacy upon which this argument depended. The fallacy was that [84] of the Commission’s decision did not define the relevant geographic dimension of the market. It defined only the geographic component of the relevant maritime services. In the course of rejecting this submission, the Court of First Instance reiterated that “the geographic market … [consists] of the area in which the maritime transport services … are marketed, that is, in this case, the catchment areas of the ports in northern Europe” ([887]).

#### The identified market in this case

1. When all the dimensions of each market are taken into account (and since we have rejected the respondent airlines’ submission that shippers in Australia did not form part of the market), the proper identification of each of the markets in relation to Hong Kong (which were the focus of all submissions) is as follows. The services to each port in Australia, including transport, involved a market between airlines, freight forwarders, exporters and (at least) including some large shippers, for a suite of air cargo services between Hong Kong and that port in Australia.

### (6) Characterisation of whether the identified market is “in Australia”

1. We move then from the issues involved in the identification of a market to the connected issue of whether the market is in Australia.
2. In considering whether an identified market is “in Australia” for the purposes of s 4E, one must understand the nature of the concept which one seeks to locate. Although the issue of whether the market is in Australia is intimately connected to the identification of the market, as we have said it is not any single dimension of the market that must be considered in determining whether it is “in Australia” but the market itself. Unless the overall dimensions of the market (and perhaps the relevant content of the market) are known, it may be difficult to determine whether it is in Australia.
3. Our point, in short, is that one addresses the characterisation question by reference to a “market” not by reference only to some part of the market identification exercise. Market identification is part of an economic analysis. The characterisation question posed by s 4E serves quite a different purpose. It limits the extent to which Parliament has chosen to exercise its legislative power in relation to a market.
4. A somewhat similar question was addressed by this Court in *GTK Trading Pty Ltd v Export Development Grants Board* (1981) 4 ALD 389;40 ALR 375. The Full Court (Evatt, Deane and Ellicott JJ) considered whether lobsters, caught by Australian fishermen in waters lying between the coast and the edge of the continental shelf, were produced or processed in Australia. The waters above the continental shelf were not within the definition of the term “Australia” in s 15B of the *Acts Interpretation Act* *1901* (Cth). At 396 their Honours said:

In the context of an Act which, as we interpret it, is wide enough to confer benefits in relation to the export of fish and lobsters, the words “in Australia” in s 4 should not, in our opinion, be given a strict geographical meaning but one wide enough to cover fish and lobsters which are caught in waters above the Australian continental shelf.

1. The “strict geographical meaning” was, “in Australia, including coastal waters, but not waters beyond coastal waters and above the continental shelf”. We cite this case only as indicating that a “strict geographical” meaning need not be adopted if the proper construction of the relevant statutory provision suggests otherwise.
2. There is another reason why this characterisation exercise should not be limited by any one dimension of the market. The notion of a market is purely conceptual. Market identification is based upon evidence as to actual conduct by buyers and sellers, and actual transactions. It also recognises potential market participants. Part of the relevant conduct will be choices and the reasons for them. To an extent the market concept is a metaphor. It is difficult to see how one can locate a metaphor in a strictly geographical sense.
3. The text of s 4E provides that, “unless the contrary intention appears, market means a market *in* Australia” (emphasis added). The preposition “in” may have a wide variety of meanings. The *Oxford English Dictionary* (2nd ed, Oxford University Press, 1989) describes the word in its “general sense” as:

… expressing the relation of inclusion, situation, position, existence, or action, within limits of space, time, condition, circumstances, etc …

That dictionary then states, under the heading “Of position or location”:

Primarily *in* (of position) is opposed to *out of*; anything that is *in* a given space is not *out of* it, and *vice versa*.

Another definition is:

Of place or position in space or anything having material extension: within the limits or bounds of, within (any place or thing).

Examples of the word’s use with the names of countries and other geographical features are given.

1. Two points emerge from that definition. First, the superficially trite proposition that “in” is the opposite of “out”, and vice versa, supports the view that s 4E does not require proof that the market was only in Australia. It is only necessary that it be shown that the market is not “out of Australia”. The second point is that, as we have said, since the word “market” is used as a metaphor, it is difficult to see how the question can be purely geographical. Unless a metaphor can be geographically located in Australia, a broader approach should be taken to the meaning of the expression “in Australia”. The *Trade Practices Act* should be construed so as to facilitate achievement of its stated objective. It is difficult to see how a narrower interpretation of s 4E would assist in such achievement. The better approach is, in effect, 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”.
2. As part of the characterisation exercise, we therefore accept the Commission’s submission that the test for the market in Australia cannot focus exclusively upon matters such as the presence of the supplier at the origin of the service, and that among other factors it is necessary to identify where suppliers must operate in order to satisfy the relevant demand for the product (here, a suite of services).
3. However we reject the Commission’s submission that the sphere of operation of a service is *conclusive* of the geographic dimension of the market. In other words, we reject the Commission’s submission that the geographic dimension of the market, in this case, includes Australia simply because part of the suite of services, even an important part, is provided in Australia. There need not be “one to one correspondence” of the product dimension and geographic dimension of the market, a concept rightly rejected by Professor Gilbert.
4. The fallacy of assimilating the product description with the geographic dimension of the market was also exposed by the Court of First Instance (third chamber) in *Atlantic Container Line AB v Commission (TAA)*. Such assimilation is also inconsistent with the approach taken by French and Spender JJ in *Singapore Airlines Ltd v Taprobane Tours WA Pty Ltd.* The geographic dimension of the market in *Taprobane Tours* was Australia. It was not Bali, Fiji, Tahiti, New Caledonia, Hawaii, Penang, the Philippines, the Solomon Islands, the Barrier Reef islands, Guam, and Mauritius. The submission is not supported by any Australian authority. And it is similar to the submission described as a “fallacy” by the Court of First Instance in the European Court of Justice.
5. The central question posed by s 4E, read with ss 45 and 45A, is whether the Hong Kong to Australian port markets for the suite of air cargo services (and involving the participants to which we have referred) were markets “in Australia”. We identify seven overlapping reasons for concluding that the identified markets for the suite of air cargo services between Hong Kong and Australian ports should be characterised as being “in Australia”. These reasons apply even if the question is to be treated as one of locating the “geographic dimension” of the identified market. But, as we have explained, the proper construction of s 4E involves (i) identifying the relevant market including each of its dimensions; and (ii) characterising whether that market is *in Australia.*
6. In summary, our seven reasons are as follows.
7. First,as we have explained, a market could be “in Australia” even if the market were also in another country. Hence, the issue here is not a question of deciding between whether the market is in Australia *or* Hong Kong.
8. Secondly,neither the legislative text of s 4E of the *Trade Practices Act,* when read with ss 45 and 45A, nor the authorities, preclude the consideration of such factors as the presence of customers in Australia to whom the services were marketed, and the fact that the services involved performance in Australia. Rather, as we have explained, the legislative text assumes that any relevant aspect will be considered in the characterisation exercise.
9. Thirdly, a significant and important part of the operation of the “suite of services” being provided was in Australia. As we have explained in our discussion of *QCMA,* actual supply also occurs in the market. The cargo was transported to Australia, ground handling services were provided in Australia and there were enquiry services in Australia (which involved tracing delayed or lost shipments and identifying and dealing with damaged shipments). The airlines competed in the supply of these services. It cannot seriously be suggested that the freight forwarders in Hong Kong had no interest in the quality of the service provided to the customers in Australia.
10. No doubt the delivery of cargo to the airline in Hong Kong evidenced a choice between or amongst substitutable services, although the making of the contract to carry would also have done so. It is true that for the carriage of cargo from Hong Kong to an Australian destination, the cargo must be delivered to the airline in Hong Kong, unless the same airline has brought the cargo to Hong Kong, a fact situation which seems not to have been considered. However, as we have pointed out, the geographical aspect of the product dimension dictates use of an airline which flies between Hong Kong and the relevant Australian port. The whole of the suite of services is no more supplied in Hong Kong than it is at that Australian port. Taking delivery of the cargo in Hong Kong is no more important in the provision of that suite of services than is the flight itself, and the delivery of the cargo at the Australian port.
11. Fourthly, the suite of services provided by the airlines involved barriers to entry in Australia. Those barriers included matters such as availability of landing slots, licences to operate in Australia, permission to build or to use facilities for perishable cargo, permission to operate additional flights and so on.
12. Fifthly, the services were marketed in Australia to shippers who (as a matter of economic reality) were customers of the airlines. The airlines competed for business in Australia. Some shippers were in Australia and were capable of operating as a constraint on the fixing of cargo rates. Although the primary Judge did not need to decide whether the freight forwarders were agents for the importing shippers in Australia, he concluded that as a matter of economic substance they were intermediaries, having fluctuating control over the cargo the carriage of which they arranged.
13. Sixthly, the purpose of s 4E supports the evaluative conclusion that the market in this case is a market “in Australia”. That purpose must be applied to the context which involves (i) marketing to persons in Australia who, as a matter of economic reality are customers; and (ii) of a suite of services which include performance in Australia. The legislative purpose is, “to enhance the welfare of Australians through the promotion of competition and fair trading and provision for consumer protection”.
14. Seventhly, the conclusion that the market is “in Australia” is consistent with the conclusion reached upon similar fact patterns in New Zealand and in Europe.
15. For these reasons we conclude that the markets for the suite of air cargo services from Hong Kong to Australian ports, involving airlines, freight forwarders, exporters and (at least) including some large shippers, were markets “in Australia”. It is common ground that the conclusion in relation to the market for air cargo services from Hong Kong also applies to the Singapore and Indonesia markets.

# THE RESPONDENT AIRLINES’ NOTICES OF CONTENTION

1. The notices of contention from the respondent airlines, particularly Garuda, were not always easy to follow. Air NZ had 11 issues in its notice of contention. Garuda had 94. The issues in the notices of contention were not always clearly matched to submissions. Garuda’s written submissions, for example, sometimes raised various themes which were only loosely tied, in a heading, to grounds of the notice of contention. The Commission submitted, in written submissions, that Garuda had not addressed grounds 17, 19, 25(b)‑(d), 27, 29‑30, 33, 34, 36(e), 45‑46 and 69. In reply, Garuda did not attempt any particular consideration of those matters. It accepted only that grounds 19, 29, and 30 had been abandoned. Our reasons which follow are structured around the written and oral submissions. Where those submissions made reference to grounds of contention then we have set those out.

## Alleged inconsistency between the *Trade Practices Act 1974* (Cth) and the *Air Navigation Act 1920* (Cth)

1. This issue was the subject of various parts of Garuda’s notice of contention (grounds 10‑18 and 77‑78). It was not directly raised in the submissions of Air NZ so it is convenient to focus on the submissions of Garuda.
2. As Garuda explained the point in its submissions, the issue concerned whether ss 45 and 45A of the *Trade Practices Act* should be construed to resolve conflict with the provisions of the *Air Navigation Act 1920* (Cth) (the “*Air Navigation Act*”) and Australia’s treaty obligations. A construction in this manner was said to be one which did not proscribe the making or giving effect to any contract, arrangement or understanding made or entered into between international airlines concerning tariffs for scheduled international air services.
3. The relevant arguments made on this point at trial were summarised by the primary Judge at [129] as follows:
4. the background to the regulation of international commercial aviation showed that at the time of the introduction of the *Trade Practices Act,* the majority of bilateral air transport agreements provided for rate fixing machinery;
5. a consideration of the terms of the *Air Navigation Act* showed that the *Trade Practices Act* could never apply to international commercial aviation;
6. alternatively, the *Trade Practices Act* could not apply where Australia had entered into an Air Services Agreement (“ASA”) with another nation which permitted or required rate or tariff fixing; and
7. consequently, the *Trade Practices Act* could not apply to the conduct alleged against the respondent airlines in the period 2001‑2006.
8. In 1974, at the time when the *Trade Practices Act* was enacted, the *Air Navigation Act* contained the following provisions.
9. Section 12 provided:

**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 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.

1. Section 13 provided:

**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.

1. Section 22(1) made it an offence for any person to contravene or fail to comply with a provision of the *Air Navigation Act.* The penalties include imprisonment and fines.
2. One of these treaties, or “agreements or arrangements” within the meaning of ss 12(2) and 13(b), was the 1969 Air Services Agreement between Australia and Indonesia entitled *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 Territories,* 7 March 1969, [1969] ATS 4 (the “Australia‑Indonesia ASA”). The Australia‑Indonesia ASA has the following features:
3. Article 2 provides for the rights for designated airlines (including Garuda) to make stops (in cities including Sydney, Darwin, and Melbourne as provided in Annex, Section II) for purposes including putting down and taking international cargo; and
4. Article 6 then provides as follows:

(1) The tariffs on any agreed service shall be established at reasonable levels, due regard being paid to all relevant factors including the 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.

(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.

1. It was common ground that a “tariff” includes all charges, including all the levies and surcharges in question in this appeal.
2. The primary Judge’s reasons comprehensively described the background to the Australia‑Indonesia ASA. These reasons can be summarised as follows.
3. Following a failure to achieve a multilateral agreement in the 1944 Chicago *Convention on International Civil Aviation,* signed 7 December 1944, 15 UNTS 295 (entered into force 4 April 1947), international aviation operations were conducted by bilateral agreements of which the first and most important was between the United States and United Kingdom (Bermuda I).
4. Bermuda I made provision for the two States to agree, within their respective constitutional powers and obligations, upon rates to be charged by air carriers, and in the event of disagreement a process be used which included the processes of the International Air Transport Association (“IATA”, which is the international trade association for airlines). The rates fixed were to be reasonable having regard to all relevant factors including cost of operation, reasonable profit and the rates charged by any other air carriers.
5. IATA obtained antitrust immunity because provisions of the *Federal Aviation Act of 1958,* 49 USC 1301 (1958) authorised the Civil Aviation Board to disapprove arrangements that were adverse to the public interest. After 1979, the Civil Aviation Board had discretion to grant antitrust immunity.
6. At the time of the introduction of Pt IV of the *Trade Practices Act* in 1974, the vast majority of bilateral air transport arrangements provided for rate fixing machinery of the nature of Bermuda I ([148]). Although this point was disputed by the Commission, Garuda provided a schedule which showed that between 1946 and 1984 Australia entered 36 different “agreements or arrangements” within the meaning of s 13(b) and s 12(2), by entering treaties with those countries. All but five of these treaties contained tariff provisions of a similar nature to those described below. In 1974, at the time of the enactment of the *Trade Practices Act,* there were 24 of these treaties in force.

### The reasoning of the primary Judge

1. The primary Judge’s conclusions on this point were as follows.
2. Although a breach of Article 6 of the Australia‑Indonesia ASA by Garuda was not a breach of the *Air Navigation Act* (and hence was not an offence), such a breach would make Garuda liable to lose its licence with the consequence that it would have to either cease operation, or commit a serious offence. Section 13(b) of the *Air Navigation Act* does, therefore, impose an obligation upon Garuda to comply with the Australia‑Indonesia ASA ([152]).
3. The *Air Navigation Act* in 1974 did not require or authorise rate fixing of the kind contemplated in Bermuda I ([156]). It required carriers to comply with any bilateral Air Services Agreement (“ASA”). But it was silent upon the terms of the ASAs ([158]). The operation of the *Air Navigation Act* was not inherently inimical to the operation of Pt IV of the *Trade Practices Act* ([160]).
4. However, the combined operation of Article 6(2) with ss 12 and 13 of the *Air Navigation Act* had the effect, in their practical operation, of requiring collusive behaviour of the kind prohibited by Pt IV of the *Trade Practices Act* when it was enacted ([165]).
5. Assuming, without deciding, that the effect of (3) is that the application of Pt IV of the *Trade Practices Act* to Garuda would put Australia in breach of its obligations at public international law ([181]), it is not possible to interpret price fixing under the *Air Navigation Act* as an act or thing that is “specifically authorised or approved” by that Act so that it would fall within an exemption in s 51 of the *Trade Practices Act* ([183], applying *Re Ku‑ring‑gai Co‑operative Building Society (No 12) Ltd* (1978) 36 FLR 134.
6. The conflict in practical operation between Pt IV of the *Trade Practices Act* and the effect of the *Air Navigation Act* on the Australia‑Indonesia ASA is that an adjustment must be made to give the two statutory schemes a harmonious operation. The appropriate adjustment is that s 13 of the *Air Navigation Act* does not authorise the Minister to cancel or suspend a licence for breach of an ASA when the conduct constituting the breach was required by Pt IV of the *Trade Practices Act* ([185]).
7. The amendments to s 51(1) of the *Trade Practices Act* by the *Competition Policy Reform Act 1995* (Cth), which introduced s 51(1C), reinforce this conclusion because that new subsection required the authorising provision to make express reference to the *Trade Practices Act* and there was no express reference in the *Air Navigation Act* to the *Trade Practices Act* ([193]). Even if the *Trade Practices Act* had not extended to international civil aviation prior to 1995, the effect of ss 51(1A) and 51(1C) was to extend it to international civil aviation thereafter ([204]).
8. Neither Indonesian domestic law nor Hong Kong law requires compliance with the relevant ASA so there is not a conflict where one State prohibits that which another State requires ([186]).
9. The terms of Garuda’s licence did not require it to engage in rate fixing ([195]) but such a requirement would not be an authorisation or approval under the *Air Navigation Act* ([194]).
10. The primary Judge also considered, in some detail, the *Air Navigation Regulations 1947* (Cth) (“*Air Navigation Regulations*”)*,* including reg 258that permits the Director‑General (rather than the Minister) to cancel a notice in circumstances which include a failure to comply with conditions including Article 6. Senior counsel for Garuda accepted that this did not add anything to the effect of the *Air Navigation Act* for the purposes of the submission (app ts 190). It suffices to put the regulations to one side.
11. As explained above, the primary Judge concluded that there was no inconsistency between the terms of the *Air Navigation Act* and the *Trade Practices Act.* He held that there was only inconsistency in their *practical operation*. He also concluded that one reason why the inconsistency in practical operation was not resolved by excluding international commercial aviation from the *Trade Practices Act* was due to s 51 of the *Trade Practices Act* and, after 1995, ss 51(1A) and 51(1C) which provided for limited exemptions from the operation of Pt IV, in circumstances which did not include the operation of Article 6 of the Australia‑Indonesia ASA.

### The respondent airlines’ submissions

1. As we have explained, the submissions on this issue were made by Garuda. Garuda’s approach on this appeal was effectively that inconsistency existed:
2. between the terms of the *Trade Practices Act* and the *Air Navigation Act*;
3. between the terms of the *Trade Practices Act* and the practical effect of the *Air Navigation Act* due to the terms of the ASA; and
4. between the terms of the *Trade Practices Act* and the practical effect of the *Air Navigation Act* due to the terms of Garuda’s airline licence.
5. Garuda also submitted that s 51 of the *Trade Practices Act* was concerned with circumstances to be taken into account when considering *contraventions* of a provision of Pt IV of the *Trade Practices Act.* It was not concerned with whether Pt IV applied *at all* in cases of conflict with a different statute. To put the matter another way, the *Air Navigation Act* was not a statute which provided “authorisation or approval” for a particular act which would otherwise contravene Pt IV of the *Trade Practices Act.* Instead, the *Air Navigation Act* was a specific statute that required conduct that the general terms of the *Trade Practices Act* would otherwise haveprohibited.
6. Each of these submissions is rejected in the sections below. We then explain how even if some inconsistency had existed between the terms of the *Trade Practices Act* and the practical effect of the *Air Navigation Act,* this would not have necessarily implied into s 45 of the *Trade Practices Act* words which excluded the operation of international commercial aviation.

### There is no inconsistency in the terms of the Trade Practices Act 1974 (Cth) and Air Navigation Act 1920 (Cth)

1. As to whether there was inconsistency at the level of the statutes we consider, with respect, that the primary Judge was correct in his conclusion and reasoning that there is no inconsistency *in principle* between the terms of s 13(b) of the *Air Navigation Act* and the *Trade Practices Act*. As French CJ and Kiefel J said in *Firebird Global Master Fund II Ltd v Republic of Nauru* [2015] HCA 43; (2015) 326 ALR 396, 416 [87] (footnote omitted):

For a court to conclude that a later statute impliedly repeals an earlier statute the court must be satisfied that the two statutes are so inconsistent that they cannot stand or live together. This will be so only if the provisions of the two statutes cannot be reconciled.

1. The effect of s 13(b) of the *Air Navigation Act* was that Garuda was exposed to the possibility of loss of its licence, at the discretion of the Minister, if it failed to comply with conditions in the ASA. But the *Air Navigation Act* did not create new legislative duties when, in 1969, Australia entered the ASA with Indonesia. Instead, the *operation* of the existing duty in s 13(b) was expanded because the entry into the ASA meant that the Minister’s discretion then included a power to take action where Garuda had failed to comply with any terms or conditions of the Australia‑Indonesia ASA*.*
2. There is a distinction between (i) the Australia‑Indonesia ASA expanding the circumstances in which the licence might be cancelled; and (ii) the Australia‑Indonesia ASA itself creating a new duty. As to (ii), the Australia‑Indonesia ASA could not itself create a new duty imposed upon an entity like Garuda who is not a party to it. Nor could it create a new duty by somehow amending the terms of the *Air Navigation Act*. Speaking of this suggestion of an international instrument amending domestic legislation, French CJ said in *Maloney v The Queen* [2013] HCA 28; (2013) 252 CLR 168, 182 [15]:

Obligations imposed by international instruments on States do not necessarily take account of the division of functions between their branches of government.The difficulty is compounded when the interpretation of the international instrument is said to have been subject to change by reference to practices occurring since the enactment of legislative provisions implementing it intodomestic law. Such practices may, by operation of Art 31(3) of the Vienna Convention, be taken into account in interpretation of the treaty or convention for the purposes of international law. They may lead to its informal modification.However, they cannot be invoked, in this country, so as to authorise a court to alter the meaning of a domestic law implementing a provision of a treaty or convention. (Footnotes omitted)

1. There is therefore no inconsistency between the terms of the *Air Navigation Act* and the *Trade Practices Act.* Any inconsistency that could exist could only arise as a result of the practical operation of the *Air Navigation Act* rather than the terms of s 13(b).
2. Garuda also relied upon the decision in *Commissioner of Police for New South Wales v Eaton* [2013] HCA 2; (2013) 252 CLR 1 for its submission that there was an inconsistency between the *Air Navigation Act* and the *Trade Practices Act* which should be resolved in favour of disapplying the *Trade Practices Act* in circumstances of international aviation. That case involved a conflict between s 80(3) of the *Police Act 1990* (NSW) and s 84(1) of the *Industrial Relations Act 1996* (NSW). The *Police Act* gave the Commissioner of Police a power to dismiss a probationary police officer at any time without giving reasons. The *Industrial Relations Act* provided for the review of a dismissal that was “harsh, unreasonable or unjust”. This included dismissal of public sector employees who were defined to include a member of the New South Wales Police Force. In a joint judgment the majority, Crennan, Kiefel and Bell JJ, held that the *Police Act* prevailed: the *Industrial Relations Act* was a general statute whose provisions were not intended to prevail over the earlier, special provisions of the *Police Act* without manifesting that intention very clearly.
3. Apart from the lack of any inconsistency at the level of the statutes in this case, the conclusion in *Eaton* also concerned a wholly different circumstance from this case. These differences, as described in the majority judgments, include:
4. The language of the relevant provisions in the *Police Act* pointed strongly against a power to review a dismissal with the decision of the Police Commissioner described as one that can be made “at any time”, “without giving any reason”, and the description of the officer as “probationary”. In contrast, there is no language in the *Air Navigation Act* which suggests any exclusion of the terms of Pt IV of the *Trade Practices Act* and the language of the Australia‑Indonesia ASA, when introduced in 1969, is directed to the parties to that treaty (Australia and Indonesia) not to international airlines.
5. Anomalies arose within the *Police Act* if the *Industrial Relations Act* had qualified the broad power of the Commissioner. For instance, it would put probationary police officers in a better position than non‑probationary officers. No internal inconsistency would exist in the *Air Navigation Act* if the *Trade Practices Act* did not exclude international commercial aviation.
6. The only point of comparison between the statutes in *Eaton* and those in this case is that *Eaton* involved a question whether a later general statute (ie the *Trade Practices Act*) was inconsistent with an earlier specific statute (ie the *Air Navigation Act*). But Garuda’s submissions did not seek to draw this comparison. Garuda submitted that the amendment to the provisions in the *Air Navigation Act* (including a 1989 amendment to s 13(b) to extend to the Minister a power to vary, as well as suspend or cancel, a licence) meant that the *Air Navigation Act* was somehow a *later* statute than the *Trade Practices Act.*
7. At some points in its written submissions before this Court, Garuda also referred to the *Air Navigation Regulations,* apparently in support of the submission that there was an inconsistency because the regulations required the conduct which Pt IV of the *Trade Practices Act* prohibited. In written submissions, Garuda relied upon the decision of the High Court in *R v Halton; Ex parte AUS Student Travel Pty Ltd* [1978] HCA 26; (1978) 138 CLR 201. That case was concerned with a prosecution for an offence of charging less than an approved tariff which, in that case, had been approved by IATA. The relevant regulation in the *Air Navigation Regulations* was reg 106A which prohibited discounting from the approved tariff. Several points can be made about Garuda’s reliance upon that case.
8. First, as the primary Judge explained, *Halton* was not concerned with price fixing ([155]). It was concerned with charging less than an agreed tariff. That prohibition against discounting is different from an alleged “requirement to engage in price fixing”.
9. Secondly, as the primary Judge observed, reg 106A (renumbered ANR 19 of 1999) was amended on 20 December 2000 by the *Air Navigation Amendment Regulations 2000* *(No 3)* (Cth) which permitted, *but did not require*, lodgement by an airline of its tariff which the Secretary could in his or her discretion approve, reject or vary by subjecting it to conditions.
10. Thirdly, as the primary Judge also observed at [1247], in September 1981 the Commonwealth formally announced that it would not prosecute the offence involving discounting from an agreed tariff.

### There is no inconsistency in the practical effect of the statutes due to Article 6, ASA

1. Although there is no conflict between the *terms* of the *Air Navigation Act* and the *Trade Practices Act*, Garuda submitted that there are potential inconsistencies between the terms of the *Trade Practices Act* and the *effect* or *operation* of the *Air Navigation Act* due to the terms of Article 6(2) of the Australia‑Indonesia ASA. The potential inconsistency in *effect* was said to arise because an international airline is exposed to the possibility of the loss of its licence under s 13 of the *Air Navigation Act* for failure to follow the procedure in Article 6(2) when that procedure is prohibited by ss 45 and 45A of the *Trade Practices Act.*
2. There are two reasons why we do not accept that there is this potential inconsistency in effect.
3. First,the potential inconsistency in operation arises only because of the possibility that the Minister might exercise his discretion under s 13(b) to cancel the airline’s licence for a failure to comply with Article 6(2). The primary Judge concluded that this inconsistency could be avoided by a conclusion that the Minister has no power to cancel or suspend a licence for breach of an ASA when that breach was required by Pt IV of the *Trade Practices Act.* Another way of putting this point is that a standard implication would be made in any event requiring the Minister’s discretion to be exercised reasonably, and that it would not be reasonable to cancel a licence where the failure consisted of complying with the requirements of Australian law: see *Minister for Immigration and Citizenship v Li* [2013] HCA 18; (2013) 249 CLR 332, 363‑364 [67] (Hayne, Kiefel and Bell JJ). This is not to “read down” s 13(b). It is simply to require a standard implication concerning the manner of operation of the discretion provided in s 13(b).
4. Secondly,the potential inconsistency in effect only arises if Article (2) is construed so that it contains some term or condition which *requires* the airlines to engage in price fixing contrary to Pt IV of the *Trade Practices Act* so as to enliven the Minister’s discretion to revoke an airline’s licence*.*
5. What is the “term or condition” required by Article 6(2) with which Garuda is required to comply to avoid the possibility of suspension or cancellation of its licence under s 13(b) of the *Air Navigation Act?*
6. Is the term or condition an obligation to “reach agreement” on the tariffs? That could not be the obligation in circumstances in which a potential failure to agree is contemplated by the second part of Article 6(2) as well as Articles 6(3) and 6(4).
7. Is the term or condition an obligation upon Garuda to *implement* any tariff which is agreed by the Article 6(2) procedure? If so, how could such an obligation arise? There is no such express obligation and Garuda did not submit that there was a basis to imply such an obligation.
8. The only manner in which Article 6(2) might be construed to impose a term or condition that Garuda must “comply with” or “conform to” within s 13(b) of the *Air Navigation Act* would be if Article 6(2) were construed to require Garuda to take *reasonable* steps that were available to “reach agreement” on the tariffs by the Article 6(2) procedure. That obligation could not be breached where Garuda failed to take steps to reach agreement because of provisions of the *Trade Practices Act.* It cannot be reasonable to require an airline to take steps that would be in breach of the law.
9. Another way of expressing this conclusion is by an appreciation of the purpose of s 13(b) of the *Air Navigation Act,* and its implicit reference to the Australia‑Indonesia ASA. The Australia‑Indonesia ASA is a treaty to which the respondent airlines were not party. The obligations imposed in the Australia‑Indonesia ASA focus upon duties imposed on the State parties. For instance, the Article 2 obligation to confer various flight and landing rights on an airline can only be performed by a State party. The Article 3 obligation to designate a specified route is an obligation that can only be performed by a State party. The Article 4 obligation to exempt airlines from customs duties and other charges is one which is only performed by the State party. The Article 5 obligation to give fair and equal opportunity to the designated airlines to operate agreed services can only be performed by the State party. In this context, the Article 6 obligation concerns the obligations upon the State parties to establish tariffs at reasonable levels, and the manner in which they should do that.
10. Understood in this way, the “terms and conditions” to which s 13(b) of the *Air Navigation Act* makes reference, without particulars, must be directed towards any conduct by an international airline that could cause a State party to be in breach of its ASA obligations. The submissions by Garuda assume that Australia was in breach of its obligations under Article 6 by enacting Pt IV of the *Trade Practices Act* in 1974. Even if this were the case, an international airline that complied with the terms of the *Trade Practices Act* would not cause Australia to be in breach of its obligations under the Australia‑Indonesia ASA. That would already have happened.
11. Although we have concluded that Garuda would not be in breach of any “terms and conditions” of the Australia‑Indonesia ASA by acting reasonably and by following its domestic legal obligations under Pt IV of the *Trade Practices Act,* there are two arguments made by, or attributed to, the Commission that we do not accept.
12. The first argument that we do not accept is that Article 6(2) contemplated “competitive discounting” (to use the Commission’s phrase). That submission is contrary to the primary Judge’s findings at [141]‑[142] (which the Commission did not challenge) that the IATA rates were minimum rates prior to 1981 (and at the time of the Australia‑Indonesia ASA in 1969).
13. The second argument we do not accept is that Article 6(2) imposed no legal duty because the agreement on tariffs that Article 6(2) mandated was only for agreement “wherever possible” and that agreement by the respondent airlines was not possible because of ss 45 and 45A of the *Trade Practices Act.* We accept Garuda’s submission that this is not the proper meaning of “wherever possible”. The primary Judge did not make any finding to the contrary. The primary Judge held, at [164], that Article 6(2) did not make the IATA rate fixing machinery compulsory, but did require it “wherever possible”. Where it was not possible Garuda and Qantas were required to agree on the rates between themselves, subject to approval by their aeronautical authorities.
14. If the Commission’s contention were accepted, it would mean that each State could, by its own action, frustrate the operation of Article 6(2) by invalidating the operation of pre‑existing tariff agreements. When s 45 was enacted, s 45(1) provided that a “contract in restraint of trade or commerce that was made before the commencement of this sub‑section is unenforceable in so far as it confers rights or benefits or imposes duties or obligations on a corporation”. Such a construction of Article 6(2) would have the effect that the State parties to the agreement had provided for a rule which was subject to an exception that could be unilaterally created whenever one of them chose to do so. That is a surprising construction of “wherever possible”. Such a construction would also be inconsistent with the second sentence of Article 6(2). The sentence demonstrates that the impossibility contemplated is not impossibility by operation of a statute but impossibility due to a lack of consensus. If agreement by the IATA mechanism is “not possible” then agreement is required between the designated airlines. The second sentence is not subject to unilateral legislation by one party.

### There is no inconsistency in the practical effect of the statutes due to the terms of Garuda’s licence

1. A third submission by Garuda was that Pt IV of the *Trade Practices Act* was inconsistent with the practical effect of the *Air Navigation Act*. Garuda’s reasoning had three cumulative steps:
2. sections 12(1) and 12(2)of the *Air Navigation Act* made it an offence for Garuda to fail to comply with the terms of its international airline licence;
3. the terms of Garuda’s international airline licence required that Garuda comply with the Australia‑Indonesia ASA; and
4. the Australia‑Indonesia ASA is inconsistent with Pt IV of the *Trade Practices Act.*
5. Each of steps (2) and (3) in the submission must be rejected.
6. First, as to step (2), the primary Judge found at [195]‑[201], with respect correctly, that the terms of Garuda’s licence did not require that Garuda comply with the Australia‑Indonesia ASA. The terms of that licence were as follows:

DEPARTMENT OF TRANSPORT

LICENCE No. 94/218

INTERNATIONAL AIRLINE LICENCE

Authority: Air Navigation Regulation 191(3) and 193

Pursuant to Section 12 of the Air Navigation Act 1920

GARUDA INDONESIA AIRWAYS

being a designated airline of

THE GOVERNMENT OF THE REPUBLIC OF INDONESIA

is hereby licensed to operate scheduled international air services over and into

Australia in accordance with the

AGREEMENT BETWEEN AUSTRALIA AND INDONESIA FOR AIR

SERVICES BETWEEN AND BEYOND THEIR RESPECTIVE TERRITORY

AS AMENDED

signed at Sydney on 7 March 1969 and arrangements made pursuant to that Agreement.

2. The services shall be operated in accordance with capacity and frequency entitlements on routes specified in the aforesaid Agreement and arrangements made pursuant to that Agreement, and such timetables as are from time to time approved by the Secretary to the Department of Transport.

3. The licensee shall comply with the relevant provisions of the Air Navigation Act 1920, the Air Navigation Regulations, the Civil Aviation Act 1988 and the Civil Aviation Regulations.

4. Subject to the provisions of the aforesaid Agreement and arrangements made pursuant to that Agreement, this licence is valid until it is cancelled or suspended in accordance with the Air Navigation Act 1920 and the Air Navigation Regulations.

5. This licence is issued subject to the condition that the licensee continues to operate scheduled international services.

6. This licence will come into effect on the thirteenth day of December 1994.

Dated this 12th day of December 1994

John Kerr

Assistant Secretary

International Relations Branch

Aviation Division

Delegate of the Secretary to the Department of Transport

1. The focus before the primary Judge was upon whether the recital in the licence that it had, “been issued in accordance with the Australia‑Indonesia ASA” had subjected the licence to the condition that it must be carried out in accordance with that ASA. The primary Judge gave three reasons why the recital did not impose a requirement of compliance with the Australia‑Indonesia ASA:
2. the existence of an ASA is the sine qua non for the issue of a licence which suggests that the opening words of the licence are more naturally construed as a recital rather than a condition;
3. a requirement to comply with the Australia‑Indonesia ASA would be a redundant condition in a licence because there was already a power for the Minister to revoke a licence for failure to comply with the Australia‑Indonesia ASA; and
4. paragraph 2, which required compliance with particular terms of the Australia‑Indonesia ASA, would have been redundant if the recital were construed to impose an obligation to comply with the whole of the Australia‑Indonesia ASA.
5. Garuda relied upon the words “subject to the agreement or arrangement” in s 12(2), suggesting that they limit the terms of any licence and require Garuda to comply with the Australia‑Indonesia ASA. The words “under which” clearly identify the relevant agreement or arrangement in question. A licence may only be issued to an airline of a country with which there is an agreement or arrangement, “under which scheduled international services of that country may, subject to the agreement or arrangement be operated over or into Australian territory”. The words “subject to” indicate that the scheduled air services may only be operated “subject to” the agreement or arrangement.
6. In effect, Garuda submitted that its licence, granted pursuant to the *Air Navigation Act*, in some way strengthened its claim that Article 6 of the Australia‑Indonesia ASA obliged it to enter into a price fixing arrangement with Qantas. However, it based this argument upon the proposition that the *Air Navigation Act* should be construed as giving effect to the Australia‑Indonesia ASA. There are at least two problems with this argument. First, the Australia‑Indonesia ASA places no obligation on Garuda. Nor does the licence require Garuda to comply with Article 6. It may be that s 12 of the Act, by reference to the Australia‑Indonesia ASA, places limits upon the power to grant a licence. However, there has been no challenge to the validity of the licence as issued. Hence we cannot see how the licence can bolster Garuda’s case in the way suggested. In any event, we have concluded that Article 6 places no obligation on Garuda. Neither s 12 nor the licence changes that fact.
7. Garuda submitted that the primary Judge erred in concluding that a requirement to comply with the Australia‑Indonesia ASA would be a redundant condition in a licence because there was already a power for the Minister to revoke a licence for failure to comply with the ASA. Garuda submitted that the power of the Minister to revoke a licence was *complemented* by making it an *offence* under ss 12(1) and 12(2) to contravene the licence. Garuda may be correct in submitting that the inclusion of such a condition would not be redundant. But the submission merely asserted that the intention of the recital was to create an offence of failing to operate a licence in accordance with the terms of the Australia‑Indonesia ASA. It remains the case that Garuda was not a party to the Australia‑Indonesia ASA. Its terms did not impose any obligations upon Garuda, in stark contrast, with condition 2 of the licence. The primary Judge was correct in his conclusion that the terms of Garuda’s licence did not impose any general obligation to comply with the Australia‑Indonesia ASA.
8. Secondly,we also reject step (3) by Garuda (see [213] above) in which Garuda alleged that the Australia‑Indonesia ASA is inconsistent with Pt IV of the *Trade Practices Act*. Garuda submitted that the *Air Navigation Act* was, “the framework for giving effect to Australia’s obligations under its ASAs” and that the Act is therefore to be interpreted, as far as possible, in accordance with the provisions of those ASAs. That was somehow said to give rise to an inconsistency with the *Trade Practices Act.* Support for that proposition was said to be the decision of French J, as his Honour then was, in *Cabal v United Mexican States (No 3)* [2000] FCA 1204; (2000) 186 ALR 188. The relevant passage appears at 238 [127] where his Honour said:

There is a general principle of the common law that legislation will be construed, so far as is possible, in accordance with the provisions of international agreements to which it gives effect … . It is perhaps difficult to talk of construing one domestic statute consistently with a number of treaties to which it seeks to give effect. There are, however, common features of many such treaties which it may be assumed parliament has sought to reflect in the processes for which the Act provides. At the very least the principles governing the construction of the Act should be consistent with those governing the interpretation of the treaties. It is the role of such principles in the construction of the Act that must now be considered.

1. His Honour was concerned with the *Extradition Act 1988* (Cth). That Act specifically provided that its terms could be modified by regulation to give effect to existing extradition treaties which were scheduled to the Act. Justice French noted the difficulty in trying to construe the legislation in the light of various treaties to which it gave effect. It is difficult to see how the present form of s 12 of the *Air Navigation Act*, adopted in 1960, can give effect to the Australia‑Indonesia ASA which was adopted in 1969. Further, if it were difficult to apply this rule of construction where there were numerous existing treaties to which it gave effect, it would be even more difficult to do so in the case of subsequent treaties. In its submissions, Garuda sought to deal with this obstacle by treating the reference by French J to “giving effect” to a treaty as meaning, “giving effect to Australia’s obligations under its ASAs”. It seeks to deal with the multiplicity of ASAs by asserting that there were common features in many of them, a proposition which the Commission does not accept.

### Part IV of the Trade Practices Act cannot be read down to exclude international commercial aviation

1. Even if there were a potential inconsistency between the *practical effect* of the *Air Navigation Act* and the terms of the *Trade Practices Act*, there is a further reason why we would still conclude that the terms of Pt IV of the *Trade Practices Act* applied. This is that the *Trade Practices Act* cannot be construed to exclude matters of international commercial aviation based on the practical effect of the *Air Navigation Act.*
2. Garuda’s submission was essentially that Pt IV of the *Trade Practices Act* should be construed to exclude international commercial aviation due to the alleged conflict between it and the effect of the *Air Navigation Act* and in order to ensure that Australian legislation is consistent with international law.Since 1908 it has been accepted that statutes should be construed consistently with international law: *Jumbunna Coal Mine NL v Victorian Coal Miners’ Association* [1908] HCA 95; (1908) 6 CLR 309 at 363; see also the many High Court authorities listed by French CJ in *CPCF v Minister for Immigration and Border Protection* [2015] HCA 1; 316 ALR 1; 143 ALD 443, 449; (2015) 89 ALJR 207, 216 [8], fn 10.
3. The Commission submitted that in order for the question of consistency with international law to arise, there must be some ambiguity in the statute, and Garuda had not identified any ambiguity. This proposition is misleading. It misrepresents the authority cited by the Commission, *Minister of State for Immigration & Ethnic Affairs v Teoh* [1995] HCA 20; (1995) 183 CLR 273. In that case Mason CJ and Deane J emphasised at 287 that, “there are strong reasons for rejecting a narrow conception of ambiguity” and said that if the, “language of the legislation is susceptible of a construction which is consistent with the terms of the international instrument and the obligations which it imposes on Australia, then that construction should prevail”. Ultimately, the question remains one of construction.
4. We have rejected the Commission’s faintly pressed construction of “not possible” in Article 6(2). Other than this submission, the Commission did not respond to Garuda’s submission that the application of Pt IV of the *Trade Practices Act* to international commercial aviation would put Australia in breach of its international law treaty obligations under Article 6. But even if this is so, Garuda has not explained how ss 45 or 45A could be *construed* so that they did not apply to international aviation, other than by finding an implication into Pt IV of the *Trade Practices Act* that the provisions do not apply to persons engaged in international commercial aviation.
5. In *Taylor v Owners - Strata Plan No 11564* [2014] HCA 9; (2014) 253 CLR 531, French CJ, Crennan and Bell JJ said (at 548 [38], footnotes omitted):

The question whether the court is justified in reading a statutory provision as if it contained additional words or omitted words involves a judgment of matters of degree. That judgment is readily answered in favour of addition or omission in the case of simple, grammatical, drafting errors which if uncorrected would defeat the object of the provision. It is answered against a construction that fills “gaps disclosed in legislation” or makes an insertion which is “too big, or too much at variance with the language in fact used by the legislature”.

1. In our opinion, an implication that exempted international commercial aviation would be too great and too much at variance with the terms and operation of the legislative scheme of Pt IV of the *Trade Practices Act* even if that implication were necessary to ensure compliance with international law.
2. In *Eaton*, Crennan, Kiefel and Bell JJ described the approach to be taken when a later statute operates upon the same subject matter but does not expressly repeal or override an earlier statute. Their Honours quoted from Lord Wilberforce in *Associated Minerals Consolidated Ltd v Wyong Shire Council* [1975] AC 538 at 553:

The problem is one of ascertaining the legislative intention: is it to leave the earlier statute intact, with autonomous application to its own subject-matter; is it to override the earlier statute in case of any inconsistency between the two; is it to add an additional layer of legislation on top of the pre‑existing legislation, so that each may operate within its respective field?

1. Section 51 of the *Trade Practices Act* makes clear the intention concerning any earlier, potentially inconsistent legislation*.* When the *Trade Practices Act* was enacted, s 51 provided:

51 Exceptions

(1) In determining whether a contravention of a provision of this Part has been committed, regard shall not be had –

(a) to any act or thing that is, or is of a kind, specifically authorized or approved by, or by regulations under, an Act other than an Act relating to patents, trade marks, designs or copyrights;

(b) in the case of acts or things done in a State–except as provided by the regulations, to any act or thing that is, or is of a kind, specifically authorized or approved by, or by regulations under, an Act passed by the Parliament of that State; or

(c) in the case of acts or things done in a Territory‑to any act or thing that is, or is of a kind, specifically authorized or approved by, or by regulations under, an Ordinance of that Territory.

1. In other words, the legislation contemplated the possibility that earlier legislation might authorise or approve matters that Pt IV prohibited. It required, however, that the authorisation or approval of that act or thing be “specific”. Non‑specific authorisation or approval, as in the *Air Navigation Act* and the regulations under that Act, is insufficient.
2. Garuda accepted the primary Judge’s conclusion that Article 6 of the Australia‑Indonesia ASA had not “specifically authorized or approved” conduct proscribed by the *Trade Practices Act,* so as to fall within s 51. But Garuda submitted that the sphere of operation of s 51, “specifically authorized or approved”, is a different area of operation from conduct contrary to Pt IV that is *required.* That conclusion requires a semantic distinction (which we reject) which treats conduct which is *required* as not being conduct which is *authorised.* For instance, a later statute might make specific reference to the *Trade Practices Act* and provide that particular conduct, which would otherwise breach Pt IV, is obligatory. It is hard to see how that would not be a specific authorisation of that conduct by the statute.However, even if the distinction that Garuda sought to draw were correct, the importance of s 51 is that it illustrates the intention that the legislative scheme in Pt IV have general and broad application, subject to a particular set of exceptions within which (Garuda accepts) it does not fall.
3. This continuing legislative intention was strengthened in 1995 by amendments which included the insertion of the following subsections in s 51 of the *Trade Practices Act*:

(1A) Without limiting subsection (1), conduct is taken to be specified in, and authorised by, a law for the purposes of that subsection if:

(a) a license or other instrument issued or made under the law specifies one or both of the following:

(i) the person authorised to engage in the conduct;

(ii) the place where the conduct is to occur; and

(b) the law specifies the attributes of the conduct except those mentioned in paragraph (a).

For this purpose, “law” means an Act, State Act, enactment or Ordinance.

…

(1C) The operation of subsection (1) is subject to the following limitations:

(a) in order for something to be regarded as specifically authorised for the purposes of subsection (1), the authorising provision must expressly refer to this Act;

…

1. In particular, the requirement in s 51(1C)(a) that an authorising provision expressly refer to the *Trade Practices Act* is inconsistent with a legislative intention that a statute, which makes no reference to the *Trade Practices Act,* and which provides for no express requirement, or authority, could permit conduct contrary to Pt IV of the *Trade Practices Act.*

## Foreign State Compulsion: Hong Kong and Singapore

1. The following issue was said by Air NZ to address grounds 6‑11 of its notice of contention and said by Garuda to address grounds 68‑76 of its notice of contention.
2. Both at trial and on this appeal Air NZ and Garuda submitted that any arrangements or understandings into which they entered were compelled by Hong Kong law. To the extent that the respondent airlines made submissions concerning Singaporean law, they were made on the same basis as Hong Kong law (Air NZ submissions [85]).
3. Air NZ argued that s 45 of the *Trade Practices Act* could not be contravened because of the following overlapping submissions:
4. parties can only “make” an arrangement or “arrive at” an understanding within s 45 if they act voluntarily;
5. when conduct is compelled it is the foreign government that is making any arrangement or arriving at any understanding, not the airlines;
6. by following the requirements of the law, parties do not “make” an arrangement or “arrive at an understanding”;
7. any arrangement or understanding cannot have the “purpose” and cannot have been likely to “have the effect” of fixing, controlling or maintaining the price of goods or services within the meaning of s 45A because it is the law that has that purpose or effect not arrangements or understandings compelled by the law; and
8. the *Trade Practices Act* does not apply to conduct in a foreign country that is required by the law of that country.
9. Garuda also submitted that claims under the *Trade Practices Act* brought against it for conduct which was compelled by a foreign law were claims that were either non‑justiciable or claims which the Court, in its discretion, should decline to entertain.
10. The primary Judge did not need to consider any of these submissions because he concluded that neither Hong Kong, Singaporean nor Indonesian law required the airlines to engage in conduct which would be contrary to the *Trade Practices Act.* Instead, they were merely *permitted* to do so.

### Hong Kong law and Hong Kong domestic practice: the primary Judge’s findings

1. The primary Judge’s findings in relation to Hong Kong law and practice were as follows:
2. surcharges and customs fees were “tariffs” within the meaning of each of the three potentially applicable ASAs ([412]);
3. an airline that wanted to impose a fuel or insurance surcharge or a customs fee was required by Hong Kong domestic law to obtain approval from the Hong Kong Civil Aviation Department (the “HK CAD”) ([418]);
4. the only surcharges that could be imposed were ones that had been approved by the HK CAD ([419]);
5. the approved tariffs were minimum charges ([425]);
6. neither Hong Kong law nor any administrative requirement from the HK CAD imposed any duty upon the airlines to make collective applications for a fuel surcharge. Although there would be delays, and although the determination would only be in force for two months, airlines could make an individual application for a single (static) charge or multiple applications for static surcharge authorisations based upon charges at levels dependent upon its own in‑house fuel index ([420], [436]); and
7. however, if an airline wanted to obtain authorisation for a variable charge based on a fuel index then the practice of the HK CAD was to proceed on the basis of a single application to be submitted by all the airlines ([443]).
8. The finding of fact described above at (6) was challenged by the Commission. The finding was based upon three matters. First, it was based upon an inference from evidence that an oral direction to this effect had been given in September 2006 ([438], [443]). Secondly, it was based upon a finding that there were obvious reasons for such a practice to exist, namely that, “it would be ungainly to have to deal with more than one fuel index and it would perhaps promote confusion amongst the shippers” ([441]). This finding is consistent with internal airline emails which refer to the HK CAD’s desire for the approach to a fuel surcharge to be “easy and transparent” (appeal book Tab [728]). Thirdly, it was based upon the conclusion that there was no reason why the position in September 2006 would involve a sudden change of practice ([443]). Indeed, the email which set out the September 2006 position did not suggest that the practice was new. The lack of novelty is also supported by the primary Judge’s reference to evidence about “confusion about [HK CAD’s] policy” in September 2006 ([435]). The reference to confusion was made at a meeting where two of the representatives of HK CAD (Mr Kwok and Ms Poon) who were present were persons who had been involved with approval of fuel surcharge mechanisms from the inception. The confusion concerned the *policy* of HK CAD not to, “accept applications by individual airlines, but [to require] a joint [Hong Kong Board of Airline Representatives Cargo Sub Committee (the “HK BAR CSC”)] application” (Tab [2923]). This was not described as a *new* policy. It was not described as a *recent* policy.
9. As to the Commission’s challenge to the finding at [443] of the primary judgment and at (6) above the Commission did not dispute any of the three bases upon which the finding was made. It is not to the point that there was no written document describing the policy or that a written document would require approval ([435]). The “policy” was, in effect, an informal practice. The finding by the primary Judge was not merely open, it was also correct.

### Hong Kong law and Hong Kong domestic practice: the respondent airlines’ submissions

1. Air NZ pointed to numerous inconveniences to airlines which sought to rely upon an approval for a static surcharge rather than an approval of a variable fuel index surcharge. Those inconveniences were said to produce “fundamentally different outcomes”. For instance, Air NZ submitted that:
2. if an airline set the static charge by reference to its internal index at the date of making its application to HK CAD then the static charge may not correspond to the index when the application is determined 60‑90 days later;
3. any application for a static charge would only be valid for two months and movements in an airlines index during that period could not permit changes to the surcharge; and
4. to attempt to remove any gap between approved surcharges which were sought based on an airline’s desired index, the airline would need to submit new applications while existing applications were pending. Even then, there would be a possibility that the first approval could expire before the second is granted so that there would be a period during which no surcharge could be charged (Air NZ submissions [14]).
5. In effect, Air NZ’s point was that the airlines could apply to charge according to their own index by multiple applications for static charges. But if they did so then the result would be substantially less flexible and substantially less transparent than if they applied for authorisation to charge by reference to an index approved by HK CAD. The practice of the HK CAD was that the latter could only be done by a joint application.
6. Air NZ’s submission was effectively that the differences between (i) running its business with an application for a static surcharge; and (ii) running its business with an application for a variable (index based) surcharge, were such that they constituted two different “forms of business”. Air NZ therefore submitted that approval for a variable (index based) surcharge was mandatory and could not be avoided by application for a static surcharge, in the way that a requirement to wear a seat belt is mandatory and cannot be avoided by riding a bicycle ([20]).

### Reasons why no foreign State compulsion was involved

1. We reject the submissions of Air NZ for four reasons.
2. First,Air NZ was not presented with a choice between running two fundamentally different “forms of business” where one involved prices that included a static surcharge and the other involved a variable (index based) surcharge. Both circumstances involved the provision of the same services, to the same customers, and potentially even charging the same prices. The comparison between a business that involves driving a car and one that involves riding a bicycle is entirely inapt.
3. Indeed, even the commercial inconvenience involved in the absence of an approved variable (index based) surcharge was not as stark as Air NZ submitted. One reason why the inconvenience was not as stark is because there is evidence that between 2001 and 2004 the HK CAD approved insurance and security surcharges within approximately 30 days and for periods of up to 6 months. On 3 October 2001 HK BAR CSC expected that approval might be possible in an urgent case within eight days which is why a response was requested before 11 October 2001 (Tab [0491]). Further the degree of inconvenience differed according to the different routes. Article 7(8) of the Hong Kong‑New Zealand ASA (Tab [0051.082]) provides that a tariff established in accordance with the provisions of the Article shall remain in force until a replacement tariff had been established. Further, Article 7(5) provides that a tariff shall be deemed to have been approved if it has not been disapproved within 30 days. There were similar provisions in the Hong Kong‑Indonesia ASA, Article 8(8) and Article 8(5), referred to by the primary Judge at [413]. These matters may have been reasons why the evidence showed that individual surcharges were realistic options for the airlines (Tabs [0199], [2950], [2973]).
4. Even more significantly, the choice presented to the airlines was not merely one between static surcharges (including those based on an internal airline index) and a variable (index based) surcharge approval. The airlines also had options of (i) absorbing an increase in fuel prices; or (ii) increasing their prices without a separate fuel surcharge amount. The evidence showed that these were realistic options (Tabs [0284], [0286], [2610]).
5. Secondly, even if Air NZ had been presented with a mandatory choice between two fundamentally different forms of *the same* business, where one of those forms involved a violation of the *Trade Practices Act* and the other did not, there was no duty imposed on Air NZ to choose to conduct its business in the manner that infringed the *Trade Practices Act.* As the primary Judge observed at [426], the choice between two options made it plain that there is no such mandatory requirement for how the business must be run.
6. Thirdly, the evidence does not support a conclusion that the *administrative practice* of the HK CAD, by its policy, imposed any *requirement* at all even in relation only to variable (index based) surcharges. Nor was such a finding made by the primary Judge. In six years of correspondence between HK CAD and the HK BAR CSC there was no document which provided for any such mandatory requirement ([433]).
7. The possibility that the HK CAD might depart from its informal practice is also supported by the fact that it did not provide details of the practice “in black and white”. Such details would require approval from the Bureau and “that would be a prolonged and complicated process” ([435]). The representative who communicated the informal practice to the airlines (Ms Liu) said that HK CAD (ts 2710):

Didn’t give me black and white. So it’s inappropriate for me just to write something in black and white recapping what CAD said, because I may have misinterpreted any one word; so I requested CAD to give me black and white but they refused.

1. Another indication of the absence of a mandatory policy by the HK CAD appears in one of the critical email chains. Ms Liu told the airlines that, “CAD indicated verbally to me that airlines should submit 1 scheme, [instead of] leaving CAD to choose” (Tab [2923]). The concern was that HK CAD would be placed in a position in which it would have to make choices between different indexes. That is wholly different from a concern about approving single index applications from one or more airlines separately.
2. Fourthly, at least in the absence of any evidence that HK CAD’s informal practice was one from which it would never depart (such as if it were told that the mandatory application of its practice would place an airline in contravention of Australian legislation), the informal policy is incapable of rising to the level of a mandatory legal requirement.
3. For these four reasons, we reject Air NZ’s submission that there was any mandatory requirement of Hong Kong law or practice that compelled any airline to join with other airlines to make a joint application for HK CAD’s approval of a variable (index based) surcharge. We also agree with the primary Judge that it is unnecessary to consider whether, on the premise that some mandatory effect could be identified, such that mandatory effect would have the consequence that (i) the airlines did not “make” an arrangement or “arrive at an understanding”; or (ii) any arrangement or understanding did not have the “purpose” or have been likely to “have the effect” of fixing, controlling or maintaining the price of goods or services within the meaning of s 45A. Nor is it necessary to determine whether, again on the premise that some mandatory effect could be identified, the mandatory effect would have the consequence that the *Trade Practices Act* would not apply, or that claims based on the *Trade Practices Act* were non‑justiciable or claims which the Court should decline to entertain.

### An extension of compelled foreign conduct to permitted foreign conduct?

1. Air NZ made an alternative submission that s 45 of the *Trade Practices Act* would not apply even if it was not compelled to join with other airlines to make a joint application for HK CAD’s approval of a variable (index based) surcharge. Air NZ submitted that it was sufficient that Hong Kong law *permitted* or *did not prohibit* conduct which was unlawful under the *Trade Practices Act.* Air NZ submitted that if the *Trade Practices Act* were construed to prohibit conduct that is expressly permitted, or not prohibited, by Hong Kong or Singapore then that construction would put Australia in breach of international law. The breach of international law asserted was the prohibition against a “fundamental interference in the domestic affairs” of another country (Hong Kong or Singapore).
2. We do not accept this submission. Air NZ pointed to no authority, no academic commentary, and no source of international law which suggested that it was a fundamental interference in the domestic affairs of another country to legislate in a manner which prohibited conduct which was permissible (but not mandatory) by the law of that other country. Air NZ submitted that the international law doctrine applied by analogy with s 109 of the *Commonwealth of Australia Constitution Act 1901* (Cth)so that international law prohibits a State from legislation that “alters, impairs or detracts from” the operation of a foreign law.
3. It was common ground that propositions of international law could be established without expert evidence and simply by way of submissions. That assumption was not the subject of any dispute but as an absolute proposition it is highly questionable. For instance, the recognition that a developing international principle has become a requirement of international law can require evidence of widespread and representative State practice and *opinio iuris* (an intention to be bound)*.* It may be difficult, for example, for a party to establish without either expert or lay evidence, a pattern of State behaviour and the reasons why States have acted in that way. However, it is not necessary to explore the extent to which the assumption is justified in this case. The parties made reference to a number of sources of international law that supported the proposition that there is an international law doctrine which precludes one State from interfering in the domestic affairs of another. That principle can be accepted. The content of that principle, and its boundaries, may be much more contestable.
4. Air NZ’s submission was that it is a fundamental interference in the domestic affairs of another country to legislate in a manner which prohibits conduct which is permissible (but not mandatory) by the law of another country. No authority was cited for this assertion of international law. None exists. The highest that Air NZ could state the content of the principle was to submit, following Jennings R and Watts R, *Oppenheim’s International Law* (9th ed, Oxford University Press, 1992) Vol 1, 406 that a State:

is prevented from requiring such acts from its citizens abroad as are forbidden to them by the municipal law of the land in which they reside, and from ordering them not to commit such acts as they ***are bound to*** commit according to the municipal law of the land in which they reside. (Emphasis added).

1. It is unnecessary to consider whether this accurately represents a consensus of international law authority (junior counsel for the Commission, Ms Younan, made a powerful argument that it does not). This is because even if this is a correct statement of authority concerning international law the content of the authority requires that the foreign law make an act *mandatory* or *binding*. For the reasons we have explained, the airlines were not bound by Hong Kong or Singaporean law to make any collective application.
2. As a matter of principle, provided that any required nexus to a State is satisfied, there is also no reason why international law should prohibit the State from making unlawful conduct which is permitted (but not required) in another State. With the possible exception of circumstances in which a person has no choice, or perhaps no real choice, about engaging in conduct permitted by another State, the effect of prohibition is merely to reduce the choices that the person can make in relation to the conduct permitted by the law of the foreign jurisdiction.

## Foreign State Compulsion: Indonesia

### The issues at trial

1. In its further amended defence for the trial proceedings Garuda pleaded at [340]‑[341]:

340. Further, in answer to each of the allegations in paragraphs 69 to 104 and 231 to 245 (**Indonesia Allegations**) [Garuda] says that:

(a) at all material times by reason of the 1992 Aviation Law of the Republic of Indonesia:

(i) all airlines providing air cargo transport services originating, or transiting through Indonesia were required to adopt the structure and classes of commercial air transport tariffs as stipulated by the Government of the Republic of Indonesia;

(ii) all such international commercial air transport tariffs. including cargo rates were required by law to be stipulated on the basis of international agreements.

**Particulars**

Articles 13, 37. 38 and 40 of the 1992 Aviation Law.

See Dr Butt’s report dated 22 November 2012, paragraphs 11 and 18‑26.

341. In 1969 the Commonwealth of Australia entered into the Indonesia Australia ASA which provided, among other things, that tariffs for international air transport, including international air cargo rates for carriage from or through Indonesia would whenever possible be reached by the designated airlines concerned through the rate fixing machinery of IATA and that when that was not possible tariffs in respect of each of the specified routes would be agreed upon between the designated airlines concerned and that such tariffs would be subject to the approval of the aeronautical authorities of Australia and Indonesia (**Tariff Agreement Requirement**).

1. At [342] Garuda pleaded that unsuccessful attempts were made by Australia to vary the Australia‑Indonesia ASA so that airlines could fix their own tariffs. It also pleaded that it was unable to participate in the IATA process, so that the default provisions of the ASA applied.
2. At [345]‑[347] Garuda pleaded:

345. In the premises, at all relevant times [Garuda] was obliged or alternatively authorised by the operation of Indonesian law and ASAs to which Indonesia was a party where possible to agree tariffs, including cargo rates in respect of specified routes with other airlines providing the carriage of cargo in respect of those routes from or through Indonesia.

346. The surcharges the subject of the Indonesia Allegations, other than any Customs Fee Surcharge imposed in Australia (**Indonesia Surcharges**) each formed part of cargo rates and were tariffs for carriage from Indonesia.

347. The Government of Indonesia was informed of and approved the structure and classes of the Indonesia Surcharges in accordance with Indonesian Law.

**Particulars**

That the Government of Indonesia was informed and approved is to be inferred from documents ACCC.003.022.0001 and ACCC.018.019.0008, the terms of the 1992 Aviation Law referred to in paragraph 1 above, and the subsequent imposition of the Indonesian Surcharges.

1. At [349]‑[350] Garuda pleaded that in declining to amend the ASA, and in fixing the structures and classes of tariffs, the Indonesian Government was acting in its own territory and under its own law. At [351]‑[353], Garuda pleaded:

351. [Garuda] says further that any investigation by an Australian Court into the Indonesia Allegations would necessarily call into question the validity of, and/or require the Court to adjudicate on the Executive Government of the Republic of Indonesia declining to agree to amend the Indonesia Australia ASA and/or would cause embarrassment to the Commonwealth of Australia in its relations with the Republic of Indonesia.

**Particulars**

Letter and accompanying submission from the Department of Foreign Affairs and Trade to the Applicant dated 2 October 2007

Letter from the Department of Transport and Regional Services to the Applicant dated 28 September 2007

Annexure JP 7 to the affidavit of Julian Peake

352. [Garuda] says further that any investigation by an Australian Court into the Indonesia Allegations concerning the Indonesia Surcharges would necessarily call into question the validity of, and/or require the Court to adjudicate on the approval of the structure and classes of those surcharges by the Executive Government of the Republic of Indonesia and/or would cause embarrassment to the Commonwealth of Australia in its relations with the Republic of Indonesia.

353. [Garuda] says further that by reason of matters referred to above:

(a) the Indonesia Allegations are not justiciable;

(b) the Indonesia Allegations do not give rise to a matter within the jurisdiction of the Court;

(c) alternatively, the conduct of [Garuda] was required by, or alternatively authorised by, Indonesian law, which is a complete defence to the Indonesia Allegations;

(d) alternatively, if this Honourable Court has jurisdiction in respect of the Indonesia Allegations it ought to decline such jurisdiction in the exercise of its discretion as a matter of comity with the Republic of Indonesia.

1. It seems that at trial the issue was whether Pt IV of the *Trade Practices Act* should be construed so as to avoid unreasonable interference with Indonesia’s sovereign authority (see the primary judgment at [359]). In particular, Garuda argued that to permit the terms of Pt IV to apply to conduct in Indonesia, in circumstances where such conduct was either required or permitted by Indonesian law or practice, involved an interpretation of the *Trade Practices Act* which displayed a lack of legislative deference to that nation’s sovereign authority, which interpretation was to be avoided, if possible (see the primary judgment at [359]).
2. At first instance Garuda’s argument failed at two levels. First, the primary Judge found that the law of Indonesia did not require airlines to “collude” in setting fuel and insurance surcharges ([186]). Second, his Honour concluded that there was, “no textual mechanism by which s 51(1) of the TPA can be read down”, so as to avoid its superimposition upon Indonesia’s domestic legislation. Garuda appeals against his Honour’s finding that the law of Indonesia did not require airlines to agree (or, as his Honour put it, “collude”) in the setting of fuel and insurance charges.

### The issues on appeal

1. In the agreed list of non‑market issues on appeal, the Commission and Garuda identify the following issues in this area:

4. Did the 1992 Aviation Law and 1995 Aviation Regulation of Indonesia impose an obligation on [Garuda], or alternatively authorise [Garuda], to agree its tariffs with foreign airlines in the supply of scheduled international air services from Indonesia?

5. Was it a criminal offence under Article 13(2) and Article 58 of the 1992 Aviation Law of Indonesia for each of the foreign airlines with which [Garuda] was found to have reached an understanding in Indonesia, to operate its aircraft on, to or through the territory of the Republic of Indonesia without having complied with the provisions of the Air Services Agreement under which each such foreign airline had been designated, including provisions for agreement on tariffs with [Garuda]?

6. Did sections 45 and 45A of the *Trade Practices Act 1974* apply to [Garuda’s] conduct in Indonesia by which [Garuda] reached agreement with a foreign carrier on a tariff if an agreement on tariffs was required or authorised by the provisions of an Air Services Agreement which was implemented by the 1992 Aviation Law and 1995 Aviation Regulation of Indonesia?

1. The principal legislation regulating the operation of foreign airlines in Indonesia was “Law No 15 of 1992 on Aviation”, described by the primary Judge as the “Indonesian Aviation Law”. A translation of the then Article 13(2) provides:

Foreign civil aircraft from and to or through the territory of the Republic of Indonesia, can only be used on the basis of a bilateral agreement, multilateral agreement or special permission from the government.

1. Professor Lindsey and Dr Butt, both experts in Indonesian law, disagreed as to the meaning of the term which, in the above paragraph is translated as, “on the basis of”, the interpretation propounded by Professor Lindsey. Dr Butt considered that the term carried a meaning which imposed an obligation to comply with such agreement or permission. That disagreement was not resolved by the primary Judge.
2. Garuda’s reliance on Article 13(2) was in support of its further submission that the operator of such an aircraft was obliged to comply with the terms of the Australia‑Indonesia ASA, an agreement between the Australian and Indonesian Governments. It was probably a relevant bilateral agreement for the purposes of Article 13(2). Although Garuda was not a party to that agreement, it seems to submit that it was bound by it.
3. Garuda also relied upon Article 38(2) of the regulations described by the primary Judge as the “Indonesian Aviation Regulations”, apparently subordinate legislation, adopted pursuant to the Indonesian Aviation Law. A translation of the then Article 38(2) provides:

Scheduled air passenger and transport cargo tariffs are to be determined guided by the provisions of bilateral treaties or multilateral treaties and the agreement of the parties that has obtained the approval of the Minister.

1. Professor Lindsey and Dr Butt agreed that Article 38(2) should be read in light of Article 40 of the Indonesian Aviation Law which provided:

The structure and classes of commercial air transport tariffs are to be stipulated by the government.

1. In oral submissions on appeal Garuda also relied on Article 58 of the Indonesian Aviation Law (app ts 394-395) which provided:

Whoever operates a foreign aircraft from, to or through the territory of the Republic of Indonesia in breach of provisions as intended or as referred to in Article 13(2) can be or is liable to a term of imprisonment of up to five years and a fine up to 60 million rupiah.

1. As we understand it, Garuda submitted at trial that notwithstanding the difference of opinion between the experts as to the legal effect of Article 13(2), it had the force of law by virtue of Article 58. Thus Garuda submitted that pursuant to Article 13(2) of the Indonesian Aviation Law, an Australian carrier could only fly from, to, or through Indonesia if tariffs had been fixed in accordance with Article 6 of the Australia‑Indonesia ASA, and that Garuda was either compelled or permitted to agree tariffs with the relevant Australian airline. Further, Garuda submitted that Article 38(2) contemplated, and perhaps authorised such agreement.
2. The primary Judge appears to have disposed of the argument concerning Article 13(2) on the basis that it did not apply to Garuda, its aircraft not being foreign in Indonesia. That conclusion may have been based on an over‑simplified view of Garuda’s submission. The question appears to have been whether the combined effect of the Indonesian Aviation Law and the Indonesian Aviation Regulations was that Garuda was required or permitted to agree tariffs with the Australian carrier. If Article 13(2) required such agreement as a condition of the Australian carrier being permitted to operate aircraft from, to or through Indonesia, then it might be argued that the Article implicitly compelled or authorised the Indonesian airline (Garuda) to enter into the agreement contemplated by Article 6, but only if Article 6 compelled Garuda to reach an agreement with Qantas as to tariffs. This argument was, we think, the basis of this aspect of Garuda’s case on appeal. It depends upon the proper construction of Article 6 of the Australia‑Indonesia ASA. We have previously concluded that upon its proper construction Article 6 did not require any airline to make an agreement as to tariffs. It follows that Garuda’s case, based on Article 13(2), must fail. There may be another reason for such failure. The better view of Article 13(2) may be that it simply requires that there be a bilateral or multilateral agreement (between States) pursuant to which the relevant airline was operating. However the validity of that reasoning might depend upon the resolution of the dispute between Professor Lindsey and Dr Butt.
3. As to Article 38, the expert witnesses agreed in a Joint Expert Statement at [3] that:

Article 40 of the Aviation Law of 1992 provides that the structure and classes of commercial air transport tariffs are to be stipulated by the government. The Elucidation to Article 40 states, inter alia, that international commercial air transport tariffs are to be stipulated on the basis of international agreement. Article 38 of Government Regulation 40 of 1995 provides that international air passenger and transport cargo tariffs are determined guided by the provisions of bilateral or multilateral agreements, and agreement between the parties that has obtained the approval of the Minister. The approval of the Minister is therefore required for such agreements to comply with Article 38 of the Government Regulation.

1. Concerning those provisions, the experts disagreed at [3] as follows:

…

**Butt** says that, read with Article 40 of the 1992 Aviation Law, the effect of Article 38 of Government Regulation 40 of 1992 is to require that Garuda and international airlines comply with, or at least have reference to, the provisions of bilateral or multilateral agreements entered into by the government of Indonesia in respect of international commercial air transport tariffs.

**Lindsey** says the effect of Article 38 is that in the process of determining international air passenger and transport cargo tariffs reference is made to the provisions of bilateral or multilateral agreements for guidance but that Art 38 does not require compliance with these agreements.

1. Both experts accepted that the relevant Minister was to set the tariffs pursuant to Article 38(2). They disagreed as to the extent to which the bilateral or multilateral agreements were to be taken into account in that process. Again, the primary Judge did not resolve the dispute. The reference to the agreement of the parties reflects, or anticipates, the process contemplated in Article 6 of the Australia‑Indonesia ASA. The extent to which the Minister was to be guided by the agreement between the parties was not addressed. In any event, as his Honour found at [454], Article 38(2) imposed no obligation upon Garuda.
2. Garuda seemed to suggest in oral submissions that Article 58 effectively made it mandatory that it engage in price fixing pursuant to Article 6 of the Australia‑Indonesia ASA (app ts 394‑395, 398). This argument adds little to Garuda’s submission concerning Article 13(2). The effect of the submission is that even if Article 13(2) imposes no obligation on Garuda, Article 58 mandates compliance with Article 6. Once again, the submission depends upon the proper construction of Article 6. We have held that it imposes no obligation to agree. Article 58 cannot change the proper construction of Article 6. Again, we are inclined to the view that on the proper construction of Articles 6, 13(2) and 58, the offence constituted by the latter provision is the operation of an airline from, to or through Indonesia in the absence of an agreement or permission as contemplated in Article 13(2) and not in contravention of a term of such agreement or permission. Once again, it seems that the question may depend upon resolution of the conflict in the evidence of the experts.

### Alleged compulsion by Indonesian State practice

1. As previously mentioned, Garuda submitted at trial that both Indonesian law and practice required or permitted the conduct which is said to have infringed ss 45 and 45A. This aspect of the case is addressed at [24]‑[28] of the notice of contention and [46]‑[49] of Garuda’s written submissions. There is no suggestion that Indonesian Government practice had the force of law. In dealing with the conduct of Air NZ and Garuda in Hong Kong, the primary Judge said at [392]:

For those reasons, it is an essential part of the airlines’ case that they demonstrate that all three obligations arose as a matter of the law of Hong Kong. The airlines approached their proof of this matter in two distinct ways. First, they sought to prove that the actual law of Hong Kong by itself generated the obligation. Secondly, they set out to demonstrate that regardless of the content of Hong Kong law the HK CAD had, in fact, as a matter of administrative discretion, imposed each of the three requirements upon them. The Commission accepted that the act of state doctrine required this Court to proceed on the basis that the actions of the HK CAD were valid whether they were authorised by domestic law or not: cf. *Habib v Commonwealth* (2010) 183 FCR 62 at [6], [38]‑[42], [91]‑[110].

1. Although this extract deals with conduct in Hong Kong, the primary Judge considered that his reasoning generally applied to the relevant conduct in Singapore and Indonesia. In dealing with the appeal as it concerns Hong Kong, we have already dealt with the question of conduct permitted or authorised by a foreign government and the question of practice as opposed to legal obligation.
2. On appeal Garuda seemed to submit that if the relevant governmental authority required that a particular step be taken, or a particular procedure be followed, the Australian courts would not rule upon the legality of such requirement. The Commission apparently conceded that this Court should proceed upon the basis that such actions were valid, whether authorised by domestic law or not. We infer that the actions in question are those associated with the alleged requirement that the airlines lodge their published tariffs (not their actual sale prices) with the government for approval. Whilst the Commission may accept that the government could lawfully ask that the airlines follow such course, it does not follow that the government was lawfully able to compel compliance with such request. To put it another way, there is no evidence that Garuda was obliged to comply with such request. It is not the government’s conduct which is in question. The question is as to Garuda’s obligations.
3. The primary Judge did not accept Garuda’s submission that the Indonesian Government was “involved” in the determination of tariffs, including surcharges, and that it required “lodgement” with it of “published” tariffs, as opposed to those actually charged by the respondent airlines (at [458]). The primary Judge discussed the evidence upon which Garuda relied to establish such involvement and rejected the submission. In so doing, his Honour referred to a number of documents to which Garuda had presumably pointed as supporting its submission. His Honour observed that the documents offered little or no evidence of any such practice, and concluded that there was no relevant practice (at [460]). On appeal, Garuda seemed to accept that four of those documents more or less supported his Honour’s inference. However it submitted that one of them, and one other document not mentioned by the primary judge, should have led his Honour to infer otherwise.
4. Garuda submitted that the obligation to lodge published tariffs was derived from an IATA resolution, the “Permanent Effectiveness Resolution 001” (see [46] and [48] of Garuda’s non‑market issues submissions). The IATA resolution required a “TC Member” to notify the Secretary (presumably of IATA) of any requirement by the member’s government that it be notified of the filing or approval of “Resolutions”. A “TC Member” is, we infer, a member of any one of the three IATA Cargo Tariff Conferences (see the primary judgment at [139]‑[141]). The Resolution made an exception in the case of limited agreements. The term “limited agreement” is defined as:

an agreement reached by 2 or more TC Members; binding on those Members who are party to it and upon those Members not present at the Conference who operate Third/Fourth or Fifth Freedom Services between the countries between which the agreement is to apply

1. Garuda submitted that as the Indonesian Government maintained only an immaterial reservation concerning that Resolution, it had approved of its, “provisions for the home carrier to notify terms of any “*limited agreement”* to the home government and to notify the other carriers of any government approval or disapproval” (at [48]). It then submitted that the primary Judge failed to take into account this “documented process” in dealings between the airlines and the government.
2. For the purposes of argument, we accept that the Permanent Effectiveness Resolution obliged Garuda, as a TC Member, to notify the Indonesian Government of the resolutions referred to in that Resolution. However, it cannot be demonstrated that the term “Resolution” encompassed resolutions of bodies such as the Air Cargo Representative Board in Indonesia (“ACRB”). The functions of this body are explained in the primary judgment at [1133]‑[1139]. As far as we can see, it was not connected to the IATA, although its members may also have been IATA members. Further, the interests of the two bodies may have overlapped. In any event, it does not follow from the fact that the Indonesian Government had, in some way, “ratified” the Permanent Effectiveness Resolution that it necessarily required that Resolutions (whatever that term means) be filed with it, and approved by it. The thrust of his Honour’s reasoning is that there was little evidence of the “reporting” of the imposition of tariffs and no evidence of any approvals (see the primary judgment at [457]‑[460], [1145]). In the absence of such evidence, the Permanent Effectiveness Resolution, to the extent that the Indonesian Government had ratified it, offered no basis for inferring that the Indonesian Government required that it be notified of increases in tariffs or claimed the right to approve them. The Permanent Effectiveness Resolution takes the matter nowhere.
3. Garuda also pointed to the minutes of meetings of the ACRB held on 30 July 2002 and 13 September 2002 as exemplifying the “practice” allegedly prescribed by the Permanent Effectiveness Resolution. At the meeting on 30 July 2002, the respondent airlines considered an IATA resolution, adopted in May 2002, proposing a new “density rule”. The nature of such rule is unclear, but it may have related in some way to the calculation of charges, based on volume rather than weight. It was adopted by IATA’s Cargo Tariff Co‑ordination Committee. Hence one might infer that it had something to do with tariffs. The ACRB decided to defer implementation of the rule until “next year”. Garuda had, by letter dated 17 July 2002, already advised the “Indonesian Authority” of the IATA resolution. At the time of the meeting it had received no response.
4. At the next meeting, held on 13 September 2002, Garuda reported that the Indonesian Authority had not accepted the new “formula”. There is then a reference number and a date, “6 September 2002”, probably the date upon which the Authority notified its inability to “accept” the “formula”. Garuda advised IATA that the resolution would not take effect in Indonesia. On appeal it submitted that the minutes reflect an example of a “practice” concerning notification of the terms of any “limited agreement” to the Indonesian Government and notifying other airlines of the government’s approval or disapproval.
5. At [457] the primary Judge considered the minutes of the meeting of 13 September 2002, concluding that the resolution in question did not address tariffs or surcharges. As we have observed, it seems likely that the formula had something to do with tariffs, but the nature of the connection is unclear. His Honour noted that at the 30 July 2002 meeting, the airlines had decided not to implement the resolution and to inform the government accordingly. As far as we can see, the minutes do not say anything about informing the government. Concerning the minutes of the meeting of 13 September 2002, his Honour observed that they recorded that Garuda advised that the Indonesian Authority was unable to accept the new formula as stipulated in the IATA memorandum. Garuda submitted that the primary Judge erred in holding that the airlines had decided not to implement the resolution, and that there was no evidence of a reply from the government.
6. His Honour noted at [457(b)] that the minutes showed that Garuda had reported that the Indonesian Authority could not accept the new formula. Hence it is unlikely that, later in that same subparagraph, he overlooked the fact. It seems more likely that his Honour was addressing a different matter. At the meeting of 30 July 2002, the airlines had resolved to defer implementation of the formula until an unidentified date in 2003. Given that Garuda had already “reported” the fact of the IATA resolution to the “Indonesian Authority”, those attending the meeting (and his Honour) may well have expected that Garuda would have advised the Indonesian Authority of the decision not to implement it until the following year. It seems likely that his Honour meant that the Indonesian Authority had not replied to any communication of that decision, treating the Authority’s non‑acceptance as being a response to Garuda’s earlier advice concerning the proposed new formula, rather than to the ACRB’s decision to defer implementation of the new formula. In any event, his Honour’s conclusion at [1145] that the Indonesian Government had never approved a surcharge was not undermined by the fact that it had refused to “accept” the new formula.
7. Other issues addressed in grounds 24–28 of Garuda’s notice of contention were not pressed in written or oral submissions. Those grounds must fail. As we understand it, by virtue of our reasoning to date, grounds 29‑30 must also fail. Under the heading, “Conduct in Indonesia – Witnesses”, grounds 31–34 of the notice of contention assert that the primary Judge erred in his treatment of the evidence of the witness Mr Mandala. We do not understand Garuda to have pressed these grounds in its submissions.

## The Hong Kong Understandings

### The 2002 Hong Kong Lufthansa Methodology Understanding

1. The primary Judge’s findings concerning the “2002 Hong Kong Lufthansa Methodology Understanding” which are relevant to this appeal concern only Air NZ. This is because the primary Judge concluded that Garuda was not represented at the 23 July 2002 meeting and was not a party to the 2002 Hong Kong Lufthansa Methodology Understanding. The Commission did not challenge that conclusion.
2. Air NZ’s notice of contention asserted (at 11(a)) that the primary Judge erred in finding that Air NZ made and implemented the 2002 Hong Kong Lufthansa Methodology Understanding.

#### (i) The primary judge’s findings

1. The primary Judge’s findings in relation to the events leading up to the 2002 Hong Kong Lufthansa Methodology Understanding (with additional references to uncontroversial evidence) were as follows.

(1) In February 2000, the HK CAD approved the introduction of a fuel surcharge which was valid for one year or until the index dropped below 110 for two consecutive weeks. The airlines, including Air NZ, then announced the surcharge to their customers and imposed it ([525]).

(2) On 23 January 2002, Lufthansa unilaterally altered its worldwide fuel index. The critical feature of this new “methodology” (the “2002 Hong Kong Lufthansa Methodology”) was that it could go down as well as up and had multiple trigger points ([535]). Since the 2002 Hong Kong Lufthansa Methodology was a tariff, it required HK CAD approval ([536]).

(3) In April 2002, Lufthansa decided not to apply for approval of the 2002 Hong Kong Lufthansa Methodology. It decided to “follow the majority” after a telephone discussion with the HK CAD in which the HK CAD was understood as hinting that it would not support the new methodology even if Lufthansa applied for it separately (ACCC.003.011.0010).

(4) On 10 May 2002 the HK BAR CSC wrote to each of the airlines enclosing a questionnaire asking airlines (i) whether they were collecting a fuel surcharge in their home countries; and (ii) whether they wished to depart from the methodology used at that time. More than 30 airlines indicated they did not wish to change from the current index whilst six indicated that they did ([538]).

(5) However, on 16 May 2002, a meeting of the HK BAR CSC was held and, contrary to the outcome suggested by the questionnaire, the members decided to adopt the 2002 Hong Kong Lufthansa Methodology. One reason for this was that the price of fuel was not expected to reach 130 (to activate the current surcharge) but the 2002 Hong Kong Lufthansa Methodology would be enlivened at 115 ([539]).

(6) The HK BAR CSC lobbied for the introduction of the 2002 Hong Kong Lufthansa Methodology but the HK CAD was “not very fond” of it and asked for calculations to show that there was no real disadvantage to shippers (ACCC.003.011.0014).

(7) On 5 June 2002, the HK BAR CSC made the application to replace the old fuel surcharge methodology with the 2002 Hong Kong Lufthansa Methodology. This was approved on 19 July 2002 ([545]‑[546]).

(8) On 22 July 2002, three days after the HK CAD approval, the Chairman of the HK BAR CSC sent an email to its members (including Air NZ) referring to the approval of the 2002 Hong Kong Lufthansa Methodology and saying, “Would all of you attend the meeting tomorrow afternoon (Jul 23) so that we can go through details of the implementation”. Details of the meeting were provided, including a commencement time of 3pm, and an attendance confirmation was requested (Tab [918]).

(9) On 23 July 2002, the HK BAR CSC held the meeting. The primary Judge drew the following inferences about events at the meeting ([555]):

* 1. all the airlines at the meeting decided to impose the surcharge with effect from 1 August 2002;
	2. this agreement was reached by a collaborative decision‑making process. The airlines were agreeing inter se to be bound by the outcome of that process; and
	3. the nature of that decision was that all the airlines present regarded themselves as bound to give effect to the decision.

#### (ii) The pleading point

1. The Commission’s amended statement of claim pleaded the 2002 Hong Kong Lufthansa Methodology Understanding as follows:

124. On or about 23 July 2002, Air New Zealand made an arrangement or arrived at an understanding with other international airlines including Air France, British Airways, Cathay Pacific, EI AI, Emirates, Finnair, Garuda, Dragonair, Japan Airlines, Korean Air, Lufthansa, Malaysia Airlines Martinair, Northwest Airlines, Qantas, SAS, Singapore Airlines, Thai Airways, United Airlines and UPS containing provisions to replace the pre‑2002 Hong Kong methodology with a revised methodology based on the Lufthansa Methodology and in the terms alleged in the table below, and those international airlines would impose surcharges in accordance with that methodology for the supply of air freight services from Hong Kong (the **“2002 Hong Kong Lufthansa Methodology Understanding”**).

| **Implementation/increase** | **Reduction/suspension** |
| --- | --- |
| **Index** | **Fuel surcharge** | **Index** | **Fuel Surcharge** |
| Exceeds 115 for 2 consecutive weeks | HKD0.40/kg (HKD0.20/kg for Asia, except South and South West Pacific) | Below 170 for 2 consecutive weeks | HKD1.20/kg (HKD0.60/kg for Asia, except South and South West Pacific) |
| Exceeds 135 for 2 consecutive weeks | HKD0.80/kg (HKD0.40/kg for Asia, except South and South West Pacific) | Below 145 for 2 consecutive weeks | HKD0.80kg (HKD0.40/kg for Asia, except South and South West Pacific) |
| Exceeds 165 for 2 consecutive weeks | HKD1.20/kg (HKD0.60kg for Asia, except South and South West Pacific) | Below 120 for 2 consecutive weeks | HKD0.40kg (HKD0.20/kg for Asia, except South and South West Pacific) |
| Exceeds 190 for 2 consecutive weeks | HKD1.60/kg (HKD0.80/kg for Asia, except South and South West Pacific) | Below 100 for 2 consecutive weeks | Suspended surcharge |

**Particulars**

124.1 On or about 16 May 2002, at a meeting of the HK BAR‑CSC, a majority of international airlines decided to change from the pre‑2002 Hong Kong methodology based on the Lufthansa Initial Methodology to a new fuel surcharge methodology based on the Lufthansa Methodology (the “**Hong Kong Lufthansa Methodology**”), to apply to the CAD to obtain approval for the revised methodology, and to impose fuel surcharges in accordance with the revised methodology upon approval.

124.2 On or about 5 June 2002, KK Leung, the Chairman of the HK BAR‑CSC, wrote a letter to the CAD on behalf of the HK BAR‑CSC, and copied to all members, applying for approval for the revised methodology.

124.3 On or about 19 July 2002, the CAD approved the revised methodology for one year with effect from 19 July 2002 until 18 July 2003.

124.4 On or about 23 July 2002, at a further meeting of the HK BAR‑CSC, it was decided to commence charging fuel surcharges in accordance with the revised methodology from 1 August 2002, and to impose a surcharge of HKD0.40/kg (HKD0.20/kg for Asia, except South and South West Pacific) from that date on the supply of air freight services from Hong Kong.

1. Importantly, [124] of the amended statement of claim begins with the allegation that, “On or about 23 July 2002” the arrangement or understanding was made. The particulars provide for events leading up to the conclusion of that arrangement or understanding on 23 July 2002.
2. On this appeal, the Commission submitted that it had run its case on the basis that an arrangement or understanding had been concluded *either* at a meeting on 16 May 2002 with subsequent conduct *or, alternatively,* as at 23 July 2002, and that the only significance of 23 July 2002 was that the implementation date was changed on that date (app ts 285‑286). The alternative case was said to arise from the particulars to the primary case.
3. This construction of [124] of the pleading is, at best, a very strained construction. In contrast with this construction, Air NZ’s understanding of the pleading was that the Commission could only succeed in relation to the 2002 Hong Kong Lufthansa Methodology Understanding if it proved that Air NZ was a party to the events of 23 July 2002. Senior counsel for the Commission accepted that this had been the manner in which Air NZ had run its case (app ts 349‑350).
4. In contrast with the way that Air NZ had approached the pleading at trial, there was a dispute on this appeal about whether the Commission had run its case beyond its pleading so as to raise the alternative allegation. The parties put copious materials before this Court and made lengthy submissions concerning the manner in which the trial was run by the Commission. It suffices to say that some of those materials provide significant support to Air NZ’s submission that the Commission ran its case on the basis that Air NZ’s presence at the 23 July 2002 meeting was a necessary condition to it succeeding against Air NZ in relation to the 2002 Hong Kong Lufthansa Methodology Understanding.
5. Ultimately, it is not necessary on this appeal to descend into all the detail of the trial. This is because when the dispute arose about the Commission’s pleading, the Commission chose not to amend its pleading. And the primary Judge’s construction of the Commission’s pleading was consistent with the approach taken by Air NZ, namely that Air NZ needed to be present at the 23 July 2002 meeting in order for it to be a party to the 2002 Hong Kong Lufthansa Methodology Understanding (app ts‑349). The primary Judge’s reasons construed the pleading in this way (see [510], [561(a)], the final sentence of [584], and [590]) and the primary Judge specifically found, in relation to the identical point concerning Garuda, that, “the pleading is concerned with entry into the understanding by being at the meeting. This is the effect of ‘on or about 23 July 2012’” ([593]). The Commission specifically declined to raise this as a ground of appeal even when the point was raised by the Court (app ts 353).

#### (iii) Did an Air NZ representative attend the 23 July 2002 meeting?

1. Air NZ submitted that the evidence cannot sustain the primary Judge’s conclusion that a representative from Air NZ, Mr Ngai, attended the 23 July 2002 meeting. There were no minutes of the 23 July 2002 meeting. Air NZ said that there was no evidence that Mr Ngai was required to attend meetings. Air NZ also said that there was evidence that Mr Ngai had missed meetings on at least five occasions.
2. The primary Judge drew the inference that Mr Ngai had attended the 23 July 2002 meeting based on the following matters taken in combination ([568], [570]):
3. Mr Gregg of Air NZ had authorised Mr Ngai to attend meetings of the HK BAR CSC on Air NZ’s behalf;
4. contemporaneous emails show that Mr Ngai had attended the meetings of the HK BAR CSC on 3 April 2002 and 16 May 2002;
5. Mr Ngai prepared a circular informing customers of the implementation of the surcharge on 23 July 2002, i.e., the same day as the meeting which had been held at 3pm; and
6. although the inference that Mr Ngai was present at the meeting may probably be drawn without resort to *Jones v Dunkel* [1959] HCA 8; (1959) 101 CLR 298, the failure by Air NZ to call Mr Ngai fortified the conclusion.
7. As to the first and second matters, Mr Ngai had attended four previous meetings on 26 September 2001, 3 October 2001, 3 April 2002, and 16 May 2002 (see ACCC.008.004.0086; [695], ACCC.009.070.0002; ACCC.009.070.0003). Mr Ngai had been involved in the process of the HK BAR CSC application and had provided updates to Mr Gregg about the process (eg ACCC.009.070.0002; ACCC.009.070.0003). Mr Gregg’s evidence was that fuel was a “significant cost” to Air NZ’s freight business (ts 1497). Mr Gregg wanted to know what was happening about the fuel surcharges and he had left the detail of the discussions with other airlines to Mr Ngai (ts 1619). The primary Judge’s inference is supported by these two matters involving the significance to Air NZ of the issue at the 23 July 2002 meeting, and the need for Mr Ngai to report to Mr Gregg about it.
8. The third matter is also significant. The primary Judge observed that it suggested either that Mr Ngai had become aware very quickly of what had occurred at the meeting or that he was present at it. As to whether he could have become aware very quickly of what occurred at the meeting, there was no correspondence from the HK BAR CSC on that day informing the airlines of the surcharge outcome ([568]).
9. The letter (Tab [921]) is authored by Mr Ngai, entitled “Re: Airline Fuel Surcharge” and written to “Dear Valued Customer”. It is dated 23 July 2002. Mr Ngai said that, “reluctantly, we are obliged to advise you that *similar to other carriers,* Air New Zealand will be implementing a Fuel Surcharge” (emphasis added). He then summarises the new 2002 Lufthansa Methodology and explains that the commencement date is 1 August 2002 for all Air NZ flights out of Hong Kong.
10. Air NZ asserted that there was evidence that Mr Ngai’s letter had been prepared on the afternoon of 24 July 2002 rather than the day which it was dated, which was the day of the meeting. Air NZ pointed to two exhibits in support of this assertion. Neither of them sustains the assertion.
11. The first exhibit to which Air NZ pointed (ACCC.009.053.0154) is an email sent by Mr Ngai on 24 July 2002 at 3.27pm to Mr Heard (an Air NZ officer with duties to input details into the computer system: app ts 162), but only copied to Mr Gregg. In the email Mr Ngai said, “HKCAD just approved our application. Attached letter to agent”. This is not inconsistent with the attached letter being written the previous day. Indeed, Mr Ngai’s language is resonant of personal knowledge from the previous day. He said that HK CAD just approved our (ie HK BAR CSC’s)application. He does *not* say, “I have just been told that HK CAD approved our application yesterday”.
12. The second exhibit to which Air NZ pointed (ANZ.144.003.20075) was a “weekly sales report” from Mr Ngai sent to Mr Gregg and Mr Turner with the highlighted notation, “Email by every Wednesday nite”. It was dated (Wednesday) 24 July 2002. One sentence in it said “HKCAD just approved HKG to implement HKD0.40/pk fuel surcharge wif 01Aug. We will distribute letter to agent this afternoon”. Again, nothing in this weekly Wednesday report suggests that the letter to the agent had only been written on the day of the report, 24 July 2002.
13. Air NZ then submitted that the letter from Mr Ngai might have been copied from a letter, also on 23 July 2002, from Cathay Pacific’s Manager of Cargo Sales to Cathay Pacific agents. The Commission submitted that this point had not been made at trial (app ts 293).
14. One paragraph of Mr Ngai’s letter is nearly identical to the Cathay Pacific letter and there are some other parts of the letters that are very similar. Air NZ submitted that the similarity between the letters invited the inference that Mr Ngai had a copy of the Cathay Pacific letter when he wrote his letter.
15. It is possible that Mr Ngai had a copy of the Cathay Pacific letter when he wrote his letter (although as this point was not made at trial there was no evidence concerning the probability that Cathay Pacific had Mr Ngai’s letter or whether they both had a different letter or circular that might have been distributed at the meeting). But a number of matters about his letter nevertheless suggest that he was present at the meeting earlier that afternoon rather than merely becoming aware of the matters at the meeting from the Cathay Pacific letter: (i) the timing and speed of his letter (on the same day as the 3pm meeting); (ii) his statement that the fuel surcharge was being imposed “similar to other carriers” when the letter from Cathay Pacific had said in its letter only that Cathay Pacific would follow the decision of HK BAR CSC; and (iii) additional “Guidelines for Introduction” which were not contained in the Cathay Pacific letter.
16. The conclusion reached by the primary Judge based on the first three matters described above, that Mr Ngai was present at the 23 July 2002 meeting, was one which was both open and correct.
17. As for the fourth matter, being the primary Judge’s application of *Jones v Dunkel,* this was entirely unexceptional. His Honour relied only upon the absence of Mr Ngai as a witness to fortify a conclusion which he considered would probably have been reached in any event. The first three matters raised an inference which Air NZ was required to contradict or explain; the failure to call Mr Ngai assisted in the conclusion that Mr Ngai’s evidence would not have assisted Air NZ: *Schellenberg v Tunnel Holdings* [2000] HCA 18; (2000) 200 CLR 121, 142-143 [51] (Gaudron J).

#### (iv) The alleged improbability of the 23 July 2002 Understanding

1. Air NZ submitted that it was inherently improbable that any airline would have made a contract, arrangement or understanding in the terms alleged on 23 July 2002. Air NZ made this submission by dividing the alleged understanding into two components and submitting that each was improbable. The two components, according to Air NZ, were: (i) replacement of the pre‑2002 Hong Kong Lufthansa Methodology with a revised methodology (the “Replacement Provision”); and (ii) a provision to impose surcharges in accordance with that methodology (“Imposition Provision”).
2. As to the Replacement Provision, Air NZ submitted that (i) as an evidentiary matter it was improbable that airlines would reach an understanding to replace the old methodology with the 2002 Hong Kong Lufthansa Methodology in circumstances in which the HK CAD had already effected that substitution; and (ii) it did not fall within the proscription in s 45 and 45A of the *Trade Practices Act.*
3. As to the Imposition Provision, Air NZ submitted that it was inherently unlikely, and there was insufficient evidence from which the primary Judge could have concluded, that an understanding was reached that the airlines would all charge the surcharge after 1 August 2002 (Air NZ submissions [99]).
4. The difficulty with these submissions is that the Commission’s pleaded case did not divide the alleged understanding into these two separate components. Nor does it make sense for it to be so divided. As the Commission pleaded in its further amended statement of claim before the primary Judge at [124] and its particulars, the arrangement or understanding that had been reached on 23 July 2002 was the culmination of a number of matters commencing with the meeting of HK BAR CSC on 26 May 2002 when a majority of international airlines decided to change from the pre‑2002 situation to the 2002 Hong Kong Lufthansa Methodology, to apply to the HK CAD to obtain approval for the revised methodology, and to impose fuel surcharges in accordance with the revised methodology upon approval.
5. This was also the approach taken by the primary Judge. At [584] the primary Judge correctly held:

Before the approval on 19 July 2002 the airlines had agreed on 16 May 2002 that they wished to impose a particular surcharge but needed to get approval to do so from the HK CAD. In the absence of an approval this agreement had no immediate consequences. When the approval was forthcoming that which they had all previously agreed they wanted to do became possible. On 23 July 2002, it now being legally possible to impose the surcharge, they all decided to do so. Far from rendering the events before it irrelevant, the approval and the meeting of 16 May 2002 explain precisely why it was extremely likely that the airlines would agree on 23 July 2002 to impose a fuel surcharge. In my opinion, the only credible answer to that contention would be a submission that they reached no such agreement on 23 July 2002 because it had already been reached on 16 May 2002. Such an argument, understandably enough, was not advanced.

1. Since the pleaded undertaking was only a single undertaking, finally concluded on 23 July 2002 when the implementation was agreed, it is artificial to try to segment the understanding into different parts and to allege that an earlier undertaking, the Replacement Provision, was improbable. The submission of Air NZ would have had force if the whole of the understanding had only been formulated on 23 July 2002. In those circumstances, as Air NZ submitted, it would have been nonsense for the airlines to have agreed to replace an existing methodology with the 2002 Hong Kong Lufthansa Methodology that the HK CAD had already approved. But that was not the case that was pleaded or run by the Commission. As the Commission had pleaded, the 23 July 2002 understanding was the culmination of a number of previous matters, to which an implementation date was added on 23 July 2002 following HK CAD approval.
2. The forensic purpose of such a separation was to permit Air NZ to argue that ss 45 and 45A did not prohibit an understanding which involved replacing a methodology when the decision whether the methodology would be replaced was a decision to be made by HK CAD *not* by the airlines. This involves not merely a contorted reading of the Commission’s pleading but also an absurdity. It would be an absurd construction for the Commission to have run a case that the airlines had reached an understanding to replace a methodology when that replacement was the role of HK CAD. Nor was the Commission’s case one in which the understanding involved lobbying HK CAD for a replacement methodology. The pleaded case of the Commission was of a single undertaking for the airlines to replace the methodology they used *and* to implement that new methodology. Naturally, this undertaking could not take place until after HK CAD had approved the new methodology (the 2002 Hong Kong Lufthansa Methodology). But once this had occurred, the airlines undertook, on 23 July 2002, to implement that methodology on 1 August 2002.
3. In relation to Air NZ’s submission about the inherent unlikelihood or insufficiency of evidence for the Imposition Provision, it is necessary to reiterate that the Commission’s pleaded case was not that there were two separate understandings involving separate evidence concerning (i) a Replacement Provision; and (ii) an Imposition Provision. Further, as explained above, there was no obligation on the airlines to implement any approved methodology. Indeed, the parties referred to evidence that the market was highly competitive (app ts 223) which might suggest an elastic response to price changes. In that context, the evidence that supported an understanding of the airlines at the 23 July 2002 meeting to impose the 2002 Hong Kong Lufthansa Methodology on 1 August 2002 was as follows:
4. Four contemporaneous documents which recorded “the floor came to the conclusion as [follows]: *Effective date*: 01th [sic] August 2002” (Mr Ho, Qantas) (emphasis added); “The surcharge … will be *effective from* 01 AUG 2002” (Mr Yip, Singapore Airways) (emphasis added) and “All airlines in BAR have agreed to implement the surcharge *as from* 01 AUG 02” (Mr Yip, Singapore Airways) (emphasis added); “Members of the BAR‑CSC has decided *to start collecting* the new fuel surcharge *from* Aug 01, 2002” (Mr Leung, Cathay Pacific) (emphasis added); and “BAR‑CSC held a meeting this afternoon (July 23) which decided to implement the fuel surcharge *effective from* August 01, 2002” (Mr Leung, Cathay Pacific) ([551]‑[554]) (emphasis added). The use of words such as “effective date”, “start collecting”, “effective from”, and “All airlines in BAR have agreed to implement the surcharge *as from*” do not suggest, as Air NZ submitted, that the airlines would merely *consider* whether to impose the surcharge at some unspecified date after 1 August 2002.
5. The statement by Mr Ho from Qantas that, “HAFFA requested Carriers to impose fuel surcharge with two weeks notification as they need time to inform all their members” was followed by the words, “*However*, the floor came to the conclusion” that the effective date would be 1 August 2002 ([551]) (emphasis added). Contrary to the submission by Air NZ, this indicates an intention to impose the surcharge from 1 August 2002 despite HAFFA’s concerns. It does *not* suggest an agreement to implement at some unspecified time after 1 August 2002.
6. As the primary Judge found based on accounts from the four people at the meeting on 16 May 2002, on that date fifteen of the sixteen airlines present (including Air NZ) agreed to switch to the 2002 Hong Kong Lufthansa Methodology if it was approved, and to implement it if possible on 1 June 2002 ([544]) (Mr Chan had described the target implementation date as 15 June 2002 [541]). The 23 July 2002 understanding was consistent with this agreement of the fifteen airlines on 16 May 2002, with the addition of the new implementation date.
7. To these matters can be added the following:
8. Mr Ngai’s letter to Air NZ’s customers (Tab [921]), dated 23 July 2002, where Mr Ngai said, “reluctantly, we are obliged to advise you that similar to other carriers, Air New Zealand will be implementing a Fuel Surcharge … with effect from Thursday August 01, 2002” (emphasis in original).
9. A letter from Mr Leung to Mr Ho on 23 July 2002, said, “This is to inform that CAD has approved BAR‑CSC’s application for the new fuel surcharge mechanism” and “[s]ubsequently BAR‑CSC held a meeting this afternoon (July 23) which decided to implement the fuel surcharge effective from August 01, 2002” (ACCC.008.002.0257).
10. A letter from Mr Leung to Mr A Shum on 6 August 2002, “[u]pon the CAD approval, BAR‑CSC decided to implement the fuel surcharge effective from August 01, 2002” (ACCC.008.024.0309).
11. Air NZ also submitted that an alternative inference was, at least, equally open from these communications. That alternative inference was said to be that there was no understanding between the airlines to *implement* the surcharge but, instead, the airlines independently, and despite competitive market conditions and the absence of any obligation, coincidentally all chose to implement the surcharge due to commercial imperatives. The surcharge was therefore said to have been substantially implemented ([617]) on the same date by all the airlines but for independent commercial reasons and not due to any understanding. Air NZ pointed to [619] of the primary Judge’s reasons as a finding to this effect (app ts 170).
12. Paragraph [619] of the primary Judge’s reasons does not support Air NZ’s submission. In that paragraph the primary Judge said:

I am satisfied that the likely effect of the understanding that was reached was that the airlines would increase their respective freight rates by the amount of the surcharge. It was the point of the surcharge. As the discussions leading to the surcharge show, the aim of the surcharge was to compensate the airlines for the rising cost of fuel. I cannot accept that any of the airlines *who were party to the understanding* had any intention but as soon as possible to increase their freight rates by the amount of the surcharge. Nothing stood in the way of preventing what the airlines in fact intended to happen from happening. It was therefore the likely effect of the understanding that the airlines would increase their freight charges by the amount of the surcharge. (Emphasis added).

1. The italicised words are important. When read with the preceding paragraphs, the point being made by the primary Judge at [619], with respect entirely correctly, was that the implementation of the surcharge was the likely effect of the understanding. Indeed, earlier, the primary Judge had described the airlines’ purpose was, “control of their freight prices by the largely simultaneous increase in those rates” and for, “all airlines to increase their rates” ([615]).
2. There is also an internal tension between the submissions by Air NZ that (i) the airlines all chose to implement the surcharges independently and for commercial imperatives; and (ii) any airline could choose not to increase a surcharge and instead increase the total price or rate. Senior counsel for Air NZ submitted that increasing total rates was “not an attractive proposition” because it would mean that the airline would not be, “competitive against others who don’t do that” (app ts 172). Yet, this would be exactly the same consequence of increasing a surcharge independently unless the increase in the surcharge did not affect the overall rate. But if the increase in surcharge did not affect the overall rate then how could there be a commercial imperative to increase the surcharge?
3. For these reasons, there was no improbability in the 23 July 2002 understanding that the airlines would implement the (replaced) 2002 Hong Kong Lufthansa Methodology on 1 August 2002.

#### (v) Whether the eight extensions of the 2002 Hong Kong Lufthansa Methodology Understanding “overtook” the Methodology Understanding

1. Air NZ’s final submission in relation to its contentions about the 2002 Hong Kong Lufthansa Methodology Understanding was that the four surcharge levels upon which the pleaded understanding was based were “quickly overtaken” by new levels approved by the HK CAD after the expiry of the HK CAD’s 19 July 2002 approval. Air NZ submitted that it was not a party to any understanding to extend the methodology to those higher levels. The importance of this issue was said by Air NZ to relate to pecuniary penalties because those penalties were said to be time barred for understandings implemented prior to May 2004 (app ts 54).
2. The primary Judge found that the Commission had pleaded that the 2002 Hong Kong Lufthansa Methodology Understanding was varied by subsequent arrangements or understandings which added additional, higher levels to the index pleaded in [124] of Air NZ’s further amended statement of claim: see [575].
3. There were two aspects to Air NZ’s submission on this point. The first was that the Commission had not pleaded any variation to the 2002 Hong Kong Lufthansa Methodology Understanding. The second was that the primary Judge found (in a finding which is not challenged on appeal) that Air NZ was not a party to any of the alleged subsequent eight extension understandings (defined as the First Hong Kong Surcharge Extension Understanding through to the Eighth Hong Kong Extension Understanding, together the “Extension Understandings”): [665], [692]‑[693]. Air NZ submitted that this finding should have precluded the primary Judge from finding that the 2002 Hong Kong Lufthansa Methodology Understanding had been varied.
4. As to the pleading point, the primary Judge was entirely correct in his conclusion at [575] that a subsequent arrangement or understanding was pleaded at [159]‑[162], [170]‑[173], [192]‑[197], [204]‑[208], [214]‑[218], and [236]‑[242] of Air NZ’s submissions. The pleading related to each of the Extension Understandings and pleaded *in the alternative* that the increased level of fuel surcharge gave effect to the 2002 Hong Kong Lufthansa Methodology Understanding *or* the relevant extension understanding (see amended statement of claim [150], [157], [169], [185], [203], [213], [235], [242]). The former of these pleas can only be understood as a plea that the increased level of fuel surcharge gave effect to the 2002 Hong Kong Lufthansa Methodology Understanding *as varied* by the new index*.* This becomes even clearer by reference to [57] of the pleading which separated the Lufthansa Index from the Lufthansa Initial Methodology and indicated the two components.
5. As to the submission that a finding of subsequent variation was precluded because the primary Judge found that Air NZ was not a party to an understanding to extend the methodology to the higher levels, the description of the primary Judge’s finding is correct but it is beside the point. The Commission’s case concerning variation was separate from its case concerning the alleged eight separate and independent arrangements or understandings (“concerning changes to the index itself or the duration of its approval”: [677]). They were particular understandings based on different evidence and pleaded in the alternative to a variation of the 2002 Hong Kong Lufthansa Methodology Understanding. Although the primary Judge did not explain the basis for the variation of the 2002 Hong Kong Lufthansa Methodology, that basis must have been the conduct that amounted to the Hong Kong Imposition Understanding. We consider the Hong Kong Imposition Understanding later in these reasons.

### The Hong Kong Extension Understandings: Garuda

1. The issues concerning liability arising from the Hong Kong Extension Understandings concern only Garuda. This is because the primary Judge found that Air NZ was not a party to any Extension Understanding separate from the 2002 Hong Kong Lufthansa Methodology Understanding ([665]). The Commission did not challenge this conclusion by the primary Judge. However, the primary Judge concluded that although Garuda was not a party to the 2002 Hong Kong Lufthansa Methodology Understanding, unlike Air NZ it *was* a party to the First Hong Kong Extension Understanding.
2. The evidence concerning the Hong Kong Lufthansa Methodology Understanding is sufficiently outlined above, as are his Honour’s findings. However, some of the documents which followed its approval by HK CAD are relevant to other understandings to which, as his Honour found, Garuda was a party.
3. On 5 June 2002, the Chair of HK BAR CSC wrote to HK CAD seeking approval of the proposed adoption of the Lufthansa Methodology.
4. On 15 August 2002 the Director‑General of Aviation wrote to the Chair of HK BAR CSC as follows (ACCC.008.024.0308):

I refer to our letter dated 19 July 2002 and your subsequent letter dated 6 August 2002.

I wish to reiterate that it is a condition of our approval that the BAR CSC shall inform the CAD one week in advance of any fuel surcharge to be levied under the mechanism approved in our letter dated 19 July 2002. I would also like to remind you that according to the Air Services Agreements concerned, designated airlines may only charge tariffs approved by relevant aeronautical authorities. In this connection, I would be grateful if you could ensure that airlines observe the provisions in the Air Services Agreements. Failure to do so may invalid[ate] our approval of your tariff filing.

1. His Honour observed at [547]:

What was approved was the application of 5 June 2002. The approval was of limited duration, one year from 19 July 2002. It did not require the airlines to obtain approval for each surcharge as it became levyable by reason of increases or decreases in the index. The obligation was only that the HK BAR CSC inform the HK CAD each time there was a change in surcharge and the corresponding index level. The approval did not contemplate airlines charging some other surcharge. The HK BAR CSC was required to inform the HK CAD of the level of surcharge levied from which it may readily be inferred there was only to be one surcharge.

1. Notwithstanding the primary Judge’s finding that Garuda was not party to the 2002 Hong Kong Lufthansa Methodology Understanding, his Honour concluded at [596] that Garuda participated in every surcharge variation under the understanding. At [114]‑[130] of the further amended statement of claim, the Commission pleaded that between 1 August 2002 and 18 December 2003, Garuda gave effect to the Hong Kong Lufthansa Methodology Understanding by imposing fuel surcharges fixed in accordance with that understanding. That case failed in the absence of a finding that Garuda was a party to that understanding.
2. At [131]–[230] of its amended statement of claim against Garuda the Commission pleaded eight arrangements or understandings (surcharge extension understandings), reached between 12 June 2003 and 16 May 2006. It pleaded that implementation of the eighth and final understanding continued until 17 October 2006 ([230]). Each of the eight understandings allegedly involved extension and/or amendment of the 2002 Hong Kong Lufthansa Methodology Understanding. The Commission pleaded that the imposition of each fuel surcharge either gave effect to the 2002 Hong Kong Lufthansa Methodology Understanding, or gave effect to a new understanding.
3. At [242B], the Commission further pleaded, apparently alternatively, that at some time between February 2003 and February 2005, HK BAR CSC and its member airlines, or some of them, including Garuda, made an arrangement or understanding that the airlines in question would impose fuel surcharges fixed in accordance with the methodology approved by HK CAD. This understanding is described as the “Hong Kong Imposition Understanding”. The case seems to depend upon the fact that with respect to each increase or decrease in fuel charges, and each approval of an extension or amendment of the fuel surcharge mechanism by HK CAD, there was correspondence between it and HK BAR CSC, copied to the airlines, and other correspondence. That correspondence and the associated documents are said to have, at some stage, resulted in a relevant arrangement or understanding to which Garuda was a party, and to which it gave effect. Below, we consider these alternative cases.
4. Of the eight understandings, the primary Judge found only the first (the First Hong Kong Extension Understanding) to be proven against Garuda ([665]). Hence Garuda’s notice of contention does not address the other seven alleged understandings. The extension understanding is dealt with in the notice of contention at grounds 59‑62 and in Garuda’s submissions at [83]‑[87]. The primary Judge dealt with it at [659]‑[667]. At [131]‑[138] of the amended statement of claim, the Commission pleaded:

131. On or about 12 June 2003, Garuda made an arrangement or arrived at an understanding, … containing provisions that the HK BAR‑CSC should apply to the CAD to extend the approval for the Hong Kong Lufthansa Methodology, and those international airlines would continue to apply surcharges in accordance with that methodology … .

…

132. Each of the provisions, or alternatively one or more of the provisions, of the First Hong Kong Extension Understanding:

132.1. had the purpose or had the effect or was likely to have the effect of fixing or controlling or maintaining the price charged by Garuda and the price charged by the other parties to the First Hong Kong Extension Understanding for the supply of air freight services including the supply of air freight services to Australia in competition with each other; and

132.2. was a provision to which section 45A of the TPA applied.

133. On or about 20 June 2003, the HK BAR‑CSC applied for an extension to the approval of the Hong Kong Lufthansa Methodology.

…

134. On or about 11 July 2003, the CAD approved an extension to the Hong Kong Lufthansa Methodology until 18 January 2004.

…

135. On or about 10 November 2003, at a meeting of the HK BAR‑CSC, it was decided to appoint a Surcharge Working Group to deal with surcharge issues.

136. By 5 December 2003, the Lufthansa Fuel Index had exceeded index level 165 for two consecutive weeks, and on or about 5 December 2003 the Chairman of the HK BAR‑CSC wrote to the CAD, copied to all HK BAR‑CSC members, notifying it that the Lufthansa Fuel Index had exceeded 165 for two consecutive weeks, and that HK BAR‑CSC members would levy a fuel surcharge of HKD1.20/kg (HKD0.60/kg for Asia, except South and South West Pacific) from 19 December 2003.

…

137. In the period from on or about 19 December 2003 until on or about 10 May 2004, Garuda imposed a fuel surcharge of HKD1.20/kg (and HKD0.60/kg for Asia except South and South West Pacific) on the supply of air freight services from Hong Kong.

138. By imposing the fuel surcharge referred to in the previous paragraph, Garuda:

138.1. gave effect to one or more of the provisions of the 2002 Hong Kong Lufthansa Methodology Understanding; and

138.2. further or in the alternative, gave effect to one or more of the provisions of the First Hong Kong Surcharge Extension Understanding.

These paragraphs plead both the making of the First Hong Kong Extension Understanding and its implementation.

1. The conduct in question must be seen in light of the fact that HK CAD’s approval of the modified Lufthansa methodology was to expire on 19 July 2003. His Honour said that it became “necessary” for the airlines to seek to extend its operation ([659]). The word “necessary” is perhaps a little inappropriate in the sense that it is an inference rather than a statement of fact. The possible extension of the two surcharges (fuel and security) was first raised by letter dated 9 June 2003 from the Chair of the HK BAR CSC to members of the relevant sub‑committee as follows.

As the two surcharges will expire by mid‑July 2003, I would like to call a meeting this Thursday afternoon (June 12, 2003) to discuss the issue together. My initial suggestion is to apply with CAD for an extension of the 2 surcharges – to keep the current fuel surcharge mechanism and to maintain the existing insurance surcharge at HK$0.25/kg.

The meeting will be held:

Venue: Hong Kong Hotels Association

508‑511, Silvercord Tower Two

30 Canton Road

Tsimshatsui

Date: June 12, 2003 (THU)

Time: 2:30PM

Please confirm your participation to Maria Ng via email address: maria\_f\_ng@cathaypacific.com or simply call her at 2747 7229 before June 11, 2003.

1. At that meeting Garuda was represented. No minutes are in evidence. However a Lufthansa employee reported as follows:

Have just attended the BAR‑CSC meeting and would like to give you an update on the discussions:-

For fuel surcharge, it was agreed that BAR will submit an application to CAD to extend the current fuel surcharge mechanism and level. Indeed, I have asked if we should adjust the surcharge level in HKD due to the appreciation of EUR in last year (as the current mechanism is based on LHC's methodology which takes € as currency unit). However, KK mentioned that different airlines use different currency units like USD, JPY, thus he suggested not to adjust the surcharge level in line with EUR development. He also felt that it would not be convincing to CAD to adjust the surcharge level just because of EUR appreciation. Thus, it was finally decided that we should keep the current mechanism & level for application to CAD.

…

1. On 16 June 2003 Mr Jimmy Wong, Garuda’s Sales Manager for Hong Kong and China, completed a questionnaire, apparently sent by the Chairman, HK BAR CSC. Under the heading “Cargo Fuel Surcharge Mechanism” two questions were posed, namely:

1. Do you follow BAR-CSC to apply for extension of the current fuel surcharge mechanism for ex-HK cargo?

2. If no, do you apply with CAD separately.

After each question there is provision for a person to tick either a “Yes” or “No” box. For the first question Mr Wong ticked the “Yes” box. As a result, he did not respond to the second question.

1. The second question appears under the heading “Cargo Insurance Surcharge”. The questions are:

1. Do you follow BAR-CSC to apply for extension of the current insurance surcharge of HK$0.25/kg for ex-HKG cargo?

2. If no, do you apply with CAD separately.

1. Mr Wong again answered “Yes” to the first question and did not respond to the second question.
2. On 20 June 2003, the Chair of HK BAR CSC wrote to the Assistant Director‑General (Air Services) of the Civil Aviation Department, as follows:

Re: Extension of Cargo Fuel Surcharge - Mechanism from July 19, 2003

BAR-CSC held a meeting on June 12, 2003 to discuss the cargo fuel surcharge mechanism as it will expire by July 18, 2003 after the one‑year validity granted by CAD.

At the meeting, the airlines reviewed the mechanism and agreed to adopt the current mechanism for another year because:

- the mechanism is fair and transparent to airlines, shippers and forwarders because it allows the surcharge to adjust according to fuel prices. If fuel prices drop to a certain level, the surcharge will be suspended.

- the current mechanism has four levels of surcharge adjustment which reflect more closely with the volatile movements of fuel prices. The old mechanism has only two levels.

- the extreme fluctuation of fuel prices makes it difficult for airlines to build the fuel surcharge into the freightage. As you can see in Appendix A, within a period of slightly more than a year, the fuel index surged from the low 100 in January, 2002 to the high 196 in March, 2003. The volatility the fuel prices is further illustrated in Appendix B, which shows the fuel surcharge has been revised 6 times since the surcharge mechanism was implemented on July 19, 2002.

- the existing mechanism, compared with the old one, is more beneficial to shippers and cargo forwarders because they have enjoyed savings in total surcharge amount since it was implemented on July 19, 2002 This is shown in the comparison table attached in Appendix B.

- HK is not the only area to impose a cargo fuel surcharge. All the other major export cargo areas have been doing a similar thing. Next week I will provide an updated list of what the other areas are doing.

The latest fuel index as of the week of June 13, 2003 was 138. BAR‑CSC Is levying the surcharge HK$0.80/kg for longhaul destinations and HK$0.40/kg for shorthaul destinations. If CAD approves BAR‑CSC to keep the current mechanism after July 18, 2003, the airlines will continue to charge the same surcharge amount unless there is any major fluctuation in fuel prices.

We are grateful if CAD will support and approve BAR‑CSC to maintain current fuel surcharge mechanism for another year after the expiry date on July 18, 2003.

Thank you for your attention.

The letter was copied to HK BAR CSC members.

1. At first instance Garuda submitted that the understanding was that the parties would apply to HK CAD for extension of its initial approval. However, his Honour inferred from Garuda’s presence at the meeting of 12 June 2003 that it was party to an understanding to fix or control prices, saying at [665]:

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.

1. On appeal Garuda submitted that:
2. the evidence did not establish an agreement in the terms alleged;
3. if an agreement was reached, it was simply to apply to the HK CAD for an extension of the tariff decision then in force;
4. it was a “tariff decision” in terms of the HK CAD’s letter of 15 August 2002;
5. if the tariff was approved, then there was no room for airlines to agree that they would continue to apply surcharges in accordance with that methodology because that outcome was required by the law of Hong Kong and the airlines’ permits, and had been mandated by the HK CAD; and
6. had the HK CAD refused approval, the evidence was unanimous that the surcharge would have ceased.
7. Garuda conceded that as at 12 June 2003 it:
8. knew of the terms of the HK CAD approval of 19 July 2002;
9. knew of the terms of the HK CAD letter of 15 August 2002, reminding airlines that they were required to observe the provisions in their relevant air services agreement to charge only approved tariffs; and
10. was applying a fuel surcharge on each sale of an air waybill in Hong Kong in accordance with the HK CAD decision.

The reference to an air waybill should be understood as a reference to the supply of air cargo services.

1. Our earlier reasoning disposes of all but the first two submissions. Those submissions depend upon the inferences which may properly be drawn from the evidence concerning the meeting of 12 June 2003. Garuda submitted that contemporaneous records of the meeting, “are silent on any question concerning the application of the surcharge”. This submission overlooks the fact that the intention to seek approval of future conduct is, itself, a basis for inferring an intention to engage in such conduct. In the present case, the agreement to seek such approval is a basis for inferring a common intention to engage in that conduct. Further, we do not accept that the evidence is otherwise silent as to a shared intention. The Lufthansa memorandum suggests that the operation of the indexing mechanism was of importance to Lufthansa. There is no reason to believe that it was unimportant to the other airlines. The amount of time spent on the question of the surcharges, spread over a number of years, suggests otherwise. The questionnaire sent to Mr Wong and his response reinforces the view that the airlines were concerned about the way in which they would collectively respond to cost increases.
2. Finally, notwithstanding its absence from the meeting of 23 July 2002, Garuda knew of the proposal to adopt the 2002 Hong Kong Lufthansa Methodology and of HK CAD’s approval of such adoption. In addition, at [596] the primary Judge concluded that Garuda had taken part in every surcharge agreement variation pursuant to the 2002 Hong Kong Lufthansa Methodology Understanding, strongly suggesting compliance with, if not adoption of it. There is no reason to believe that other airlines had not also done so. In that context, it is difficult to avoid the conclusion that the letter of 20 June 2003 sought approval of conduct in which the airlines intended to participate.
3. A separate submission made by Garuda, at [109] of its written submissions, was that the primary Judge supported his conclusions as to the engagement of s 45A by reference to his reasons concerning the 2002 Hong Kong Lufthansa Methodology Understanding, reached in July 2002 (see the primary judgment at [658] and [667]). Garuda submitted that his Honour erred in so doing given that, in the case of that understanding he had, at [617], found that thereafter, all airlines which were parties to it raised their prices. Garuda pointed out that such increases said nothing about understandings allegedly reached between February and June 2003. Hence it submitted that the primary judgment itself discloses an error, presumably that his Honour relied upon the fact that the airlines raised prices in or after July 2002, when such conduct could not have been relevant in connection with the First Hong Kong Extension Understanding.
4. At [617], his Honour dealt with actual effect, having previously dealt with purpose at [614]‑[616], and subsequently with likely effect at [618]‑[619]. Obviously enough, actual events after the making of the understanding may well have said something about its effect, but less about its purpose or likely effect at the time at which it was made. To the extent that his Honour referred to actual increases which followed the imposition of surcharges after June 2003 in connection with the First Hong Kong Extension Understanding, he identified them. We do not accept that his Honour impermissibly relied upon the events preceding June 2003. The references at [658] and [667] to his Honour’s earlier reasons should be understood as applying those reasons mutatis mutandis.
5. In our view his Honour’s conclusion was fairly available on the evidence. Garuda has demonstrated no error.

### The Hong Kong Imposition Understanding

1. Both Air NZ and Garuda were found to have been party to the Hong Kong Imposition Understanding ([658]). The Commission’s case in relation to the Hong Kong Imposition Understanding was not substantially different from its alternative case, described above, that the 2002 Hong Kong Lufthansa Methodology Understanding had been varied by conduct of the airlines following each change in the index. However, the Hong Kong Imposition Understanding was separately pleaded (set out at [647]) and dealt with by the primary Judge. We have also followed this approach. We have considered the submissions made by Air NZ and Garuda separately because although they raised some matters of common ground not all issues were put in the same way.

#### Air NZ

1. The primary Judge found that Air NZ and the other airlines reached an understanding that they would all impose the fuel surcharge in accordance with the level circularised in each letter from the HK BAR CSC to the HK CAD.
2. The primary Judge drew this inference against Air NZ by reference to three matters ([650]):
3. the parallel pricing that occurred between the airlines;
4. written exchanges of pricing intentions between the airlines which were circulars issued by HK BAR CSC notifying airlines when various trigger levels for the surcharges had been met; and
5. the context (in the case of Air NZ) which included its involvement at the meeting of 23 July 2002 where it took part in price fixing.
6. Air NZ submitted that the primary Judge erred in drawing this inference because:
7. parallel pricing was inevitable in circumstances in which the airlines could only charge the approved surcharge (Air NZ submissions at [106]);
8. as the primary Judge had found, the circulars from HK BAR CSC were required by the HK CAD as a condition of its approval of the index mechanism ([546]‑[547]) and, in any event, these circulars merely provided notification of the only lawful surcharge that could be imposed (Air NZ submissions at [107]); and
9. Air NZ reiterated earlier arguments (addressed above) that Air NZ did not reach any understanding at the 23 July 2002 meeting (Air NZ submissions at [108]).
10. We do not accept these submissions. Each of the points made by Air NZ above can be addressed separately, although it is the cumulative force of them that is relevant.
11. We have already rejected point (3). The existence of a previous understanding provides substantial colour to points (1) and (2).
12. Further, point (1) ignores the important qualification that airlines were not required to charge the approved surcharge. As we have explained, assuming that rates otherwise remained the same, the concern that an airline would not be competitive against another who did not impose an additional surcharge could only be ameliorated by an understanding among all the airlines to impose the surcharge.
13. As for point (2), the condition imposed by HK CAD was for HK BAR CSC to notify HK CAD. It was not a condition that HK BAR CSC copy all of its members into the letters advising of the trigger levels ([648]‑[649]). Nor was it a condition that the member airlines should put their names forward to HK BAR CSC to be included on a circulated list, and to remain on a list of airlines who were imposing fuel surcharges ([647]‑[648]). Those additional elements support the inference drawn by the primary Judge.
14. The primary Judge’s findings concerning the Hong Kong Imposition Understanding should be upheld in relation to Air NZ.

#### Garuda

1. This matter is dealt with at grounds 55‑58 of the notice of contention, [88]‑[102] of Garuda’s written submissions and in his Honour’s reasons at [623]‑[658]. It should be kept in mind that this part of the pleading is, in effect, alternative to the pleading concerning the eight alleged Extension Understandings. The Commission pleaded at [230A] of its amended statement of claim that:

230A. Further to paragraphs 112 to 230, in respect of each increase or decrease of the fuel surcharge and each extension of approval for the fuel surcharge mechanism by the CAD:

230A.1 the HK BAR‑CSC wrote to member airlines (including Garuda) informing them of the fuel surcharge to be imposed by member airlines and (when relevant) the date of commencement;

230A.2 the HK BAR‑CSC wrote to the CAD, copied to member airlines, informing the CAD of the surcharge which member airlines would be imposing and usually including a list of airlines (including Garuda) who would be imposing the surcharge and the latest fuel index movements upon which the fuel surcharge mechanism was based;

230A.3 on occasion, the HK BAR‑CSC wrote to the CAD, copied to all members, informing the CAD of the surcharge which the members would be imposing but separately maintained with the CAD a list of airlines (including Garuda) who were imposing fuel surcharges in accordance with the fuel surcharge mechanism approved by the CAD;

230A.4 the member airlines included on the lists referred to in 230A.2 and 230A.3 put their names forward to the HK BAR‑CSC for inclusion in the list, and permitted their names to remain on the list; and

230A.5 the member airlines included on the lists referred to in 230A.2 and 230A.3 imposed the fuel surcharges in accordance with the notification to the CAD.

…

There follows a list of 52 letters or emails, many with attachments. All are from HK BAR CSC to member airlines or to HK CAD. Communications to HK CAD were generally copied to members.

1. At [625] of the primary judgment his Honour said:

The Commission ran an alternative case that on each occasion a trigger for a change in the surcharge was indicated by the appropriate fluctuation in the price of aviation fuel, the HK BAR CSC wrote to the HK CAD, sending a copy to the member airlines, and informing it of the amount of the surcharge which would be imposed and the date of its imposition; that the HK BAR CSC would also inform the HK CAD of the identity of the airlines who would be implementing the relevant surcharge alteration by providing it with a list of participating airlines, a copy of which was also provided to the airlines themselves; that the airlines included in the lists put their names forward to be included on them and permitted their names so to be included; and that the airlines on the lists imposed the surcharge in accordance with the amount and timing notification to the HK CAD. These events are said to have occurred between 6 August 2002 and 26 September 2006 and are alleged to have given rise to an understanding between the airlines by February 2003, and no later than February 2005, that they would impose fuel surcharges in accordance with each notified alteration sent to the HK CAD.

1. At [626]‑[646], his Honour analysed many of the documents identified in the amended statement of claim. At [650] his Honour concluded:

The Commission says that the Court should infer that the airlines had reached an understanding that they would all impose the surcharge in accordance with the level circularised in each letter from the HK BAR CSC to the HK CAD. Having regard to the principles outlined above in Chapter 8 it seems to me that what one has here is: (a) parallel pricing; and (b) written exchanges of pricing intentions. However, these two phenomena occurred in a context (in the case of Air NZ) which included its involvement at the meeting of 23 July 2002 where it took part in price fixing. That set of circumstances makes it, to my mind, more likely than not that Air NZ reached the understanding alleged. In the case of Garuda, it is not shown to have been at that meeting. The situation is more equivocal. It is possible that the circularisation process adopted by the HK BAR CSC of the surcharges which would be levied was purely the provision of information and that Garuda thereafter acted as it did not as the consummation of an unspoken understanding reached with the other airlines but instead as one firm pricing its services by reference to what its competitors were charging. The opposite inference is also open, that is to say, that Garuda acted as it did conscious that it was obliged to charge the relevant surcharge and that the other airlines were likewise bound. I am minded to draw this latter inference. I do so more confidently where Garuda called none of its employees involved in the decision to set the surcharges.

1. At [656]‑[658] his Honour said:

656 … Garuda submitted that the evidence did not show that the airlines had imposed the surcharges in accordance with the notifications given by the HK BAR CSC to the HK CAD. Rather it submitted that the airlines had imposed the surcharges in accordance with the HK CAD’s approval. This is largely the same as Air NZ’s first and second arguments. I reject it for the same reasons. The HK CAD approval did not compel any airline to charge the surcharge. It was optional for each airline whether it wished to be involved in the surcharge application process. Further, the approval was a permission. No airline was compelled by it to charge a surcharge.

657 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. In my opinion, the Hong Kong Imposition Understanding is established.

658 For reasons already given, there is no doubt – and I conclude – that Garuda and Air NZ both gave effect to this understanding. Further, I conclude that the arrangement or understanding was one to which s 45A applied for the same reasons as I have given in respect of the Hong Kong Modified Lufthansa Methodology Understanding. For the reasons given in relation to the same understanding I conclude that but for the absence of a market in Australia both airlines would have breached ss 45(2)(a)(ii) and 45(2)(b)(ii) of the TPA.

1. On appeal Garuda submitted that:
2. the finding against it was primarily based upon parallel movements in its fuel surcharge and those of other airlines;
3. an equal, or more probable inference is that Garuda was merely acting in compliance with the requirements of the HK CAD;
4. Article 8 of the Hong Kong‑Indonesia ASA required that the designated airlines charge the tariffs approved by the authorities for carriage between Hong Kong and Indonesia;
5. such tariffs might be agreed by the designated airlines and approved by the authorities;
6. as a matter of Hong Kong domestic law, any surcharge required approval of the HK CAD;
7. the only surcharge which could be charged was the approved surcharge; and
8. each surcharge, once approved, was a tariff and was therefore a minimum which Garuda was not permitted to discount.
9. For reasons which are substantially similar to those given in connection with the Air NZ case and elsewhere, we reject these submissions. Save for the first, they assume the correctness of Garuda’s submissions concerning the content of Hong Kong law, which submissions we have rejected. As to the first ground, his Honour’s finding that Garuda was a party to the Hong Kong Imposition Understanding was based upon rather more than parallel movements in fuel surcharges. Garuda’s conduct must be seen in light of its knowledge of, and apparent participation in the steps leading up to the meeting of 23 July 2002, and its conduct thereafter. His Honour concluded at [596] that it took part in every surcharge variation under the methodology. These considerations suggest a well‑established routine which was to be continued throughout the period from August 2002 until September 2006. Garuda’s conduct was not limited to the adoption of approved rates or those of its competitors. It was, at the very least, well aware of the various steps taken to present to HK CAD common proposals as to index‑based surcharges, as particularised at [230A] of the amended statement of claim. It is one thing to identify a competitor’s rates and adopt them, or try to better them. It is quite another thing to participate in an industry‑wide process which has, as its purpose, the presentation to a government agency of an agreed method for calculating a surcharge dealing with a major cost item.
10. Garuda submitted that the primary Judge “relied on” the fact that it had not called employees who had been involved in the fixing of surcharges as witnesses. In fact, his Honour reached his decision by reference to other evidence, merely noting that Garuda’s failure to call such witnesses gave him more confidence in his conclusion. Garuda submitted that any failure to call these witnesses was explained. A deponent, Mr Evans, had provided, “unchallenged evidence that employees who might have given evidence of the conduct in Hong Kong had ceased to be employed by Garuda” (at [97] of Garuda’s non-market issues submissions). Further, there was “no issue” that each of them was out of the jurisdiction. Garuda also submitted that the primary Judge erroneously thought that the relevant employees would have given evidence concerning conduct alleged against Garuda in Indonesia rather than evidence concerning its conduct in Hong Kong.
11. We do not accept that Mr Evans’ affidavit accounted adequately for Garuda’s failure to call the witnesses. That the witnesses were out of the jurisdiction and/or no longer employed by Garuda would not necessarily explain the failure to call them. Further, there were other relevant considerations, such as the likely importance of their evidence, and of the issues in the case to which that evidence related. We have been told nothing about these matters. It was for the primary Judge to assess them. There is no basis for inferring that his Honour erred in attributing weight to Garuda’s failure to call these witnesses.
12. As to the assertion that his Honour misunderstood the matters to which their evidence might have gone, it is true that, at [1140], his Honour treated the affidavit as dealing with witnesses who were relevant to the case concerning conduct in Indonesia. It seems to be accepted that the witnesses referred to at [1140] were those referred to at [650]. However, his Honour did not suggest that the witnesses were only relevant to one case or the other. It may be that, rightly or wrongly, he understood that their evidence related to both cases.
13. At [99]‑[100] Garuda submitted that the primary Judge concluded that the relevant markets were discrete markets for the carriage of cargo from Hong Kong to individual ports in Australia and, “assumed that the ports included at least Sydney, Melbourne, Perth and Brisbane”. No specific criticism is made of either the conclusion or the assumption. However Garuda submitted that s 45A would only have been engaged if it were shown that the understanding had the relevant purpose, effect or likely effect of, “price‑fixing for services supplied by the airlines in competition with each other in a market in Australia” ([100]). Garuda submitted that the Commission did not identify the airlines which were competing with Garuda in a particular market, at any particular time, and that there were no findings in this regard.
14. Given the way in which the case was conducted, there can be little doubt that Qantas and Garuda were competing in the Australian markets. However the evidence goes further. The Commission pleaded at [6] of the amended statement of claim, that a large number of airlines provide freight services of the kind contemplated at [3], to and from places throughout the world, including places within Australia. Garuda only partially admitted [3] and [6], but it admitted that the demand for air cargo transport services was met by certain airlines providing international carriage of goods by air. Paragraphs [84]–[88] of the agreed statement of facts concern interlining and code‑sharing arrangements, by which airlines not operating into, or out of particular ports might do so in conjunction with other airlines. Hence airlines which did not fly into Australia might, nonetheless, provide cargo services. More importantly we note that at [109], it is agreed that:

During the relevant period, all of the Respondent Airlines, other than Air New Zealand operated only wide‑bodied passenger aircraft to and from Australia and to and from Singapore, Indonesia, Hong Kong, Dubai, Japan, Thailand and India (**the** **Specific Countries**). Air New Zealand operated narrow‑bodied and wide‑bodied aircraft between Australia and New Zealand during the relevant period.

The term “Respondent Airlines” is defined in the glossary as:

The airline companies which are named as respondents in the proceedings being PT Garuda Indonesia, SIAC, Emirates, Cathay Pacific, Thai Airways, Malaysian Airlines and Air New Zealand.

1. We understand the letters “SIAC” to stand for Singapore Airlines cargo. We infer that the named airlines were carrying cargo to relevant ports in Australia from relevant Asian ports. There would otherwise be no point in naming them, save for the possibility that they might be possible, but not actual, competitors. In any event the point of Garuda’s submission is unclear. It asserts at [100] that in the absence of evidence as to which airlines served which ports:

(i)t was impossible … to identify the scope of evidence relevant to an assessment of the purpose of any party to any such understanding or the effect of any such understanding on the pricing of that party, let alone to come to a conclusion on what the evidence showed.

1. The submission seems to be that information concerning the identity of airlines serving particular ports was essential to identification of the purpose, effect or likely effect of any impugned understanding. However Garuda has not sought to demonstrate how, or why the alleged absence of such information should lead us to reject any of his Honour’s findings as to those matters. It may be that this question is, in some way, related to the repeated references by Garuda to the level of competition in the relevant market or markets, as allegedly demonstrated by variations in its own advertised rates. Such matters seem to be more relevant to an attempt to show a substantial lessening in competition for the purposes of s 45 than to a case which depends upon s 45 together with s 45A. We deal with this argument in relation to Garuda’s conduct in Indonesia. We see no merit in this submission.
2. A separate submission made by Garuda, at [109] of its written submissions, was that the primary Judge supported his conclusions as to the engagement of s 45A in relation to the Hong Kong Imposition Understanding by reference to his reasons concerning the methodology understanding, reached in July 2002. We have already dealt with this submission in relation to the First Hong Kong Extension Understanding.
3. The primary Judge’s conclusions concerning the Hong Kong Imposition Understanding should be upheld in relation to Garuda.

### The October 2001 and December 2002 Hong Kong Insurance Understandings

1. These matters are dealt with at grounds 63–65 of Garuda’s notice of contention and in Garuda’s submissions at [103]–[105]. His Honour dealt with them at [694]–[701].

#### The October 2001 Hong Kong Insurance Understanding

1. The primary Judge explained at [694] that the Commission’s case in relation to the October 2001 Hong Kong Insurance Understanding was that Air NZ and Garuda reached an understanding or made an arrangement with the other HK BAR CSC member airlines on or about 3 October 2001. The understanding was that they would all impose an insurance surcharge from 11 October 2001 at the level of HKD0.50/kg.
2. The primary Judge concluded that this understanding had been made for four reasons in combination ([695]):
3. a meeting occurred on 3 October 2001 which Air NZ and Garuda attended. At the meeting a decision was made by a majority of airlines present (including Air NZ and Garuda) that the HK BAR CSC would apply to the HK CAD for approval to impose an insurance surcharge of HKD0.50/kg on routes out of Hong Kong;
4. an application was made in those terms to HK CAD on 3 October 2001 on behalf of various airlines including Air NZ and Garuda;
5. after some to‑ing and fro‑ing the application was approved by the HK CAD on 19 October 2001; and
6. the insurance surcharge was imposed by both Air NZ and Garuda.
7. Before the primary Judge, Air NZ submitted that all that could be gleaned from these facts was that the airlines had agreed to make an application. The primary Judge rejected this submission observing that the situation is indistinguishable from that obtained with respect to the 2002 Hong Kong Lufthansa Methodology Understanding, save that in the case of the insurance surcharge there was not even a commercial incentive to apply jointly (as there was in the case of the fuel surcharges) ([696]).
8. On this appeal, Air NZ and Garuda repeated these submissions in writing. Both Air NZ and Garuda said that the evidence, at its highest, showed only that there was an understanding that each would join in an application to HK CAD for the approval of a surcharge, possibly to lobby the HK CAD for approval, but that there was no evidence of an understanding that the surcharge would be implemented. Air NZ also repeated the submission that it made in relation to the 2002 Lufthansa Methodology Understanding that there was no need for an understanding because the airlines would all have expected that the insurance surcharge would be imposed by all other airlines.
9. We reject these submissions for the same reasons that we rejected the equivalent submission concerning the 2002 Lufthansa Methodology Understanding. As we have previously observed, a shared understanding that there should be an application for HK CAD’s approval of future conduct is a basis for inferring an understanding that the parties would, subsequent to such approval, engage in that conduct. In the event that approval was forthcoming, there would be no impediment to their doing so. The primary Judge’s reference at [696] to the absence of any commercial incentive is, we infer, a reference to the fact that there was no commercial need to seek approval of an index‑based mechanism, so that HK CAD’s requirement for a joint application for approval of any such mechanism did not apply in the way that it had in connection with fuel surcharges. In our view it was fairly open to his Honour to infer that the decision to seek approval bespoke an understanding that the parties would act in accordance with any such approval.
10. There is additional evidence supporting the October 2001 Hong Kong Insurance Understanding including an understanding that the insurance surcharge would be implemented by all airlines. That evidence includes the following:
11. evidence concerning a HK BAR CSC meeting on 26 September 2001, prior to the 3 October 2001 meeting, to discuss what to do in Hong Kong in response to the “pressing issue” that “airlines around the world are facing the additional insurance premium imposed on both passengers and cargo” (Tab [0438]);
12. a report of that meeting describing how “33 airlines … met today to basically discuss the amount of IS [insurance surcharge] *to be implemented & when*” (emphasis added). The note continues: “Target date of implementation 01/0Oct’2001. This date was contentious so BAR will accept majority decision” (Tab [0445]);
13. a questionnaire distributed at the meeting which contained questions including whether (as a majority ultimately agreed): the airlines (i) agreed to a collective filing by HK BAR CSC; (ii) agreed to the proposed average amount of HK $0.50 per kg; and (iii) their preferred *implementation date* (Tabs [449], [450]);
14. A note of the meeting on 3 October 2001 in an email from Ms Ahrens from Lufthansa (Tab [487]) headed “surcharge *implementation* from HKG” (emphasis added):

Dear all

we just had our 2nd BAR meeting for the surcharge implementation in the HKG market

The following was the outcome:

…

* amount to be charged: 0.50 HKD
* effective 11 October
* per kg on chargeable weight
* to be charged on AWB [air waybill] under code XD.

…

1. Garuda also submitted that the airlines only notified their customers of their intention to impose the surcharge after the relevant approval was obtained, and that this fact suggests that there was no prior understanding as to the imposition of each surcharge. It was no doubt prudent for the airlines to proceed in that way, but prudence says nothing about the purpose, effect or likely effect of the decision to apply for such approval.

#### The December 2002 Hong Kong Insurance Understanding

1. As to the December 2002 Hong Kong Insurance Surcharge Understanding, this was a claim by the Commission that on 16 December 2002 Air NZ and Garuda reached an arrangement or understanding with other airlines that they would impose a reduced insurance surcharge of HKD.025/kg from 11 January 2003. The primary Judge upheld this claim ([700]) based on a meeting held on 2 December 2002 between a number of airlines to discuss a proposal by Cathay Pacific to reduce the insurance surcharge. A report of what occurred at the meeting was prepared by an employee of Martinair. What occurred was that Cathay proposed to reduce its surcharge to HKD0.25/kg. Some airlines did not agree. Others (including Garuda) agreed. Those airlines who favoured a decrease in line with the Cathay proposal agreed to make an application to the HK CAD for approval. This was made on 16 December 2002, and approved with effect from 11 January 2003. Along with other airlines, Garuda and Air NZ both implemented it.
2. Although Garuda was present at the 2 December 2002 meeting, Air NZ was unable to attend. However, prior to the meeting Air NZ completed a survey form indicating that it would follow Cathay’s proposal to reduce the cargo insurance surcharge. The primary Judge concluded that this constituted a sufficient consensus with Cathay and the other airlines to constitute an understanding within the meaning of s 45.
3. With one exception, Air NZ relied on the same arguments in its submissions concerning the December 2002 Hong Kong Insurance Surcharge Understanding as it did for its submissions concerning the October 2001 Hong Kong Insurance Understanding. Air NZ’s submissions fail for the same reasons. The one exception was that Air NZ also submitted that the survey form completed by Air NZ involved only an indication by Air NZ that it would join in an application by the HK BAR CSC for the reduced surcharge proposed by Cathay. Air NZ submitted that there was no basis for an inference from Air NZ’s completion of the survey that Air NZ was a party to an understanding to *impose* the surcharge. Once the background and context of the survey is considered it becomes apparent that this submission cannot be made out. Garuda made the same submissions as it made concerning the October 2001 Hong Kong Insurance Understanding.
4. The genesis of the 2 December 2002 meeting and the survey was a meeting called by HK BAR CSC for 8 October 2002. The Chairman explained that the purpose of the meeting was that there, “may be adjustment in the insurance premium in the coming months”. He said that this, “will then affect *the amount of surcharge we levy in the HK market*” (emphasis added) (Tab [1045]). This is plainly an indication that the airlines intended to impose a single, adjusted levy.
5. A report of the meeting on 8 October 2002 (Tab [1051]) described how Cathay had already informed HK CAD of its desire for a downward adjustment of the insurance surcharge and how, “all carriers pushed CX to check with CAD if the current practice of HKD0.50/kg … could be maintained”. Cathay undertook to revert to HK BAR CSC after discussion with HK CAD. Once again, the intention disclosed was for the imposition of a surcharge, not merely an application for a lower surcharge with the possibility of imposing it.
6. Then, on 26 November 2002 (Tabs [1084], [1085]) the Chairman of HK BAR CSC sent an email and letter to the airlines advising them that the current insurance surcharge approval would expire on 21 January 2003 and that HK BAR CSC had to apply a month in advance for extension, revision or cancellation. He asked for the airlines to reply explaining whether they could, “(i) come to the meeting on DEC2, 2002 to discuss the issue; and (ii) reply the attached question and return to [the Chairman] before DEC2, 2002”.
7. The survey which was enclosed recited the current HK$0.50/kg surcharge until 21 January 2003, and that application was required by HK CAD one month in advance. It explained that, “CX revised cargo insurance surcharge is likely to be about half the amount of the existing one, mainly due to the drop in insurance premiums”. It then said:

As such, BAR‑CSC would like to get feedback from your company to see if you would follow CX revised surcharge.

1. The plain indication was that the purpose of the survey was to garner support for *implementation* of a surcharge not merely joining in an application to HK CAD. The first question asked, “Would your company follow CX revised cargo insurance surcharge, which is likely to be half of the current amount?” Then it was said, “If yes, CX is likely to apply with CAD for the revised surcharge on behalf of your company by using CX justification”.
2. Air NZ replied “yes” to the first question (Tab [1120]). Garuda replied that they would follow HK BAR CSC’s decision (Tab [1112]).
3. The application that was then made by HK BAR CSC to HK CAD explained that, “BAR CSC proposes to *implement the new surcharge* 14 days after CAD’s approval date” (emphasis added). This was because, “the various airlines (about 49) [which included Garuda and Air NZ: (Tab [1152])] need to make programming changes in their respective reservation and financial systems” (Tab [1151]).
4. This background to the survey makes it clear that Air NZ was not merely participating in an understanding to make a joint application to HK CAD, or to lobby HK CAD. Air NZ’s understanding with the other 48 airlines was to implement a new, lower, surcharge of HK$0.25/kg when it was approved by HK CAD.
5. We would reject the grounds of the notices of contention concerned with the October 2001 and the December 2002 Hong Kong Insurance Understandings.

### Other matters raised by Garuda in relation to Hong Kong

1. At [106]‑[111] of its written submissions on non‑market issues, Garuda made a number of submissions which seem to relate to all of the alleged contraventions said to arise out of its conduct in Hong Kong. Some of these submissions reflected submissions made with respect to specific understandings. As a result, we have already dealt with a number of these matters. The only new submission seems to be that advanced in [108] at footnote 14 which relates to the primary judgment at [616].
2. At [108] Garuda submitted, regarding all of the Hong Kong understandings, that his Honour ought to have considered the evidence of discounting to which he referred to at [616]. His Honour there acknowledged that there was some evidence which suggested that some airlines, at later times, discontinued their cargo routes to overcome the effect of the surcharge. We see no reason to doubt that his Honour gave appropriate weight to that evidence.

## The Singapore Understandings

1. The Commission’s case in relation to understandings in Singapore failed, with one exception. That exception was that the primary Judge found that Air NZ was a party to an understanding concerning an insurance and security surcharge (“Singapore ISS Understanding”) ([1126]).
2. As pleaded in the amended statement of claim at [270], the Singapore ISS Understanding involved an allegation that Air NZ made an arrangement or arrived at an understanding with other airlines containing a provision that the parties would continue to charge (and would not reduce) the amount that they were currently charging their customers for the insurance and security surcharge (“ISS”) on the supply of air freight services from Singapore including Australia.
3. The primary Judge explained at [1113]‑[1114] that the Singapore ISS Understanding was first raised at a meeting of the HKBAR CSC (*not* the Singapore BAR CSC) on 26 September 2001. Mr Ngai of Air NZ was present at this meeting. The meeting occurred just under three weeks after the attack on the World Trade Center in New York on 11 September 2001. With the rise of new risk insurance expenses, Singapore Airways explained that it was proposing to impose a surcharge out of Singapore. That surcharge was imposed by Singapore Airways on 8 October 2001, in relation to the new risk insurance expenses, at the rate of SGD0.18/kg. Most airlines subsequently followed suit.
4. On 10 December 2012, Singapore Airways administered a survey asking about the rate of the ISS that airlines were charging. In response many airlines indicated that they were charging an ISS of around SGD0.18/kg (including Singapore Airways and Air NZ). On 11 December 2002, internal communications within Air NZ, authored by Mr Chew, indicated that it wished to, “hold on to [the ISS] as long as possible” ([1119]).
5. On 23 January 2003 there was a meeting of the Singapore BAR CSC at which Air NZ was represented by Mr Chew. The results of the December survey had been circulated to the airlines. The minutes of this meeting provided ([1120]):

2.3 Insurance & Security

2.3.1 At the ACFC meeting, [the Singapore Civil Aviation Authority] and [the Singapore Aircargo Agents Association] have requested airlines to consider lowering their insurance and security surcharges (ISS) to insure Singapore remains a competitive hub. Chairman [of BAR CSC] said the ISS is an essential component for airlines to combat and protect airlines from the growing threat of terrorism in South East Asia. On the contrary, the ISS charges may be revised upwards with mounting Middle East uncertainty.

2.3.2 Member airlines agreed that there would be no reduction to the ISS charge.

1. The primary Judge relied upon three matters to conclude ([1125]‑[1126]) that Air NZ was a party to this agreement and that it gave effect to the agreement by keeping its ISS at SGD0.18/kg. These were:
2. the minutes record an agreement between the airlines;
3. the minutes were confirmed as correct; and
4. The fact that Air NZ acted consistently with the agreement recorded.
5. Air NZ focussed on each of these three elements of the primary Judge’s reasoning and submitted that they did not, in combination, support an inference that Air NZ was a party to any Singapore ISS Understanding. Air NZ also submitted that various other matters made it unlikely that it would have been party to such an understanding.
6. As to the first matter relied upon by the primary Judge (the minutes recording an agreement), Air NZ submitted that the minutes do not say which member airlines agreed nor what they agreed to do. Air NZ also relied on evidence of Mr Ros (who recorded the minutes) and submitted that the best interpretation of the minutes was that the airlines were simply refusing the request from the Singapore Civil Aviation Authority and the Singapore Aircargo Agents Association.
7. As to Mr Ros’ evidence, Air NZ’s submissions omitted to mention that the primary Judge had been reluctant to place any weight on Mr Ros’ evidence because he had not been cross‑examined ([1103], [1123]). Mr Ros was a senior officer from Singapore Airways, whose affidavit was accepted under s 63(2) of the *Evidence Act 1995* (Cth)over the objection of the Commission ([727]). Nor did Air NZ mention the primary Judge’s reasons that, “(Mr Ros) was not shy about recording an agreement where one occurred … despite Mr Ros’ evidence that where his minutes use the word ‘agreed’ he did not mean that an agreement had been reached” ([1052]).
8. As to the meaning of the sentence, “Member airlines agreed that there would be no reduction to the ISS charge”, the context also supports the primary Judge’s conclusion that the sentence described an agreement to continue to charge (and not to reduce) the ISS ([1126]).
9. That context includes the following:
10. the wording of the pre‑meeting survey sent to the airlines on 10 December 2002 by BAR CSC which indicated that the completed survey would be sent to all members (“advise the quantum that you are levying for ISS and if there are any plans to reduce this amount”) (Tab [0065.034]); and
11. in an Air NZ weekly sales report on 11 December 2002, Mr Chew informed Mr Gregg that in relation to the survey it concerned the, “future plan of the Insurance Surcharge‑Plan to withdraw or hold”. He said that, “So far, few airlines (CX, NW) responded that the plan is to stay – not lifting it. As for NZ (SIN) we will hold on to it for as long as possible (revenue to us)” (Tab [0060.117]).
12. As to the second matter relied upon by the primary Judge (the minutes not being corrected), Air NZ referred to the evidence of Mr Ros that it was not the practice of BAR CSC to correct minutes. Again, Air NZ neglected to refer to the findings by the primary Judge that he was reluctant to place any weight on Mr Ros’ evidence. The minutes (which were two pages) had been sent to Air NZ on 19 February 2003 (Tab [1238]) and Mr Chew was present on 5 August 2003 when the minutes were approved ([1125]).
13. As to the third matter relied upon by the primary Judge, against these matters, Air NZ submitted that other matters made it unlikely that an agreement was reached. Those other matters include:
14. that Air NZ charged on a different weight basis (chargeable weight rather than actual weight) which meant that most of the time the surcharge imposed by Air NZ was different from other airlines (ANZ 202.004.00001]);
15. the agreement was vague (which airlines were to be bound? For how long? How would monitoring occur?);
16. major airlines were not present at the meeting including Lufthansa, Emirates, Korean Air and Qantas; and
17. there was no evidence that this agreement was ever mentioned again in the months or years that followed.
18. The first of these matters does not militate in any real way against an agreement for two reasons. First, it does not appear that the airlines were concerned, in reaching their agreement, about any difference between charging by reference to actual weight or chargeable weight. Indeed, it does not appear that there was any evidence that any of the customers would have been concerned about this difference. The evidence (Tab [0065.048]) was that Air NZ was not the only airline that charged by reference to chargeable weight (indeed that document incorrectly records Air NZ as charging by actual weight).
19. The second of these matters is not significant. Section 45 does not require the formality or certainty of a concluded agreement. An “understanding” is sufficient. Further, the understanding (described as an “agreement” in the minutes) concerned a simple point. The airlines present had agreed not to reduce the ISS. It was implicit that the understanding was between those present and that it would apply until further agreement.
20. The third of these matters was put in abstract terms. It was unclear what Air NZ suggested should have occurred due to the absence of major airlines from the meeting. Was it suggested that the likelihood was that any agreement would have been deferred until a further meeting? Was it suggesting that the absence of major airlines meant that the minutes should not be read literally and “agreement” was really just a reference to what each airline had said in the survey? In either case, this point does not significantly detract from the agreement, although it might have meant that the parties to the agreement would not persist if major airlines had not followed the same approach as that which had been agreed. This point was also argued in a context in which the primary Judge had said (by reference to evidence to which we were not referred on appeal) that there was a, “distinct possibility of collusive behaviour between [the two biggest airlines in Singapore: Singapore Airways and LH]” but since neither had been heard he made no finding about this ([1101(b)]). The primary Judge concluded that it was difficult to imagine a co‑ordinated arrangement being *effective* if Lufthansa were not a party to it. The evidence was that major players (Emirates, Lufthansa, Singapore) were all charging the 0.18 surcharge (see Tab [0065.046], Tab [0065.048]). The effectiveness of the agreement might have been reduced or undermined if the airlines which were not present at the meeting lowered the surcharge. But this does not significantly detract from the minuted agreement.
21. The final matter is also not significant. Air NZ did not explain why subsequent evidence was expected. If all of the airlines maintained the agreement (and there was no outbreak of “cheating”) then what evidence or references to the agreement would be expected? Air NZ itself maintained the ISS until at least January 2007 (Tab [3040]).
22. In oral submissions in reply, senior counsel for Air NZ, Mr Smith SC, raised a further argument, possibly for the first time in this litigation. He submitted that the agreement was unlikely because the ISS had first been implemented by airlines unilaterally (and without any allegation of price fixing) 15 months before the survey was conducted (app ts 385). This may be so, but in the context of a survey concerning the intentions of other airlines, the previous practice of the airlines is not a good reason for concluding that no agreement was reached.
23. Ultimately, and perhaps most significantly, this ground of appeal was an attempt to relitigate exactly the same point that was before the primary Judge but by reference to only a snapshot of the evidence and in a broader context. In any event, we consider that the primary Judge’s conclusion was correct.

## The Indonesian Understandings

1. At [33]‑[36] of its written submissions on non‑market issues, Garuda summarises its submissions concerning its conduct in Indonesia as follows:
2. in finding that Garuda entered into the October 2001 fuel surcharge understanding, his Honour failed to take into account Indonesian civil aviation law and government practice;
3. his Honour should have found that none of the fuel surcharge understandings or security surcharge understandings were shown to have had the purpose, effect or likely effect of fixing, controlling or maintaining cargo prices upon the basis that the amount of each such surcharge would not affect the overall cargo prices; and
4. his Honour, in determining whether the standard of proof had been satisfied, should have taken into account the gravity of the allegations made against it.
5. These submissions, or variations on the same themes, recur throughout Garuda’s submissions concerning its conduct in Indonesia. Below we deal with submission (2) in relation to the specific submissions made concerning each understanding. However we return to the issue separately in the section of these reasons concerned with the “component of a price” submissions, because this general issue was common to Garuda and Air NZ and was treated separately by Air NZ.

### Five categories of alleged understandings

1. In relation to Garuda, the primary Judge considered 10 separate fuel surcharge understandings, one air freight understanding, one customs fee understanding and the so‑called overarching Indonesia understanding. In its written submissions, Garuda addressed the impugned conduct in Indonesia, under five headings, namely:
2. the first (October 2001) Indonesian fuel and security surcharge understandings;
3. the second and subsequent Indonesian fuel and security surcharge understandings;
4. the September 2005 Indonesian fuel surcharge understanding;
5. the October 2001 Indonesian price understanding; and
6. the May 2004 customs fee understanding.

The primary Judge dealt with these issues in a somewhat different way. We will adopt Garuda’s approach.

### The October 2001 Fuel and Security Surcharge Understandings

1. At an ACRB meeting held on 4 October 2001, those attending agreed to implement a fuel surcharge and a security charge. The primary Judge found that the purpose, effect or likely effect of the surcharges was to control cargo rates. We should stress the fact that there were two understandings, one concerning fuel surcharge and the other concerning a security surcharge. In its submissions, Garuda tends sometimes to use the singular and sometimes, the plural. In dealing with the submissions, our reasons may reflect this grammatical irregularity.
2. Garuda submitted that:
3. the primary Judge erred in finding that there was an understanding, and that any such understanding had the relevant purpose, effect or likely effect given that:

(a) the agreed surcharges were de minimis, being 3% to 5% of total price;

(b) the rate of each surcharge was kept constant over time; and

(c) there was unconstrained competition on the balance of total cargo price;

1. any agreement reached at the meeting of 4 October 2001 was conditional upon government approval, and that such approval must have been given, as the minutes of the meeting of 29 October 2001 indicate that implementation had commenced;
2. the grant of such approval was a statutory function of the Indonesian Government, and was to be based on agreements reached by the airlines; and
3. the airlines did not conduct themselves as if mutually committed to imposing the surcharge and, as at 17 October 2001, they knew that 19 airlines would not impose the surcharge, and that others would impose it at varying rates.

Hence Garuda submitted that s 45A was not engaged.

1. At [1141] the primary Judge set out the minutes of the meeting of 4 October 2001 as follows:

During the meeting, the following items have been discussed and agreed:

1. Security Charge (SC) ex Indonesia:

a. Name of charge is Security Charge with the abbreviation is SC.

b. Effective as of 16 October 2001 – UFN.

c. The following amounts will be applied:

- To TC1: USD0.10/kg

- To TC2: USD0.10/kg

- To TC3: USD0.50/kg

d. The above amounts will be based on chargeable weight.

e. The members of ACRB should report to JKTCFGA (Mr. S.M. Pulungan) for the implementation of SC above.

f. GA will report to Indonesian Government.

2. Fuel surcharge (MY) ex Indonesia:

a. With effect from 16 October 2001, all members agreed to implement Fuel surcharge for the shipment ex Indonesia to all destinations at amount of USD0.05/kg based on chargeable weight).

b. GA will report to Indonesian Government.

3. MDP (Market Development Price) ex Indonesia:

a. To avoid undercutting price among others airlines especially for the market ex Indonesia, members agreed to set up Working Group MDP to determine Minimum Based Price.

b. Members of Working Group are as follows:

- GA as Chairman

- BR as Secretary

- SQ

- EK

- LH

- KE

- KL

c. Working Group will conduct a meeting on 10 October 2001 at 9.00 AM at GA Office to prepare the presentation to be presented in the next ACRB Meeting.

1. The meeting was chaired by a Garuda employee and held at Garuda’s cargo centre. Not all members of the ACRB were present at the meeting. However the minutes were circulated to all members. There was no objection to their accuracy. They were adopted at the next meeting, held on 29 October 2001. The minutes were prepared by Garuda employees.
2. On 5 October 2001 Mr Azhar, the General Manager of Cargo Services at Garuda, wrote to all members of the ACRB as follows:

Kindly please find minutes meeting of ACRB which be held on October 04, at GA Cargo Centre for your reference.

To those members not attended the meeting, we request to adopt the decision that approved by all members in the meeting, and the main point is to implement it.

Thank you again for your attention and cooperation.

1. In inter‑office correspondence dated 8 October 2001, Mr Pulungan the Head of Cargo Services at Garuda, wrote as follows:

**1. International Flights**

In accordance with the joint decisions between Cargo Airlines in Indonesia, we hereby advise that as from 16 October 2001 additional surcharges are to take effect as follows:

a. Security charge (SC) for cargo deliveries to

- TC1/TC2 of USD 0.10/kg

- TC3 of USD0.05/kg

Note: In fact, GA’s proposal was to call this additional Insurance Coverage, however the majority of members decided on Security charge.

b. Fuel Surcharge (MY) for cargo deliveries to all overseas destinations of USD0.05/kg.

Note: Some members have implemented a fuel surcharge of between USD0.05 and USD0.10/kg.

**2. Domestic Flights**

For domestic deliveries it has been determined to also levy a Security charge of Rp. 5000/AWB (Airway Bill) which is also to take effect on 16 October 2001.

Bearing in mind the size of the financial cost borne by the Airlines, enterprise partners and our customers are to be immediately made aware of the surcharge so that it can be implemented in accordance with the date that has been decided upon as stated above.

As per the FIN draft attached.

Overseas Branch Offices are to adopt the decisions of the National Carrier or the decisions of their respective Representative Board and directly report back.

The above is forwarded for implementation and thank you for your cooperation.

1. At first instance, Garuda submitted that the reference in the minutes to its reporting to the Indonesian Government indicated that the undertakings were conditional upon government approval. His Honour did not accept that the Indonesian Government required that it be informed of proposed surcharges, or that it had ever approved a surcharge ([1145]). Having regard to the minutes and other documents, his Honour rejected Garuda’s submission that the understandings reached on 4 October 2001 were conditional upon any such approval.
2. On appeal Garuda again submitted that any understanding was subject to relevant government approvals. We have indicated that we agree with the primary Judge’s conclusion that neither Indonesian law nor government practice required such approval. It was open to his Honour to find, on the basis of the minutes of the meeting of 4 October 2001 and the other Garuda documents to which we have referred, that Garuda considered that the understandings would take effect on 16 October 2001, and that government approval was not necessary.
3. In our view the minutes of the meeting of 29 October 2001 confirm that the understandings were to be implemented. Garuda submitted that the primary Judge should have inferred that government approval was necessary, had been granted, and that implementation was proceeding on that basis. That submission depends solely upon the reference to reporting in the minutes of the meeting of 4 October 2002. In our view the term “report” is more likely to mean, in this context, “inform” than “seek approval”. Further, this is supported by the absence of any reference to approval from the Indonesian Government in the minutes of 29 October 2001. This conclusion is also strengthened by the express reference in the minutes to the Japanese position (“Implementation [Security Charge] for JL still pending due to MOT Approval not yet received”). In addition, his Honour’s finding concerning the absence of evidence of any practice of seeking or granting approval cannot be overlooked.
4. Garuda submitted that the airlines did not conduct themselves as if they were mutually committed to impose the surcharges. This proposition was based upon the assertions that there was no allegation that any fuel surcharge was imposed prior to October 2002, and that, on 17 October 2001, the airlines understood that 15 out of 19 of them would not impose the fuel surcharge. Both assertions are misleading.
5. The first assertion reflects the Commission’s pleading rather than the evidence. Whilst the Commission did not plead the imposition of a fuel surcharge prior to October 2002, the minutes of the meeting of 29 October 2001 demonstrate that most members had, by that stage, implemented the two surcharges. Concerning the meeting of 17 October 2001, we have only the document mentioned above. It is headed “Result ACRB Meeting 17 October 2001”. The first page seems not to be presently relevant. The second page refers to “FSC” (fuel surcharge) “SIN”, presumably Singapore, and “FSC TC1/TC2”. Routes between Indonesia, Hong Kong and Singapore on the one hand, and Australia on the other, are TC3 routes, not TC1 or TC2 routes (the Cargo Traffic Conference areas). It may be that “FSC SIN” includes TC3 routes. Under the heading “SC [security charge or surcharge] for TC3 routes”, there is an indication that all but two airlines had adopted the surcharge. Garuda may have assumed that TC3 routes were included under the heading “FSC SIN”. If so, then it is true that, as at 17 October 2001, only three airlines had implemented the fuel surcharge. However, as we have said, by 29 October 2001, the position was otherwise.
6. The balance of Garuda’s submissions concerning the October 2001 fuel and security surcharge understanding addressed the operation of s 45A of the *Trade Practices Act*. The thrust of the submission was that fixing the surcharge would not fix the total price charged for air cargo services. In its written submissions, Garuda identifies the relevant services as being the supply of an air waybill, or carriage pursuant thereto. We understand that Garuda no longer presses the submission that the relevant product was the air waybill. We proceed on that basis. It is common ground that the ultimate question is whether or not the overall price for air cargo services was controlled by the relevant understanding outlined above.
7. At [1148] his Honour concluded that the fuel and security surcharge understandings reached on 4 October 2001 comprised a “price fix”, a term which we understand to include the fixing, controlling or maintaining of the price. His Honour based this conclusion upon his reasoning in connection with Hong Kong at [614]–[619].
8. Garuda accepted that the relevant price is the combination of the air cargo rate and any applicable surcharges. However it submitted at [58] of its written submissions on non‑market issues that:

The ACCC did not allege any commitment by the airlines affecting their cargo rate. In light of evidence of downward competitive pressure on cargo rates the [Commission] failed to prove that agreements to fix two surcharges at US$0.05/kg each controlled price when cargo rates ranged between US$1 and US$1.60”.

1. The first sentence presumably distinguishes between an understanding that a fuel or security surcharge would be imposed and an understanding that the overall price would be raised. There is no doubt that the Commission alleged an arrangement or understanding, the purpose, effect or likely effect of which was the fixing, controlling or maintaining of prices (amended statement of claim at [70]). His Honour dealt with this argument at [615] in addressing the Hong Kong case. Referring to the three considerations identified at [614] and referred to above, he said:

In my opinion, (a) is sufficient to permit an inference to be drawn that the purpose of the understanding was to increase the price for air freight services by the amount of the surcharge in accordance with the methodology. This is not to say that the airlines were necessarily ruling out later reductions in their freight rates which might counteract the surcharge, only that they all intended to move their prices, in the first instance, in accordance with the index. This was its point. Consequently, as at 23 July 2002 – the time when the question of purpose is to be ascertained – the purpose was for all the airlines to increase their freight rates in accordance with the methodology. In my opinion, on that date there was an understanding between the airlines whose purpose was the control of their freight prices by the largely simultaneous increase in those rates by the imposition of a surcharge in accordance with the methodology. Section 45A(1) is enlivened.

1. We understand his Honour to have meant simply that the purpose may be inferred from the wording of the relevant minutes. In the present case the minutes of the meeting of 4 October 2001 are reinforced by subsequent conduct, demonstrated by the minutes of the meeting of 29 October 2001. This evidence was to be assessed having regard to the importance of fuel prices to an airline, and the fact that there was an obvious advantage to be gained from moving in concert.
2. Garuda submitted that evidence as to downward competitive pressure on cargo rates should have led his Honour to conclude that the Commission had not established that s 45A was engaged. This submission seems to have been based upon evidence concerning Garuda’s Recommended Selling Prices (“RSPs”). The primary Judge rejected that argument, on the basis that the RSPs were minimum selling prices, and not *actual* freight rates [1168]. Garuda challenged this conclusion. At [89]–[99] the primary Judge discussed four categories of *actual* rates charged for air cargo services, namely:
3. “standard” rates;
4. “contract” or “special” rates;
5. “ad hoc” rates; and
6. “TACT” (“The Air Cargo Tariff”) rates.
7. Concerning standard rates, his Honour said at [94]:

Each local cargo sales office of Air NZ and Garuda publishes, from time to time, its standard rates as ‘tariff’ or ‘rate’ sheets or schedules for carrying freight by air from the airport at which that office is located to the airport at which the airline relinquishes possession. Standard rates are generally quoted in the local currency at the place of origin. Sometimes the standard rates of airlines operating in particular origins (especially those exhibiting high currency volatility) are published in US dollars or Euros. Standard rates are generally reviewed between one and four times a year (on a seasonal basis), depending on the airline.

1. Concerning contract or special rates, his Honour said at [95]–[97]:

95 Contract rates are rates that have been agreed between an airline and a specific freight forwarder for cargo transported by the airline from a place of origin to places of destination. Mostly such agreements about contract rates do not include an obligation on the part of the freight forwarder to purchase any services from the airline. Contract rates are usually less than standard rates.

96 Contract rates are often agreed where there is a regular need for capacity leading to the possibility of higher volumes or in relation to cargo that has some special feature that means it does not fall under ‘standard’ rates, such as a requirement for special handling.

97 Contract rates that are offered to freight forwarders may be negotiated by email, telephone or at meetings with the staff of the local cargo sales office of an airline, who are based at the airport at which the airline first takes possession, with the relevant origin freight forwarder.

1. Concerning ad hoc rates, his Honour said at [98]:

Ad hoc rates (also referred to as ‘spot rates’) are rates negotiated in respect of carrying a particular shipment of freight by air. Ad hoc rates may be affected by immediate supply and demand conditions including capacity on available flights at the required time.

1. TACT rates are rates published by IATA. They are used only for unusual cargo and in other special circumstances.
2. These findings seem to be based upon agreed facts.
3. In considering these different rates, one should keep in mind the dominant position of freight forwarders as customers for air cargo services. His Honour’s conclusion that Garuda’s RSPs were minimum selling prices, not “freight rates”, seems to have meant that the RSPs were not the rates which were regularly charged to freight forwarders, presumably because freight forwarders negotiated more favourable contract rates or, perhaps, ad hoc rates.
4. Garuda submitted that his Honour ought to have accepted the proposition that movement in RSPs reflected the downward pressure on prices. It submitted that its RSPs were, using his Honour’s nomenclature, “standard rates”. That submission may be correct, but it does not mean that the RSPs provided a reliable guide to the level of competition concerning cargo rates. The primary Judge observed at [95] that contract or special negotiated rates were usually less than standard rates, no doubt because of the dominant position of freight forwarders as consumers of cargo services. Because of such dominance, competitive pressure would be more accurately reflected in the contract rates than in the standard rates or RSPs.
5. Garuda and the Commission referred to various documents in seeking respectively to attack or defend his Honour’s conclusion. Garuda attributed his Honour’s finding to a letter from “head office” concerning the process for fixing RSPs, submitting that the method of fixing the rate says nothing about its purpose. As far as we can see the letter in question is dated 25 November 2005. It deals with the RSPs for 2006. The second paragraph suggests that all existing arrangements concerning special and contract prices were to be terminated with effect from 31 December 2005. The attached document distinguished between RSPs and Implemented Selling Prices (“ISPs”) which were offered to business clients. ISPs were to be fixed by branch offices and were not to be lower than RSPs. ISPs might be raised or lowered by branch offices, as long as the ISP was not lower than the RSP. The ISP might be reduced below the RSP after consultation between the branch office and (presumably) Garuda headquarters. The document suggests that his Honour correctly understood the RSPs to be minimum prices. We note that this letter post‑dated the conduct with which we are presently concerned.
6. Garuda also pointed to [13] and [16]‑[17] of an affidavit by Mr Gamma Mandala, a Senior Manager with Garuda, which provided as follows:

13. In the period 2001‑2006, Garuda had and implemented a policy that when it carried cargo which was delivered to it by someone other than an appointed cargo agent, it required payment in cash of the full amount calculated by reference to Garuda’s published cargo rates. However, when cargo was delivered to Garuda for carriage by an appointed cargo agent, Garuda provided the carriage at rates negotiated with the cargo agent and usually extended credit terms negotiated with each cargo agent.

…

16. Garuda sent copies of the RSPs for each year to Garuda appointed agents and sent notices of any changes or any additional charges including surcharges to the Garuda appointed agents as changes occurred. The notices of new information were called “GA Cargo Info”. ~~I was responsible for the issuing of GA Cargo Info at certain times. Annexed hereto and marked “GM-2” is a bundle of copies of GA Cargo Info.~~

17. The position today and during the period 2001 to 2006 is that the agent charges the shipper the cargo rate charged by Garuda based on the RSP with a commission and in addition will charge a handling service charge for the land transportation provided by the agent and for the other services including customs clearance, security and dangerous goods compliance, packaging and preparation of necessary forms. The agent does not disclose to Garuda the amount of the total fee charged by the agent to the shipper. As the shipper is the customer of the agent, the agent will usually try to preserve that relationship and will not involve the airline in direct communication with the shipper.

1. As we understand it, the deletions and underlinings refer to changes in Mr Mandala’s evidence as between different versions of his affidavit. We do not understand this evidence to be in dispute. It demonstrates that freight forwarders (cargo agents) could negotiate rates below the RSPs but charge the shippers the published prices. Given their dominant position as purchasers of air cargo services, it seems likely that lower prices were quite common. This evidence suggests that the RSPs were not minimum prices.
2. Garuda also referred to the statement of Mr Joseph Haddad, the Garuda Cargo Manager in Sydney. At [31] he said:

I distributed the RSP for Australia to all IATA freight forwarders in Australia. The rates charged by Garuda were the rates shown in the RSP at the relevant time or on some occasions a lower rate negotiated by the freight forwarder. However, if a rate lower than the RSP was to be charged it was necessary for me to obtain approval from the cargo pricing department at head office in Jakarta before I could quote a rate lower than the rate shown in the RSP.

1. To the extent that Mr Haddad asserted that freight forwarders were charged at RSP rates, his evidence is inconsistent with that of Mr Mandala. It may be, however, that Mr Mandala had authority which Mr Haddad lacked.
2. Pursuant to an inter‑office memorandum dated 10 December 2001, any proposed reduction in RSPs charged by branches had to be the subject of a proposal by the branch office, presumably directed to Garuda’s headquarters. A branch office might charge more than the RSP without making a proposal, but was obliged to report the increase to head office. This document suggests that the RSPs were minimum prices.
3. His Honour’s reluctance to draw inferences from the movement of RSPs, as invited by Garuda, is understandable, having regard to this evidence. Some of the evidence suggests that the RSPs were minimum rates. Other evidence suggests that lower rates were frequently negotiated. Whether or not his Honour was correct in classifying the RSPs as minimum rates, it seems clear that they would have given little indication as to the state of competition in the market. We see no basis for upsetting his Honour’s finding.
4. In any event, Garuda’s figures are of limited value. They cover only the period between 1 January 2001 and 8 February 2002, showing RSPs as at 1 January 2001, 5 September 2001, 1 January 2002 and 8 February 2002. They provide rates in five categories, namely for cargo shipments up to 45 kg, 100 kg, 250 kg, 500 kg and 1,000 kg. The figures appear in the following table at [60] of Garuda’s written submissions on non-market issues:

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
| Kg | 1 January 2001 | 5 September 2001 | 1 January 2002 | 8 February 2002 |
| 45 | US$1.70 | US$1.60 | US$1.50 | US$1.30 |
| 100 | US$1.55 | US$1.45 | US$1.40 | US$1.20 |
| 250 | US$1.35 | US$1.35 | US$1.30 | US$1.15 |
| 500 | N/A | US$1.15 | US$1.20 | US$1.05 |
| 1000 | N/A | US$1.00 | US$1.10 | US$1.00 |

1. The table shows a steady decline in the 45 kg, 100 kg and 250 kg categories over the 13 month period. The trend is not so clear for the 500 kg and 1,000 kg categories. We are presently concerned with the position as at October 2001, and the purpose, effect or likely effect of the understandings reached at that time. Even apart from his Honour’s doubts concerning the relevance of the movement in RSPs, the figures do not seem to say anything about the probable purpose, effect or likely effect of the imposition of the surcharge. Garuda’s argument is an assertion rather than a submission based on evidence. Further, there is no expert evidence which might assist in evaluating such evidence as is available.
2. Garuda submitted that, in effect, the various airlines agreed to implement the surcharges, but did not intend that their overall prices would increase to reflect such implementation. That submission is to be addressed by reference to the evidence. Garuda implicitly submitted that his Honour could not properly have found that the purpose, effect or likely effect of the understanding was to control cargo prices. It submitted that the amounts of the surcharges were, relative to cargo prices, “de minimis” and likely to be affected by competitive pressures. We do not see that we can properly assume that the surcharge was de minimis. We would need to know much more about the matter than we do, having regard to the evidence. Similar comments apply to the question of “competitive pressure”.
3. Prima facie, at the meeting of 4 October 2001 the airlines agreed to implement the two surcharges with effect from 16 October 2001. The minutes of the meeting of 29 October 2001 demonstrate that by that date, most of the relevant airlines had done so. The natural meaning of each resolution adopted at the meeting of 4 October 2001 was that the overall cargo price would be increased by the amount of each surcharge. The minutes of the meeting of 29 October 2001 confirm that this had occurred. That evidence leads inevitably to the conclusions reached by the primary Judge.
4. Logic also supports those conclusions. The airlines must have had some purpose in taking this action. We see no reason to doubt that the surcharges were imposed for the purpose of recouping additional outgoings to be incurred by the airlines in purchasing fuel and making security arrangements. It is improbable that the airlines intended, or expected that the overall cargo prices would not rise as a result of such imposition. If overall prices did not rise, then the airlines would not derive the additional revenue which they sought. Their agreement meant that they could not achieve that outcome by competing over the amount of the surcharge so as to increase revenue by increasing market share. No doubt, the airlines also wanted to signal to the freight forwarders and other customers that they were incurring higher costs, which costs they were passing on to customers. That message could be most effectively communicated by raising the overall price. It is unlikely that freight forwarders or other customers would have paid much attention to a communication that, in effect, increased costs. It is also unlikely that the airlines went to the trouble of reaching these understandings in the absence of any expectation of a benefit. It is clear that they wished to move together. It is reasonable to infer that they hoped that by moving together, each would minimise the risk of losing market share. The understanding committed the airlines to uniform action. Uniform action was likely to result in uniform, or near uniform price increases, at least in the short term.
5. Finally, Garuda submitted that the primary Judge erred in basing his conclusion as to purpose, effect or likely effect upon his reasoning in connection with conduct in Hong Kong. It submitted that his Honour found at [615] that in Hong Kong, the participating airlines reached an understanding, the purpose or effect of which was to produce parallel price increases, “in accordance with the methodology” (an agreed mechanism for triggering a fuel surcharge). Garuda submitted that there was no basis upon which his Honour could have concluded that the purpose of the Indonesian understandings was to achieve such a “parallel increase” in prices, and that the conclusion was contrary to the evidence which showed, “wide variations in implementation of the surcharges” ([61] of Garuda’s written submissions on non‑market issues). As to the so‑called wide variations in implementation, one response is to point out that as his Honour observed in connection with Hong Kong at [616], if variations occurred, they occurred after the understandings were reached, and therefore do not affect the purpose, effect or likely effect at the time at which they were reached. To the extent that Garuda submitted that there was no evidence to support his Honour’s conclusion concerning Indonesia, it simply ignores the matters identified at [614]. They were as relevant to the case concerning conduct in Indonesia as they were in connection with Hong Kong. Garuda has not, on appeal, attacked his Honour’s reliance on such matters.
6. In effect, Garuda submitted that market conditions were such that the surcharges could not have had the purpose, effect or likely effect of fixing, controlling or maintaining prices. Whilst we accept that market conditions may be relevant to the consideration of issues arising under ss 45 and 45A, the nature of that relevance must be clearly identified. Whatever use might be made of such evidence for the purposes of s 45, when s 45A is not engaged but where the former section is engaged, any relevance must be as to the questions posed by it. The case is, we think, primarily concerned with the purpose, effect or likely effect of controlling prices. In some cases, market conditions may be such that a court could not be satisfied that the understanding was reached with the purpose, effect or likely effect of controlling prices, but that would be an extreme case. Garuda pointed to scant evidence concerning market conditions and no expert evidence explaining it or its significance. In those circumstances, we see no reason to doubt that at the time at which each understanding was reached, its purpose was that revealed by the minutes. The likely effect may be inferred from the airlines’ apparent intention, coupled with their capacity to raise prices.
7. As to Garuda’s submission that there were wide variations in the implementation of the understanding, the evidence does not support it. Garuda referred to document ACCC.003.022.0007 at 0008. This document is part of the “result” document relating to the ACRB meeting on 17 October 2001. We have already referred to it. As we have observed, the evidence is that the fuel surcharge understanding had been implemented by most airlines on or before 29 October 2001. We have not been referred to any evidence concerning TC3 routes which would suggest variations in implementation of the fuel surcharge understanding. No variation is shown in the document to which we have referred. The document discloses variations in the rate of the security surcharge, but of those airlines which had imposed it, none had imposed less than the agreed amount. Only two airlines had not imposed a surcharge. There is nothing in this submission.

### Second and subsequent Indonesian Fuel and Security Surcharge Understandings

1. Garuda dealt collectively with eight different fuel surcharge understandings and five security surcharge understandings reached between April 2002 and September 2005. They are the subject of grounds 39‑50 in the notice of contention and are dealt with at [1156]‑[1189] and [1205]‑[1236] of the primary Judge’s reasons. Garuda’s submissions appear at [62]‑[71] of its written submissions on non-market issues. In each case Garuda submitted that s 45A was not engaged. In effect, Garuda submitted that:
2. the primary Judge erred by addressing the wrong question, namely whether each understanding had the purpose of controlling the amount of the surcharge, rather than controlling the amount of the overall price;
3. there was no evidence that the imposition of each surcharge was likely to lead to higher negotiated prices, or that the amount of the surcharge in any way constrained an airline’s pricing flexibility; and
4. the evidence was of vigorous price competition, so that the only purpose of the surcharges was to communicate to freight forwarders that the airlines faced increased costs in connection with fuel and security surcharges.
5. In support of these propositions Garuda pointed out that between April 2002 and September 2005 there were numerous meetings, attended by representatives of the airlines, at which understandings were reached concerning routes TC1 and TC2, whilst agreed surcharges for routes TC3 were left unchanged. It also pointed out that on 1 May 2003 Garuda discontinued the fuel surcharge but, following complaints from foreign airlines, agreed to re‑impose it. Garuda submitted that these events occurred in circumstances which were only consistent with the surcharge being understood to be an agreed tariff, and in circumstances only consistent with Garuda experiencing downward pressure on its prices. At [68] Garuda asks rhetorically:

How could [the surcharge] fix the price when the list price for cargo rates varied from US$0.95/kg to US$1.30/kg, Garuda negotiated its prices with freight forwarders and there was active competition on those cargo rates?

1. It submitted that his Honour erred in his finding because he again asked the wrong question namely, whether the understanding fixed, controlled or maintained the fuel surcharge rather than the overall price.
2. Garuda then set out a table of cargo rates for the period from 1 January 2001 until 1 January 2006 as follows:

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
| kg | 1 January 2001 | 1 January 2003 | 1 January 2005 | 1 January 2006 |
| 45 | US$1.70 | US$1.30 | US$1.55 | US$1.55 |
| 100 | US$1.55 | US$1.20 | US$1.45 | US$1.45 |
| 250 | US$1.35 | US$1.15 | US$1.25 | US$1.25 |
| 500 | N/A | US$1.05 | US$1.10 | US$1.10 |
| 1000 | N/A | US$0.95 | US$0.95 | US$0.95 |

1. It conceded that in January 2005 and January 2006 there were some increases, although the charges were still lower than in 2001. Garuda submitted that this evidence is only consistent with the market remaining competitive, and cargo rates being set by the forces of competition.
2. Garuda also submitted that the airlines implemented fuel and security surcharges at different rates, some basing them on actual weight, and others on chargeable weight, and some not imposing them at all. It submitted that, “the airlines knew that to be the case” ([71]). Garuda then submitted that an agreement to hold a de minimis surcharge constant (whilst there was competition on the cargo rates and a known absence of uniformity on the surcharges in fact imposed) could not control the overall price.
3. Clearly his Honour understood that the relevant question was as to the purpose, effect or likely effect upon overall price. His Honour gave detailed consideration to the matter at [600]–[620]. Whilst it is true that at [1159] he found that Garuda had the purpose of fixing the price of the fuel surcharge, it is most unlikely that his Honour had lost sight of the clear proposition identified in those earlier paragraphs. It is much more likely that he was focussing on the mechanism by which the price increase was to be achieved. Alternatively, he may simply have misspoken.
4. We have, in dealing with the October 2001 surcharges, dealt with the balance of Garuda’s other submissions concerning these fuel and security surcharges. The submissions are really only assertions, given some apparent legitimacy by reference to sparse evidence as to Garuda’s own market conduct, unsupported by any expert evidence. In pointing to the absence of evidence concerning negotiations with freight forwarders, Garuda overlooks the fact that s 45A facilitates proof of the substantial lessening of competition required by s 45.
5. It follows that grounds 39–48 of Garuda’s notice of contention fail.

### The September 2005 Fuel Surcharge Understanding

1. His Honour dealt with this matter at [1217]–[1226]. It is dealt with at [49]‑[50] of the notice of contention and [72]‑[73] of Garuda’s non-market issues submissions. His Honour found that there was a relevant understanding with respect to TC1 and TC2 routes, but not TC3 routes. Indonesia‑Australia routes were TC3 routes. As the case now only concerns the provision of cargo services from Hong Kong, Singapore and Indonesia to Australia, the finding concerning TC1 and TC2 routes is irrelevant. In the course of oral submissions, the Commission properly conceded that the finding ought not to have been made. The parties should make submissions as to any appropriate orders concerning this aspect.

### The 2001 Indonesian Price Understanding

1. The Commission alleged that at the meeting on 29 October 2001 Garuda and other airlines reached an understanding to the effect that from 1 December 2001, all of them would impose a freight charge on cargo shipped to Sydney and Perth. In the case of Sydney the charge was to be not less than US$1.00/kg. For Perth it was to be not less than US$0.80/kg. This matter is dealt with in the notice of contention at grounds 51 to 52, in Garuda’s submissions at [74]‑[78] and in the primary Judge’s reasons at [1149]‑[1155]. The alleged understanding is set out at [4] of the minutes of the 29 October 2001 meeting as follows:

MDP (Market Development Price) ex Indonesia:

a. Working Group MDP already set up the minimum rate (net rate) to various destination as attached.

b. Floor agreed to implement the above rates effective as from 01 December 2001. List of members approval as attached.

c. BA will give approval/comments soon.

d. For the members not attended this meeting, GA will send the above rates for approval/comments. Due date for comments if 10 November 2001 (no comments means approved).

1. The fourth page of the attached document headed “Marketing Development Program Ex Indonesia” demonstrates that two of the relevant routes were Jakarta/Sydney and Jakarta/Perth. His Honour took the reference in the minutes to “Floor” as being to those members who were present, the term being used in contradistinction to the words, “the members not attended this meeting”, in item 4(d). The minutes were prepared by Garuda staff. There was no challenge to their accuracy at trial or in these proceedings.
2. Garuda submitted that the minutes do not disclose an arrangement or understanding to fix prices, but merely an attempt to do so. It submitted that it is unclear whether any understanding amongst those represented at the meeting was dependent upon the subsequent agreement of those not represented at the meeting. Garuda further submitted that the terms of any understanding were open to amendment, prior to any implementation being “contemplated”. It submitted that a subsequent fax dated 31 October 2001 was “unambiguous” in asserting that, “unanimous agreement was required of all airlines and that if it was to be implemented the programme was to be implemented by all airlines”. At trial Garuda submitted that the facsimile dated 31 October 2001 demonstrated that no agreement had been reached at the meeting of 29 October 2001. The facsimile reads as follows:

Reference been made during our ACRB meeting at Aero Jasa Catering Building on 29 Okt 2001 which was attended by members as the attached list.

We still have a pending subject need approval for more members, which is MDP (Market Development Program) as a minimum price level. This program is a gentlemen agreement program among our members aiming to set minimum price level as to keep the market price not deteriorate below the level (currently made majority sell above the level).

Your aproval [sic] highly appreciate at the latest on 10th Nov 2001, by written letter addressed to me, as this program requested to be implemented on 1th Des 2001 by all audiences.

Thank you for your attention and cooperative, we remain.

1. Garuda submitted that the passages commencing, “We still have a pending project”, and, “Your aproval [sic] highly appreciate”, were directed to all ACRB members and required their attention. His Honour concluded that the letter was addressed only to those airlines which had not attended the meeting. The Commission’s case was that Garuda was party to an understanding with the other members present at the meeting. Garuda also submitted that it was bound to make such an agreement by virtue of Indonesian law, a submission which his Honour had previously rejected, as have we. His Honour otherwise disposed of this submission at [1153] as follows:

I agree, however, with the Commission’s submission that this letter is simply addressed to the airlines referred to in item 4(d) of the minutes, i.e., those which had not been at the meeting. The airlines to which this letter was addressed were irrelevant because, as the Commission noted, it did not allege that they had been party to the understanding.

1. Garuda challenged his Honour’s conclusion that the fax was addressed only to those not present at the meeting. It pointed out that Singapore Airlines and Lufthansa, both of which were represented at the meeting, were the only airlines which produced copies of it in the course of these proceedings. Thus Garuda asserted that it was sent to those airlines which had attended the meeting, as well as to those which had not.
2. In our view the fax was intended to prompt those not in attendance at the meeting to indicate their approval of the proposal. However the fact that both Singapore and Lufthansa had copies suggests that it was, at some stage, sent to them. There is nothing surprising about that possibility. The airlines which were represented at the meeting had a clear interest in knowing whether those not in attendance would agree to the proposal, whether or not those attending had already bound themselves to act according to the proposal.
3. In our view paragraph 4 of the minutes demonstrates that the parties present at the meeting had reached a final agreement to implement the proposal with effect from 1 December 2001. Paragraph 4(d) merely acknowledges the possibility that other members might comment, and that such comments might lead to change. It does not follow that paragraph 4(d) rendered conditional, any understanding reached at the meeting. In our view the overall effect of the minutes and the subsequent fax was that those attending the meeting had agreed to implement the proposal with effect from 1 December 2001, whilst accepting the possibility that there might be some changes to it, and that those not present would be asked to give their approval. Grounds 51 and 52 of the notice of contention must fail.

### The May 2004 Customs Fee Understanding

1. This matter is dealt with in grounds 53 and 54 of Garuda’s notice of contention, at [1190]‑[1204] of the primary Judge’s reasons and at [79]–[82] of Garuda’s written submissions.
2. In April 2004 the Indonesian Government announced that it would impose a customs fee on air waybills and/or cargo manifests for flights out of, and into Indonesia. At an ACRB meeting, the airlines represented agreed to pass any such fee onto customers. The Commission alleged an agreement, arrangement or understanding to fix, control or maintain prices. The primary Judge found that there was a relevant understanding concerning exports from Indonesia but was not so satisfied as to the alleged understanding concerning imports from Australia. The evidence indicated that airlines generally sought to pass such charges onto their customers. The tax was fixed in Indonesian currency. His Honour dealt with the exports aspect at [1190]‑[1197].
3. The Commission relied primarily upon minutes of a meeting held on 6 May 2004. Paragraph [4] of the minutes of that meeting read as follows:

ACRB members agree that in covering the expenses arising in relation to the matters above:

a. To levy a charge for each export item – a new fee called: **Custom Charges Data Processing** = **CG**, the minimum amount being USD.5.-/per AWB (Airway Bill) and to be implemented effective 16 May 2004.

b. On behalf of ACRB member airlines in accordance with the attached list that has been jointly signed, a Notification Letter will be sent to GAFEKSI (Indonesian Freight Forwarders Association) concerning point a above.

c. ACRB members recommend: for import items to be also charged a minimum of Rp. 50 000 (alternative 1) or alternative 2: a minimum amount of USD.6.-/per AWB (all in).

d. A final decision on the options for imports will be made in the next meeting and each ACRB member airline is to discuss/consider its size and implementation in the meantime with their respective HO (Head Office); collection of AWB (from origin station or at destination station)?

1. At [1197] his Honour said:

I accept that this minute is sufficient to establish the understanding insofar as it concerns exports from Indonesia, for the reasons I have given in relation to the other understandings. Garuda admitted that it maintained the customs fee of $USD5.00 from 16 May 2004 until at least October 2005 on inbound and outbound flights with the exception of flights from Australia where it imposed a fee of AUD10.00. I conclude that the purpose of the understanding was to fix the fee and that s 45A applies. But for the absence of a market in Australia I would have found breaches of both s 45(2)(a)(ii) and s 45(2)(b)(ii) in respect of its exports from Indonesia.

1. At [82] of its written submissions, Garuda submits:

In light of the evidence referred to above of continual competition on cargo rates and the evidence of the industry practice of passing on government charges there was insufficient evidence to support a conclusion that an agreement to charge US$5.00 per air waybill in order to recover a tax of about US$20.00 per manifest had any price fixing purpose. If a manifest had on it 4 air waybills for cargo weighing 4 tonnes Garuda’s RSPs indicate the cargo rate would have been US$3,800. How could fixing a fee of US$20 - about half a percent of the total price in that modest example - control price negotiations on the total? The trial judge at [J1197] found that the purpose was to “*fix the fee*” and reasoned that that was sufficient to constitute a contravention of s45. The evidence did not support a conclusion that the purpose of the understanding was to fix the price for the carriage of air cargo.

1. We have dealt with similar submissions concerning other alleged understandings. We consider that the submission fails to recognise the fact that his Honour based his inference upon the wording of the minutes. Once again, Garuda seeks to discredit his Honour’s inference by reference to sparse market evidence, without the benefit of any supporting economic evidence. We are unpersuaded that the primary Judge was in error.

## Garuda’s submission concerning the IATA Authorisation

1. This matter is dealt with in Garuda’s notice of contention at [77]‑[85], in Garuda’s submissions at [118]‑[121] and in the primary Judge’s reasons at [1244]‑[1272]. Air NZ and Garuda submitted that they were entitled to rely upon an authorisation issued by the Commission in 1985 which provided an immunity from liability under s 45 of the *Trade Practices Act* (see s 88(1)(c)‑(e)).
2. Although the notice of contention appeared to raise this issue with respect to all of Garuda’s impugned conduct, in its submissions Garuda limited the application of the alleged IATA Authorisation to the May 2004 Customs Fee Understanding, apparently because the customs fee understanding was listed in the TACT register maintained by IATA or on its behalf.
3. As we have explained, IATA is an international organisation to which many, perhaps most, airlines belong. Amongst other functions it concerns itself with passenger fares and cargo charges. It has a quite complex constitutional structure, with mechanisms for fixing fares and cargo charges. At some stage it was realised that the utilisation of these mechanisms by IATA and its member airlines might breach ss 45 and 45A. IATA applied to the Commission for authorisation pursuant to s 88 of the *Trade Practices Act*. The application was successful.
4. The Australia‑Indonesia ASA contemplated the use of the IATA mechanism in order to fix relevant tariffs. Where that was not possible, tariffs were to be agreed between or amongst the relevant airlines. Failing such agreement, or if the aeronautical authorities did not approve submitted tariffs, those authorities were to endeavour to agree them. At first instance and on this appeal, Garuda submitted that the customs fee understanding was reached pursuant to IATA mechanisms and was therefore authorised by the IATA Authorisation. For present purposes, we assume that if the customs fee understanding was the product of the IATA mechanisms, it would be so authorised.
5. At [1252] his Honour set out [15]‑[16] of the Commission’s reasons for granting authorisation as follows:

15. The Commission also accepts that there is public benefit in the preparation and availability of tariff information providing a basis for determining fares and for fare structuring that is known throughout the industry. Fares are set by way of resolutions passed at Traffic Conferences (resolutions of a type contained in documentation filed in support of this application). The Commission acknowledges that the compilation of fare information will reflect a consensus or agreement reached by airlines participating in the relevant Traffic Conferences. In so far as such agreements are arrived at with respect to fares for the Australian market, the Commission accepts that there is a public benefit to be derived by reason of the fare information extracted from them. *What the Commission does not accept is IATA, acting itself or through its members compelling its members to charge in Australia tariffs set in accordance with IATA tariff resolutions so as to preclude competitive pricing or discounting in Australia.* But the form of authorization sought by IATA (see Attachment 1) allows room for such competition in prices and discounts.

16. Thus the Commission proposes to grant authorization so that collaboration by carriers through IATA can continue in all IATA activities – technical, legal, ticketing, clearing house, safety and tariff co‑ordination *but that IATA cannot, acting through itself or its members, compel a member:*

* *to charge the fares (or pay the commissions) in Australia that have been set by carriers within IATA*; or
* not to advertise in Australia tariffs they are actually charging; or
* to require their agents to so charge in Australia or not to so advertise in Australia.
1. At [1253] his Honour noted that although this passage concerned passenger fares, the IATA Authorisation elsewhere made it clear that the same reasoning applied to cargo tariffs. The parties have not suggested to the contrary. At [1254] the primary Judge set out the terms of the IATA Authorisation as follows:

2. Noting IATA’s undertaking that Pt XII and the Second Schedule to the Provisions for the Conduct of IATA Traffic Conferences (Document I) will not be used in Australia to:

(i) compel members to charge in Australia tariffs set in accordance with those provisions; or

(ii) compel members to pay in Australia agents commissions set in accordance with those provisions,

authorization is granted for the contracts arrangements and understandings evidenced by:

(a) IATA’s Act of Incorporation (Document 1);

(b) IATA’s Articles of Association (Document 1);

(c) IATA’s Rules and Regulations of the Executive Committee (Document 1);

(d) IATA’s Committee Rules and Regulations of the Standing Committees (Document 1);

(e) IATA’s Manual of Clearing House Regulations and Procedures Document 19); and

(f) IATA’s Rules of Procedure of General Meetings (Document 1),

*And also* authorization is granted for the contracts arrangements and understandings evidenced by the Provisions for the Conduct of IATA Traffic Conferences including Pt XII and the Second Schedule except to the extent that Pt XII and the Second Schedule are given effect in Australia by IATA, acting itself or through its members, to compel its members:

(i) to charge in Australia tariffs set in accordance with those provisions;

(ii) to pay agents in Australia commissions set in accordance with those provisions;

(iii) not to advertise in Australia tariffs they are actually charging; or

(iv) to require their agents:

(a) to charge in Australia tariffs set in accordance with those provisions; or

(b) not to advertise in Australia tariffs they are actually charging,

*And further* authorization is granted for the resolutions the members of IATA have adopted at conferences convened in accordance with the Provisions for the Conduct of IATA Traffic Conferences (Documents 6, 8, 20‑42) except to the extent specified in the Schedule to this Determination.

3. Authorization is granted for IATA and its members to give effect to:

(a) IATA’s Act of Incorporation (Document 1);

(b) IATA’s Articles of Association (Document 1);

(c) IATA’s Rules and Regulations of the Executive Committee (Document 1);

(d) IATA’s Committee Rules and Regulations of the Standing Committee (Document 1);

(e) IATA’s Manual of Clearing House Regulations and Procedures (Document 19);

(f) IATA’s Rules of Procedure of General Meetings (Document 1),

*And also* to give effect to the Provisions for the Conduct of IATA Traffic Conferences (Document I) (including Pt XII and the Second Schedule) except to the extent that Pt XII and the Second Schedule are given effect in Australia by IATA, acting itself or through its members, to compel its members:

(i) to charge in Australia tariffs set in accordance with those provisions;

(ii) to pay agents in Australia commissions set in accordance with those provisions;

(iii) not to advertise in Australia tariffs they are actually charging; or

(iv) to require their agents:

(a) to charge in Australia tariffs set in accordance with those provisions; or

(b) not to advertise in Australia tariffs they are actually charging,

*And further* authorization is granted to IATA to collect information as to tariffs commissions and conditions actually applying in the market in Australia.

4. Authorization is granted to IATA and its members to:

(i) convene Traffic Conferences in accordance with the Provisions for the Conduct of IATA Traffic Conferences;

(ii) adopt resolutions at such conferences (including resolutions setting tariffs); and

(iii) give effect to any such resolutions;

except to the extent that such resolutions are given effect in Australia by IATA, acting itself or through its members, to compel its members:

(i) to charge in Australia tariffs set in accordance with those provisions;

(ii) to pay agents in Australia commissions set in accordance with those provisions;

(iii) not to advertise in Australia tariffs they are actually charging; or

(iv) to require their agents:

(a) to charge in Australia tariffs set in accordance with those provisions; or

(b) not to advertise in Australia tariffs they are actually charging,

*Provided that* this authorization does not authorize IATA or its members to give effect in Australia to the resolutions specified in the Schedule or to give effect in Australia to any resolution passed in substitution for and substantially identical with such resolutions.

1. The IATA Authorisation extends to:
2. various IATA “constitutional” arrangements;
3. contracts, arrangements and understandings evidenced by the IATA Provisions for the Conduct of IATA Traffic Conferences, including resolutions adopted by IATA members at conferences convened in accordance with such Provisions, with certain exceptions;
4. the conduct of IATA and its members in giving effect to the various documents, contract, arrangements and understandings; and
5. the convening by IATA and its members of Traffic Conferences in accordance with the Provisions for the Conduct of such conferences.
6. IATA undertook that neither it nor its members would use its mechanisms to compel identified anti‑competitive conduct in Australia. Various aspects of the IATA Authorisation were subject to exceptions in similar terms to the undertaking. The IATA Authorisation itself is not, on its face, limited to conduct in Australia or in connection with routes to or from Australia. The undertaking and the exceptions are, however, concerned with conduct in Australia.
7. At first instance, Garuda argued that if its conduct were otherwise in breach of ss 45 and 45A, the meeting at which the understanding was reached was a tariff conference, convened and conducted pursuant to the IATA rules, and hence covered by the IATA Authorisation. The case seems to have been conducted on the basis that the terms “tariff conference” and “traffic conference” could be used interchangeably. The primary Judge did not accept the submission for three reasons. First, his Honour considered that the IATA Authorisation was, “concerned with the setting of prices by airlines in Australia and not with the fixing of tariffs on inbound flights to Australia”, supporting this conclusion by reference to various passages in the IATA Authorisation and in the Commission’s reasons ([1256]). Secondly, his Honour did not accept that the ACRB meeting was a tariff conference under the IATA rules. His Honour considered that a meeting under the IATA rules could only occur if the persons constituting the meeting intended that it be a meeting in the “requisite sense” ([1257]). As we understand it, his Honour considered that the mere fact that the airline representatives could have convened a conference under the IATA arrangements did not mean that they had done so when they attended an ACRB meeting. Thirdly, his Honour considered that the IATA Authorisation did not authorise IATA or its member airlines to compel an airline to charge a tariff ([1258]).
8. The primary Judge did not accept that the possible compulsion dealt with in the undertaking and the exceptions, included only legal compulsion. His Honour considered that those provisions were concerned with practices which would undermine competition, and that the word “compel” included attempts to enforce a mutual understanding. He considered that to read the IATA resolution otherwise would be a “charter for price fixing” ([1258]).
9. On appeal, Garuda essentially made two submissions. First, it submitted that the primary Judge erred in holding that the IATA Authorisation did not authorise price fixing outside of Australia. Secondly, it submitted that the customs fee understanding was published in TACT, the sources of which were traffic conference resolutions or filings under the Traffic Conference Resolution 116bb. In that sense the understanding was pursuant to the “Provisions for the Conduct of IATA Traffic Conferences”, or gave effect to a Traffic Conference Resolution, and was therefore authorised by [2], [3] or [4] of the IATA Authorisation. Garuda asserted that his Honour failed to deal with a submission to that effect.
10. The Commission submitted that:
11. the IATA Authorisation was concerned with the setting of prices in Australia for the reasons given by the primary Judge;
12. the various meetings were not tariff conferences under IATA rules;
13. the sources of rates included in TACT were not limited only to traffic conferences or filings; and
14. the IATA Authorisation did not permit IATA or its members to compel airlines to charge, in Australia, tariffs set in accordance with IATA resolutions.
15. As to Garuda’s first submission, we consider that his Honour erred in concluding that the IATA Authorisation, “was concerned with the setting of prices by airlines in Australia and not with the fixing of tariffs on inbound flights to Australia”. We accept that the IATA Authorisation applied only to airlines operating in Australia, but it does not follow that it applied only to the setting of prices in Australia, and not to conduct outside of Australia. Whilst the conduct referred to in the undertaking and the exceptions is limited to conduct in Australia, the IATA Authorisation is not otherwise so limited. In our view, Garuda’s conduct in reaching the relevant understanding in Indonesia was authorised, but its enforcement in Australia was not.
16. As to Garuda’s second submission, namely whether the understanding was reached using the IATA mechanisms, Garuda did not properly address the key finding by the primary Judge. It merely asserted that the customs fee understanding was pursuant to the “Provisions for the Conduct of IATA Traffic Conferences”, or gave effect to a Traffic Conference Resolution (116bb), and was therefore authorised by [2], [3] and [4] of the IATA Authorisation. In the end, his Honour determined as a matter of fact that the meeting was not convened or conducted as part of any IATA mechanism. The meeting was rather a meeting of the ACRB, the purpose and function of which are discussed at [1133]‑[1139]. The slides of a presentation given at the meeting suggests that the meeting was to be:
* A forum to consolidate view/information/effort among the Cargo Airline or The Airline’s Cargo Department which conduct Air Cargo Bussines [sic] in Indonesia.
* A forum to discuss any matters that concern to Air Cargo Bussines [sic] in Indonesia
* A forum to do social activities among the member and or to the public for the public awareness its existence.
* A forum to cooperate jointly in regard of facing any issues or policy i.e. government issues, authority issues, and other’s issue that become handicap to Air Cargo Bussines [sic] in Indonesia.
1. At [1139] his Honour concluded:

The ACRB was clearly a body designed to foster co‑operation but there is nothing to indicate at this point that it was prices which were to be the subject of that co‑operation. The minutes do not suggest that the ACRB’s basic purpose was to fix surcharges or, more generally, air freight rates. I do not find that the ACRB was set up to facilitate price fixing understandings or the exchange of future pricing intentions.

1. At [1257] his Honour held:

Secondly, the various meetings at which the surcharges were agreed were not tariff conferences under the IATA rules. No person at any of those meetings conceived themselves to be engaged in IATA tariff conferencing. Before a meeting may occur it is necessary that the persons at the meeting should intend that what is taking place is a meeting in the requisite sense. There is not, for example, a meeting of the directors of a company when they coincidentally happen to be in the same place at once. Nor does a Full Court of this Court convene on any occasion three of its judges happen to be in the same room. In this case, the participants at the meetings in question had only in mind that they were attending meetings of the HK BAR CSC, the Singapore BAR CSC or the ACRB respectively. They did not have in mind that they had been attending a cargo tariff conference or related procedure under the IATA rules.

1. Garuda did not submit that either of the findings at [1139] or at [1257] was unsupported by the evidence, or based upon legal error. It simply asserted that the customs fee understanding was reached, pursuant to the “Provisions for the Conduct of IATA Traffic Conferences”, or gave effect to a Traffic Conference Resolution (116bb), and was therefore subject to the IATA Authorisation. But Resolution 116bb authorises IATA airlines to file with it proposed, new or altered charges. Garuda had not sought to explain how, or why, it asserted that the customs fee understanding was reached pursuant to any part of the IATA mechanism. The evidence suggests otherwise. Garuda identified no error in his Honour’s conclusion that the understanding was not authorised by the IATA Authorisation.

## Garuda’s submission concerning the Qantas Authorization

1. Qantas also obtained an authorization from the Commission (the “Qantas Authorisation”). It may be found at (1985) ATPR (Com) 50-090, commencing at p 55,151. Some parts of it are not included in that report but may be found at *Qantas Airways Limited* [1987] ATPR (Com) 50-056, commencing at p 57,163. At [1261] his Honour set out its terms as follows:

With respect to Application No. A90427, the TPC grants authorization to Qantas:

(i) to give effect to the tariff arrangements with the airlines set out in Attachments A and B, or to make further arrangements of a like type with those airlines, on the basis of the conditions set out in para. 2 above; and

(ii) to make arrangements of a like type with other airlines with which Qantas at present does not have such arrangements, provided that when such agreements are proposed they are first submitted to the TPC for consideration;

on condition that in both circumstances there is no requirement on carriers or agents-

* to charge the fares (or pay the commissions) in Australia that have been set by the agreements;
* not to advertise in Australia tariffs they are actually charging

and that the carriers concerned and their agents are kept aware of this condition.

1. There are two attachments to the Qantas Authorisation. According to [2] at p 57,164, Attachment A lists the carriers then “involved” with Qantas in arrangements concerning tariffs and related conditions. The list includes IATA and non‑IATA members, but all of the agreements were reached outside of the IATA mechanisms. At [14] on p 57,167 it is said that Attachment B lists agreements entered into by Qantas with other carriers outside of the IATA mechanisms. Attachment A is divided into two parts, depending upon whether the other airline was an IATA member. Attachment B is also divided into two parts, depending upon whether the agreement was with multiple other carriers or a single carrier. It seems probable that whilst Attachment A deals with tariffs, Attachment B deals with passenger fares.
2. Garuda submitted at trial and on appeal that its impugned understandings to which Qantas was a party in Hong Kong and Indonesia were authorised by the Qantas Authorisation. Inherent in Garuda’s submission is the proposition (which his Honour accepted) that the Qantas Authorisation protected both Qantas and those airlines with which Qantas had arrangements. In grounds 86 and 87 of the notice of contention, Garuda asserted on appeal that the Qantas Authorisation would also authorise Garuda’s conduct in entering into each understanding, even if Qantas was not a party to it. It is not clear whether that position was urged in argument at trial.
3. At [1265] and [1266] the primary Judge dealt with a number of preliminary matters. We need not say anything about them save that, for the reasons which we have given, we consider that the IATA Authorisation included the fixing of tariffs on “inbound flights” to Australia. However that matter is not relevant to the operation of the Qantas Authorisation. The relevant understandings about which the Qantas Authorisation is concerned were not negotiated under the IATA mechanisms. At [1268] his Honour held that the airlines participating in the ACRB decisions, which led to the various understandings, did not understand themselves to be engaged in tariff agreements under the Australia‑Indonesia ASA. At [1269] and [1270], his Honour concluded that even if the Qantas Authorisation otherwise applied to the understandings, they required carriers to charge fares in Australia that had been set by the “agreement”, and so were beyond its scope.
4. On appeal, Garuda submitted that the primary Judge erred in concluding that because those participating in the relevant meetings did not understand themselves to be engaging in tariff agreements “under the relevant ASAs” but outside the IATA structure, the Qantas Authorisation did not apply to the various understandings. Garuda submitted that the primary Judge also erred in concluding that the understandings required the airlines to charge agreed rates in Australia, contrary to the condition imposed upon the Qantas Authorisation. Unlike the IATA Authorisation considered above (the operation of which was confined by Garuda to the May 2002 customs fee understanding), Garuda seemed to rely on the Qantas Authorisation with respect to all of the understandings arising out of its conduct in both Indonesia and Hong Kong.
5. The Qantas Authorisation authorised Qantas to do three things, namely:
6. give effect to the arrangements identified in the attachments;
7. make further arrangements of a like type with the airlines identified in the attachments; and
8. make arrangements of a like type with other airlines with which it did not then have arrangements, provided that any proposed arrangement was first submitted to the Trade Practices Commission for “consideration”.
9. The Authorisation is subject to a condition. For present purposes, the condition is that a relevant arrangement must not require a carrier (airline) to charge fares in Australia, which fares have been set pursuant to the said agreement (arrangement). There is no dispute that the word “fares” includes cargo charges.
10. We understand Garuda to rely on the second aspect of the Authorisation. As to the first aspect we do not understand Garuda to have submitted that any of the relevant understandings were listed in the attachments. The Qantas Authorisation predated all of them. As to the third aspect, there is no evidence that the Trade Practices Commission “considered” any of the presently relevant understandings.
11. In order to fall within the second aspect, Garuda must show that each understanding was an arrangement with Qantas of a like type to those identified in the attachments, made with one (or perhaps more) of the airlines named in Attachments A and B. But Garuda did not attempt to demonstrate that any of the understandings were “of a like type”. This might have been a significant obstacle to Garuda’s submission concerning the Qantas Authorisation. However, it seems to have been assumed that *any* arrangement as to tariffs with a relevant airline would attract the operation of the Authorisation. This assumption may have led the primary Judge to conclude that the Qantas Authorisation would apply only to arrangements reached by the airlines under the “relevant ASAs” (see the primary judgment at [1268]). Having reached that conclusion, his Honour then concluded that those participating in the relevant meetings had not understood themselves to be participating in the process contemplated by the relevant ASAs. It was still necessary to determine whether the arrangements under the relevant ASAs were “of a like type” to those in the attachments.
12. Garuda submitted the Qantas Authorisation did not, in terms, prescribe any particular mechanism by which such an arrangement was to be made. However, in (1987) ATPR (Com) 950-056 at pp 57,164 and 57,165, the Trade Practices Commission set out its understanding of the way in which the various existing non‑IATA arrangements had been made. We need not set out the passage in full. It is sufficient to say that the Trade Practices Commission understood that:
13. the agreements listed in the attachments were the means by which the respective airlines made joint recommendations to their respective governments as to agreed tariffs; and
14. most of Australia’s ASAs provided that tariffs would be fixed between the relevant airlines, and then filed with the relevant aeronautical authorities, as contemplated by (for example) Article 6 of the Australia‑Indonesia ASA.
15. The Qantas Authorisation must be understood in that context. Of course, as we have explained, there was no evidence that the Indonesian Government insisted on being advised about such tariffs, or purported to approve them. Nonetheless there is much to be said for his Honour’s view that the Qantas Authorisation was intended to apply to arrangements made pursuant to inter‑governmental agreements. It seems most unlikely that the Trade Practices Commission would have given open‑ended approval to any agreement made by Qantas with other airlines without considering it. It is much more likely that it would have approved of arrangements which merely resulted in recommendations to government. The Commission submitted that at the relevant meetings those attending simply were not making agreements as contemplated by the Authorisation. That no attempt to satisfy the requirement that the understandings were of like type with those specified in the Authorisation supports that view. We consider that the understandings were, as a matter of fact, not arrangements to which the Authorisation applied.
16. We consider that the primary Judge was also correct in holding that the understandings required the parties to whom the benefit of the Authorisation was provided (including Qantas and Garuda) to charge fares agreed in the understandings. Garuda attacked this conclusion by reference to the first two sentences at [1269]. His Honour said:

Further, the Qantas authorization was explicit that there was to be ‘no requirement’ on carriers to charge any tariff so agreed. Yet the critical feature of each of the understandings I have found to exist is that the airlines involved undertook to each other to charge the agreed fuel and insurance surcharges.

1. Garuda submitted that his Honour erred in that he proceeded as if the condition in the Authorisation restricted a carrier from charging the agreed fare anywhere when, in fact, the condition only restricted a carrier from doing so in Australia. It seems most unlikely that his Honour would have overlooked the fact that the condition related to requirements as to the charging of agreed tariffs in Australia. Indeed, at [1266], the primary Judge explained that his consideration of this submission was only on the assumption that he had been wrong to conclude that there was a market *in Australia.* It is more likely that his Honour’s omission of the geographical limit to the restriction in [1269] simply reflected the way in which the parties had cast their submissions. In any event his Honour found that, “the airlines involved undertook to each other to charge the agreed fuel and insurance surcharges”.
2. In those circumstances Garuda’s point only has relevance if the surcharges which were the subject of the understandings were all on cargo services ex Hong Kong, Singapore or Indonesia, and those surcharges would not be charged in Australia. However, if an airline entered into an agreement with a shipper or freight forwarder in Australia, to carry cargo from one of those ports to Australia, the understandings required the airline to charge the agreed tariff. We are not aware of any evidence which suggests that the airlines did not charge tariffs in Australia for the provision of such services, although in general, the charges may have been paid in the port of departure. The matter is discussed in the primary judgment at [121]‑[128]. We otherwise agree with the primary Judge’s reasoning.
3. This aspect of the notice of contention must fail.

## Garuda’s submission that the proceedings were out of time

1. This matter is dealt with at grounds 93 and 94 of the notice of contention, at [128]–[134] of Garuda’s submissions and at [1273]–[1279] of the judgment at first instance.
2. Section 76 of the *Trade Practices Act* provided that in the event that the Court is satisfied that a person has contravened specified provisions of the *Trade Practices Act*:

… the Court may order the [offender] to pay to the Commonwealth a pecuniary penalty … .

1. Section 77 of the *Trade Practices Act* provided:

(1) The Commission may institute a proceeding in the Court for the recovery on behalf of the Commonwealth of a pecuniary penalty referred to in section 76.

(2) A proceeding under subsection (1) may be commenced within 6 years after the contravention.

1. At [332]‑[334] of Garuda’s further amended defence it pleaded:

332. Further or in the alternative:

(a) paragraphs 69 to 85A (inclusive), paragraphs 101 to 104 (inclusive), paragraphs 112 to 134 (inclusive), paragraphs 231 to 239 (inclusive), paragraphs 246 to 251A (inclusive) and paragraphs 252 to 254 (inclusive) allege contraventions of the *Trade Practices Act* that were not within six years of the commencement of this proceeding;

(b) paragraphs 230A to 230G allege contraventions of the *Trade Practices Act* that were not within six years of the amendment of the Originating Application by which relief was first sought in respect of those allegations.

333. In answer to the whole of the allegations in the Amended Statement of Claim, this proceeding when commenced by the Applicant and the proceeding as amended by the Amended Originating Application filed on 17 October 2012 was not a proceeding which the Applicant was authorised to institute for the recovery on behalf of the Commonwealth of a pecuniary penalty referred to in section 76 of the *Trade Practices Act 1974*.

**Particulars**

Section 77 of the Trade Practices Act 1974

334. Alternately, the allegations made in the paragraphs particularised in paragraph 332 above are statute barred and cannot be the subject of findings or relief.

1. Paragraphs [332] and [333] raise two different defences.
2. The first defence, in [332], is essentially a limitation defence. We understand that the Commission accepts that any claim to a pecuniary penalty, raised after expiry of the six year period, is barred (primary judgment at [1274]). However, it seeks to recover penalties for conduct in respect of which the limitation period had not expired at the time at which each relevant claim was made. It also claims other forms of relief which are not statute‑barred. The parties must identify the conduct which is statute‑barred. That matter may be considered after the publication of these reasons.
3. The second defence, in [333], raises a different point which is said to be an answer to all of the Commission’s claims for the imposition of pecuniary penalties. The allegation in [333] is that the proceedings seeking pecuniary penalties as originally commenced, and as amended on 17 October 2012, were not proceedings which the Commission was authorised to institute. This submission asserts that a necessary element of the Commonwealth’s entitlement to seek such penalties was not satisfied (namely that any application for such imposition be made within the six year period). Sometimes this point is expressed as being that a condition precedent to the exercise of power was not satisfied. Garuda submitted that the Commission had no power to commence *any* proceedings for relief because the proceedings included a claim for contraventions some of which occurred more than six years prior to such commencement. Garuda therefore submitted that in those circumstances, all claims for the imposition of pecuniary penalties should be dismissed.
4. We reject this “condition precedent” submission by Garuda for two independent reasons. The first reason is that even if s 77(2) of the *Trade Practices Act* was properly construed as a provision which was a condition precedent to the exercise of a power to impose pecuniary penalties, the consequence would not be, as Garuda submitted, that the whole of the proceeding would be set aside. The consequence would only be that the Commission would have no power to seek a pecuniary penalty for those contraventions which were more than six years prior to the commencement of the proceeding. This has the same practical effect as if a limitation period had barred the commencement of a proceeding for pecuniary penalties for those contraventions. The second reason why we reject Garuda’s condition precedent submission is that s 77(2), properly construed, is not a condition precedent to the exercise of power. It is a limitation provision.
5. We turn to the first reason why we reject Garuda’s submission. Garuda submitted that the Commission’s application was for pecuniary penalties in respect of the whole of its contraventions under the *Trade Practices Act.* Garuda submitted that since *some* of the contraventions relied upon by the Commission were outside the six year period in s 77(2) (eg the understandings set out at [1274] including the 2002 Hong Kong Lufthansa Methodology Understanding and the October 2001 Insurance Surcharge Understanding) this meant that there was no power for the Commission to have brought the proceeding. Garuda said that the primary Judge should therefore have set aside the decision to bring the proceeding and dismissed the claim for pecuniary penalties.
6. The primary Judge held that the effect of s 77(2) was that “*a proceeding*” for the recovery of a pecuniary penalty related to an identified contravention in s 76 ([1279]). He concluded that “proceeding” refers to individual claims for individual civil penalties and not “the overall originating process and pleading”. We agree with this conclusion. As the primary Judge said, if it were otherwise, then the Commission could never commence an action for a pecuniary penalty combined with a non‑penalty claim because the latter (as a non‑penalty claim) would fall outside s 77(1). The reference to “a proceeding” involves individual claims for individual civil penalties: *Australian Competition and Consumer Commission v Eurong Beach Resort Ltd* [2005] FCA 1134 [2]‑[3] (Kiefel J).
7. Garuda submitted that, “even if [the conclusion of the primary Judge] be right” the Commission’s application was not for a “severable penalty” but was for penalties based upon all the contraventions, including those which were outside the six year period (at [133] of Garuda’s submissions). This submission is incorrect. It is inconsistent with authorities which treat penalties as being imposed separately for each contravention: *Pearce v The Queen* [1998] HCA 57; (1998) 194 CLR 610, 623‑624 [45] (McHugh, Hayne and Callinan JJ) as applied in *Re Idylic Solutions Pty Ltd; Australian Securities and Investments Commission v Hobbs* [2013] NSWSC 106; (2013) 93 ACSR 421, 451 [113], 452 [116] (Ward JA). Garuda’s submission also misdescribed the Commission’s originating application. The order sought by the Commission in its amended originating application was as follows (see ACCC.909.020.0424):

An order that the respondent pay to the Commonwealth of Australia, pursuant to section 76 of the Act, such pecuniary penalties [plural] as the Court determines to be appropriate in respect of the respondent’s contraventions [plural] of the Act.

1. We turn then to the second reason why we reject Garuda’s condition precedent submission. This reason is that s 77(2) of the *Trade Practices Act*, properly construed, is not a condition precedent to the exercise of power. It is a limitation provision.
2. An early Australian explanation of the distinction between the two “defences” appears in *The* *Crown v McNeil* [1922] HCA 33; (1922) 31 CLR 76. That case involved a claim under the *Crown Suits Act 1898* (WA), s 33 of which relevantly provided:

No claim or demand shall be made against the Crown under this Part of this Act unless it is founded upon and arises out of some one of the causes of action mentioned in this section. Provided that nothing herein contained shall be deemed to give a cause of action for breach of contract which would not have arisen in like circumstances before the passing of this Act.

(1) Breach of any contract entered into by or under the lawful authority of the Governor on behalf of the Crown or of the Executive Government of the Colony, whether such authority is express or implied.

…

1. Section 37 provided:

No person shall be entitled to prosecute or enforce any claim or demand under this part of the Act [i.e. a claim against the Crown] unless the petition setting forth the relief sought is filed within twelve months after the claim or demand has arisen.

1. At 96, in the joint judgment of Knox CJ and Starke J, their Honours said:

The new mode of enforcing claims against the Crown given by Part III. of the *Crown Suits Act* is, by force of sec. 37, subject to a condition that the petition for relief be filed within twelve months after the claim has arisen. The function of sec. 37 is not to bar a cause of action, as in the case of the ordinary statutes of limitations, but to prevent a party resorting to the special statutory procedure unless he comes within the time specified. No Court has any right or power to act in opposition to the express words of the statute. The only relevance of the argument as to concealed fraud must, therefore, be in relation to the point of time at which the claim or demand arose or accrued.

1. At 100–101 Isaacs J, as his Honour then was, said:

Sec. 37 differs fundamentally from our ordinary *Statute of Limitations*. The latter finds a person in possession of a right and a remedy. In some cases it abolishes the right, in others it simply bars the remedy. But in both cases it takes from the person something he already has independently of that statute. In *Hurrinath Chatterji v. Mohunt Mothoor Mohun Goswami.* Sir *Richard Couch* in the Privy Council said: “The intention of the law of limitation is, not to give a right where there is not one, but to interpose a bar after a certain period to a suit to enforce an existing right.” Sec. 37 is a condition of the gift in sec. 22, and unless that condition is satisfied the gift can never take effect. Non‑compliance with its terms is not a matter in bar of the claim as in the case of the *Statute of Limitations*: it is an objection which goes to the foundation of the procedure, and shows that the petitioner is not “*rectus in curiâ*”. (Footnotes omitted)

1. In *Sent v Jet Corporation of Australia Proprietary Limited* [1986] HCA 35; (1986) 160 CLR 540 the High Court considered s 82 of the *Trade Practices Act* which, at that time, relevantly provided:

(1) A person who suffers loss or damage by conduct of another person that was done in contravention of a provision of Part IV or V may recover the amount of the loss or damage by action against that other person or against any person involved in the contravention.

(2) An action under sub‑section (1) may be commenced at any time within 3 years after the date on which the cause of action accrued.

1. At 542 the Court observed:

Presumably in order to avoid the time limitation prescribed by s 82(2), Jet Corporation sought and obtained leave to make a claim under s 87(1A) and (2).

…

and at 543:

The Act contains no time limitation expressly applicable to claims made under s 87.

Thus the High Court treated s 82(2) as a limitation provision, rather than as a “condition of the gift”.

1. Shortly thereafter Gummow J, as a member of this Court, discussed the issue in *Elna Australia Pty Ltd v International Computers (Aust) Pty Ltd (No. 2)* [1987] ATPR 40-795; (1987) 16 FCR 410, 414–415. That case was also concerned with s 82 of the *Trade Practices Act*. At 415 his Honour observed:

The respondent pleaded s 82(2) as a defence. In doing so it followed the trend of authority that although s 82(2) is expressed in terms perhaps indicative of a condition precedent to jurisdiction, or at least of an element in the cause of action, it is nevertheless to be treated as if it constituted a defence … . The respondent formally submitted in the course of argument that the amended statement of claim was defective for want of assertions that the trade practices claims were brought within time. I indicated that I regarded myself, particularly on an application of the character of the present one, as bound by the weight of authority for the contrary view.

I should add that insofar as the applicant’s claims to relief may be read as founded upon s 87(1A) of the TP Act, in addition to s 82, it was accepted by the parties in the end that, for the purposes of the present application, nothing of importance turned upon this.

1. *The Commonwealth of Australia v Verwayen* [1990] HCA 39; (1990) 170 CLR 394 concerned a claim against the Commonwealth, the relevant limitation statute being that of the State of Victoria, s 5(6) of the *Limitation of Actions Act 1958* (VIC) which provided:

No action for damages for negligence … where the damages claimed by the plaintiff consist of or include damages in respect of personal injuries to any person, shall be brought after the expiration of three years after the cause of action accrued.

1. At 405, Mason CJ said, concerning the relevant provision:

Although the terms of s. 5(6) are such that it is susceptible of being read as going to the existence of the jurisdiction of a court to hear and determine an action of the kind described, limitation provisions similarly expressed have not been held to limit the jurisdiction of courts. Instead, they have been held to bar the remedy but not the right and thus create a defence to the action which must be pleaded … .

1. Justice Brennan, as his Honour then was, said at 425‑426:

As it is a characteristic of a right susceptible of waiver that it is introduced solely for the benefit of one party, a condition precedent to the jurisdiction of a court to grant relief cannot be waived … . It follows that, if the jurisdiction of a court to entertain proceedings is conditioned on the commencement of the proceedings within a specified time, a defendant cannot waive the time requirement and thereby confer jurisdiction on the court. Conversely, where a case is fought on the issue whether a time limitation in a particular statute is or is not a condition precedent to jurisdiction, an argument that another statute overrides the time limitation can be raised on appeal though conceded in the court below: … . However, a defence under s. 5(6) of the Limitation Act does not create a condition precedent to jurisdiction. It is merely a right conferred on a defendant to defeat a claim brought outside the time limited by the Limitation Act. In *Australian Iron & Steel Ltd. v. Hoogland* … , Windeyer J. said:

“It seems that, under the common law system of pleading, when a limitation is annexed by a particular statute to a right it creates, the plaintiff should allege in his declaration that the action was brought within time. On the other hand it is for the defendant to plead the *Statute of Limitations* as a defence to an action on a common law cause of action, as if he does not it is assumed that he intends to waive it: … . However, when issue is joined on a plea of the Statute, the burden of proving that the action is within time is on the plaintiff: see cases referred to by Dixon J., as he then was *…* . And, even when a time limit is imposed by the statute that creates a new cause of action or right, it may be so expressed that it is regarded as having a purely procedural character, as a condition of the remedy rather than an element in the right; and in such cases it can, it seems, be waived, either expressly or in some cases by estoppel: *…* .”

In *Chapple v. Durston* … Vaughan B., noting that the Statute of Limitations bars the remedy not the right (as does s. 5(6) of the Limitation Act), said:

“If he intends to insist upon it, he should plead it to prevent surprise, and if he does not, it should be presumed he intends to waive it.”

As the right created by s. 5(6) is introduced solely for the benefit of a defendant, who must plead the right before it is effective, the right is capable of waiver by a defendant.

1. At 456 Dawson J said:

It is commonly said that a person may waive a statutory right in the sense of not relying upon it. In order to waive a statutory right in this way, it must be a personal or private right and must not rest upon public policy or expediency … . Provided that it bars a remedy rather than extinguishes a cause of action, a statute of limitations gives rise to a right of that kind and it must be pleaded if it is to be invoked … . If it is not pleaded, it is said to be waived, but the use of the term “waiver” in this way exemplifies its imprecision. A waiver of this kind does not amount to an election and does not necessarily give rise to an estoppel.

1. At 473‑474 Toohey J said:

Section 5(6) of the Limitation Act provides that no action for damages for negligence in respect of personal injuries “shall be brought after the expiration of three years after the cause of action accrued”. Such a provision has been long held to go, not to the jurisdiction of a court to entertain a claim, but to the remedy available and hence to the defences which may be pleaded. Absent a plea of limitations, in those circumstances the matter does not arise for the consideration of the court… Equally, it is well established that provision such as s. 5(6) is procedural in nature… .

1. At 497–498 McHugh J said:

Section 5 is not a condition precedent to the obtaining or maintaining of a statutory right by the plaintiff. Nor is the common law right of the plaintiff to sue the Commonwealth subject to the statutory condition that he commence his action within the period set by s. 5 of the Limitation Act. There is, of course, a fundamental difference between a true statute of limitation, such as s. 5, which bars stale claims and a limitation period annexed by a statute to a right which it creates. In the latter class of case, the limitation period will generally be of the essence of the right: see *Australian Iron & Steel Ltd. v. Hoogland* [(1962) 108 CLR 471, 488–489]. It is not a condition precedent to the right but part of it. However, neither is a true statute of limitation a condition precedent to the right which it bars. It is a plea in confession and avoidance of that right and not a condition precedent to its exercise.

1. More recently in *State of Western Australia v Wardley Australia Limited* *& Ors* [1991] ATPR 41-131; (1991) 30 FCR 245 at 258‑259 the Full Court (Spender, Gummow and Lee JJ) said:

The substantive element of s 82 contains concepts which, at common law, would be encompassed by the terms “causation”, “remoteness” and “measure of damages”. Section 82(2) directs attention to concepts of “causation” by fixing the period within which an action may be commenced by reference to “the date on which the cause of action accrued” and thus to the suffering of the loss or damage “by” conduct contravening the statute. The use of the preposition “by” indicates the requirement for some sufficient cause or reason which links the conduct with the suffering of loss or damage, the amount of which is recoverable as the measure of damages. As has been pointed out in L J W Aitken’s article … the term “loss or damage” is used twice in s 82(1), and in different senses, first to identify the damage which is the gist of the action and then, in association with the term “amount”, to identify the quantum or measure of the damages which is recoverable in the action. This is a distinction not always observed in the decisions dealing with the limitation provision in s 82(2).

In a general sense, the effect of s 82(2) may be described as the prescription of a time limitation: … . But there is a distinction between the operation of a statute of limitation, properly so called, which prevents the enforcement of rights of action independently existing, and a time limitation imposing a condition which is the essence of a new right: … . It is for a defendant to plead a statute of limitation against an independent right but when a limitation is annexed by a particular statute to the right which it creates it is for the plaintiff to allege that the action was brought within time: … . If the jurisdiction of a court to entertain proceedings is conditioned in this way on commencement of proceedings within a specified time, the defendant cannot by a purported waiver confer jurisdiction on the court: … .

However, it is necessary when dealing with s 82 to bear in mind its double operation, to which we have referred above, as dealing both with right and remedy. In our view, in stating that an action under subs (1) may be commenced at any time within the three year time limit specified in s 82(2), that latter provision is to be regarded as having a procedural character. That is to say, s 82(2) is a condition of the remedy rather than an element in the right and a prerequisite to jurisdiction which cannot be waived. It follows that it is for a defendant to assert non‑compliance, rather than for a plaintiff to assert compliance with s 82(2) as an element of the cause of action.

1. Finally in *Mayne Nickless Ltd v Multigroup Distribution Services Pty Ltd & Ors* [2001] FCA 1620; (2001) 114 FCR 108 the Full Court (Wilcox, French and Drummond JJ) said at 123:

If a proceeding is brought out of time under s 82 and the limitation is pleaded and the application dismissed, then there will have been no finding of a contravention which is a necessary condition of the exercise of the power under s 87(1). If the time limitation under s 82(2) is not pleaded or is waived, or if the respondent is estopped from raising it, then a finding of contravention may be made and damages awarded under s 82. Such other orders as may be open under s 87 can also be made. That possibility is open as the time limitation imposed by s 82(2) does not in terms operate as a jurisdictional limitation but rather as a procedural bar. The cause of action under s 82 is defined in s 82(1). The time bar under s 82(2) presupposes the existence of that cause of action.

1. Garuda submitted at [131] that, “Judges of the Court have consistently characterised the provision (s 77) as one conferring a limited power on the ACCC”. It cites the decision of Kiefel J in *Australian Competition and Consumer Commission v Eurong Beach Resort Limited* (above) at [2]‑[3] as authority for this proposition. However her Honour simply observed that:

2 The applicant (‘the ACCC’) sought declarations as to the contraventions and injunctions against future conduct. Since the bringing of the proceedings in 2002, the respondents have ceased their business and the injunctions are no longer sought. Pecuniary penalties are not sought under s 76 of the Act. In the case of many of the periods of alleged contravening conduct, penalties could not be sought as s 77 of the Act limits the bringing of proceedings for penalties to six years from the date of the contravention.

3 The respondents seek orders striking out those parts of the application which are outside the period in which penalties may be sought. Included amongst those parts of the application are periods which combine time barred conduct and conduct which is not. In this regard the respondents submit that the applicant be at liberty to replead to limit the period.

1. We accept that her Honour’s language might suggest that she was addressing the existence of a cause of action rather than a limitation period. However we doubt whether her Honour had in mind the distinction with which we are presently concerned. The structure of ss 76 and 77 is very similar to that of ss 82(1) and 82(2). In particular ss 77(2) and 82(2) are couched in very similar language. Both deal with proceedings to enforce statutory causes of action created by adjacent provisions in the legislation. Clearly, her Honour did not consider the possible relevance of the decisions in *Wardley* and *Mayne Nickless*. There was no call for her Honour to do so.
2. Garuda also referred to the decision of Gray J in *Australian Competition and Consumer Commission v Leahy Petroleum Pty Ltd* [2007] FCA 1844 at [24]. We see nothing in that paragraph which suggests that s 77 should be treated as going to jurisdiction rather than operating by way of limitation.
3. Finally Garuda referred to the decision of Bennett J in *Australian Competition and Consumer Commission v April International Marketing Services Australia Pty Ltd (No 7)* [2010] FCA 902. That case concerned s 77. At [1] her Honour observed that s 77(1) empowered the Commission to:

… ‘*institute a proceeding in the Court for the recovery of a pecuniary penalty on behalf of the Commonwealth’*. This power is limited so that such a proceeding can be commenced only within six years after the relevant contravention (s 77(2) of the Act). (Emphasis in original.)

1. Her Honour’s language certainly suggests an assumption that pursuant to s 77 proceedings must be commenced within the six year period. However her Honour’s language at [23]‑[24] is redolent of that used in connection with limitation periods. Again, her Honour was not asked to consider the possible application of *Wardley* or *Mayne Nickless*.
2. The cause of action is created by s 76 of the *Trade Practices Act*. The time bar contained in s 77 presupposes the existence of that cause of action. There can be little doubt that absent s 77, the Commonwealth could apply for the imposition of a penalty pursuant to s 76. In effect, Garuda submitted that s 77(2) should be treated differently from s 82(2) because the applicant under s 77(2) is a statutory corporation which must look to a statute for its power. Whilst we accept that a statutory corporation must find its powers and authority in statute law, we see no reason to treat the conferment of power on the Commission by s 77 as being in any way different from the “power” conferred on “persons” (as defined in the *Acts Interpretation Act 1901* (Cth)) pursuant to s 82. In our view, s 82 and ss 76 and 77 are expressed in similar terms and should be similarly construed. It follows that s 77 should be construed as being a limitation provision, and not as prescribing a condition precedent to the creation of the right. Grounds 93 and 94 of Garuda’s notice of contention must fail.

## The “component of a price” contention

1. At first instance the case concerned conduct in Singapore, Hong Kong and Indonesia. Many of the issues arose in connection with Air NZ and/or Garuda’s conduct in more than one of those jurisdictions. His Honour chose to consider those common issues in connection with the conduct in Hong Kong, indicating that his reasoning was to be applied, where appropriate, with respect to conduct in the other jurisdictions. Thus, his Honour’s reasons concerning the operation of ss 45 and 45A in connection with conduct in Indonesia, is, to some extent, found in his reasons concerning conduct in Hong Kong.
2. One of the common issues concerned the nature of surcharges as a component of the price. There was no challenge to the primary Judge’s conclusion that s 45A would only be enlivened if a provision of each understanding had the purpose, or had or was likely to have the effect, of controlling the *whole* price of the relevant service.
3. We should say something about the meaning of the word “control”. It means, according to The *Oxford English Dictionary* (2nd ed, Oxford University Press, 1989):

To exercise restraint or direction upon the free action of; to hold sway over, exercise power or authority over; to dominate, command.

The *Macquarie Dictionary* (6th ed, Macquarie Dictionary Publishers, 2013) defines the word as:

To exercise restraint or direction over; dominate; command … to hold in check, curb.

1. In *Radio 2UE Sydney Pty Ltd v Stereo FM Pty Ltd* [1983] ATPR 40-367; (1983) 68 FLR 70 at 72 the Full Court (Woodward, Northrop and Sheppard JJ) said:

In our view the word “fixing” in s. 45A takes colour from its general context and from the words used with it – “controlling or maintaining” – and not every determination of a price, following discussion between competitors, will amount to a price “fixing”. There must, we believe, be an element of intention or likelihood to affect price competition before price "fixing" can be established. This will often be a matter of inference, requiring no direct evidence for it to be established.

1. In *Trade Practices Commission v Parkfield Operations Pty Ltd* [1985] ATPR 40-526; (1985) 5 FCR 140 at 143 Fox J said:

I think, contrary to the argument, that prices can be “'fixed” even if all that is proposed is an increase to a certain figure, without any provision as to when, or by what machinery or what amount, a further change may take place. Assurance of permanency, or long duration, or constant relativity, is not necessary. The absence of reference to the duration of operation of the proposed prices, and how, or when, changes might be made, is, however, meaningful in the present context, because it is only another feature of the vagueness of what was being suggested.

1. The decision was reversed on appeal (see *Trade Practices Commission v Parkfield Operations Pty Ltd* [1985] ATPR 40-639; (1985) 7 FCR 534). However we do not understand the Full Court to have doubted the correctness of the above proposition, with the possible exception of the last sentence. At 540 the Court (Bowen CJ, Smithers and Morling JJ) said:

It was argued that a mere momentary raising or prices would not have such an effect, and that there was nothing in the evidence to indicate permanence or duration in the proposal.

This submission should be rejected. No doubt the evidence required to sustain an allegation that a provision or an arrangement has the purpose, or is likely to have the effect, of fixing, controlling or maintaining a price must be such as to satisfy the court that the provision does indeed have that purpose. But there is no requirement that the provision should have the purpose of fixing, controlling or maintaining a price for any length of time. In any event, on the facts of the present case, there can be no suggestion that the price rise suggested by Mr Chapman was to be momentary or in any sense illusory. The proper inference from the evidence is that the arrangement in which he was seeking to involve XL and others was that there should be a price rise of indefinite duration, albeit of doubtful longevity.

1. In *Australian Consumer and Competition Commission v CC (NSW) Pty Ltd* (1999) 92 FCR 375 at 413 [168]–[169], Lindgren J said:

168 The word “control” is not defined in the Act. Its natural or ordinary meaning is “to exercise restraint or direction over” (the *Macquarie Dictionary*) or “to exercise restraint or direction upon the free action of” (the *Oxford English Dictionary*) a person or thing. There are degrees of control and there may be control although the “restraint” or “direction” is not total. An arrangement or understanding has the effect of “controlling price” if it restrains a freedom that would otherwise exist as to a price to be charged.

169 Concretes submits that the notion of “fixing, controlling or maintaining” price involves a degree of “specificity” as to price and a degree of “proximity” between the arrangement or understanding and price. I accept that an arrangement or understanding which no one intends, and is not objectively likely, to have any effect on price, but which, by reason of unforeseeable supervening circumstances has had that effect, is not caught. But, with respect, I do not find the general proposition relied on by Concretes determinative of the present case. Of course, I accept that “likelihood” is to be assessed as at the time when the arrangement is made or the understanding is arrived at.

At 415 [178] his Honour said:

Concretes also submits that because the supposed UTF understanding left the Tenderers with a great deal of freedom as to the price which they would charge, it did not have the effect of controlling price competition and therefore did not fall within the terms of s 45A. It seems to me, however, that putting to one side de minimis cases, the degree of control, although relevant to penalty, is not relevant to the issue of contravention. I do not consider the degree of control here to have been de minimis.

1. In *Australian Competition and Consumer Commission v The Australian Medical Association Western Australia Branch Inc* [2003] FCA 686; (2003) 199 ALR 423 at 461-462 [193]–[195] Carr J appears to have disagreed with the proposition that the degree of control is relevant only to penalty. The disagreement may simply disclose different views as to the meaning of the protean term “de minimis”. It is clear, however, that total control is not necessary. It is also clear that there may be price‑fixing in the absence of agreement as to the precise price (see *Trade Practices Commission v Parkfield Operations Pty Ltd,* above, and *Trade Practices Commission v Service Station Association Ltd* (1992) ATPR 41-179; (1992) 109 ALR 465 (Heerey J) at first instance and, on appeal see *Trade Practices Commission v Service Station Association Ltd* [1993] ATPR 41-260; (1993) 44 FCR 206, 228 per Lockhart J (Spender and Lee JJ concurring)).
2. Two preliminary points of terminology should be made. First, in [108] and [110] of its written submissions Garuda seemed to distinguish between “freight rates” and “price”, asserting that the former is the largest component of the latter. We do not understand the case to have been conducted on the basis of that distinction or nomenclature. Nor do we understand his Honour to have said otherwise at [616] or anywhere else. As we understand it, the terms “freight rate”, “cargo rate” and “price” all refer to the overall price at which cargo services are provided.
3. Secondly, Garuda also took issue with the primary Judge’s characterisation of the departure of airlines from the terms of the various understandings as “cheating”. As far as we can see, the terminology is unimportant. The point is that such conduct did not necessarily detract from his Honour’s conclusions as to the understandings.
4. The essence of Air NZ’s contention about surcharges being only a component of the price was that each airline submitted that the inference concerning purpose, effect, or likely effect on the *whole price* was not open for two reasons: (i) competition on cargo rates was “fierce and unconstrained” including when the alleged understandings were reached; and (ii) the size of the surcharges in comparison with the rates as a whole was so small that it had negligible likelihood of having any impact upon price.
5. Garuda made submissions which were very similar to (i) and (ii) above and which, where the submissions were directed at particular surcharges, we have already addressed. At [108] of its written submissions, Garuda asserts that there was “ample unambiguous evidence of unconstrained competition on cargo rates”. And a recurring theme in Garuda’s case was that an arrangement or understanding as to the level of each surcharge could not and/or was not shown to have affected the level of the overall charge for cargo services.
6. At [608] his Honour observed:

The Commission did not shy away from the need to show that the relevant purpose, effect or likely effect had to be the control of the whole price. It submitted that an arrangement by all competitors to increase their charges by the same amount was an arrangement which controlled the price because the liberty that would otherwise exist to charge each airline’s usual freight rate was restrained by the necessity of increasing the charge by the amount of the surcharge.

1. As to the submission that a component of price is not the price to which s 45A applies, the primary Judge observed at [603]:

the substantial debate between the parties was whether the introduction of each surcharge had the effect (or was done with the purpose) of the airlines increasing their cargo charges by the amount of the surcharge or whether, instead, the effect (or purpose) of the understanding related only to the surcharge itself so that the imposition of the surcharge had no overall effect on cargo rates because competition remained extant on overall price.

1. At [612]–[620] the primary Judge considered the factual basis upon which the Commission asserted that the purpose or likely effect of the various understandings was to fix, control or maintain cargo prices. At [614] his Honour noted that the Commission submitted that the purpose was to be inferred from:

(a) the fact that the airlines sought to come to an understanding as to the levying of the relevant surcharges at specific amounts or rates to be applied and as to the date by which this was to occur;

(b) the evidence of airline employees as to the significance of fuel cost as an input for the airlines; and

(c) the evidence of airline employees, especially those of Air NZ, that they would not impose a fuel surcharge unless the large carriers did so.

1. At [619] his Honour held, concerning the Hong Kong transactions:

I am satisfied that the likely effect of the understanding that was reached was that the airlines would increase their respective freight rates by the amount of the surcharge. It was the point of the surcharge. As the discussions leading to the surcharge show, the aim of the surcharge was to compensate the airlines for the rising cost of fuel. I cannot accept that any of the airlines who were party to the understanding had any intention but as soon as possible to increase their freight rates by the amount of the surcharge. Nothing stood in the way of preventing what the airlines in fact intended to happen from happening. It was therefore the likely effect of the understanding that the airlines would increase their freight charges by the amount of the surcharge.

1. In light of the primary Judge’s findings, three points should be made about the respondent airlines’ submissions that (i) the competition on rates was fierce; and (ii) the amounts of the surcharges were small compared with the total rate.
2. First, point (i) detracts from the respondent airlines’ submission. If competition on rates was fierce then there was a significant incentive for the airlines to increase their rates by the fixed amount of a surcharge. Even a small proportionate increase would represent increased revenue for the airlines without consequent loss of sales, if all airlines imposed the surcharge. In effect, Garuda’s submission goes to the likelihood of the understanding being reached rather than its purpose, effect or likely effect.
3. Secondly, there was little or no evidence concerning the extent of competition and the economic effect of the proportion of the surcharges to the total rate. We were not directed to any substantial expert evidence on this issue. As to the alleged “fierce” level of competition, whilst evidence of such competition may assist in identifying purpose, effect or likely effect, the mere assertion that there was unconstrained competition does not necessarily assist at all. That is particularly so where, in relation to Garuda, it seemed to be based upon references to Garuda’s published cargo rates, without reference to actual rates charged, and in the absence of any expert economic evidence. In relation to Air NZ, the assertion was supported in written submissions by reference to one document only (ANZ.201.004.00458). This is an Air NZ cargo monthly report for August 2002. There are references in that report to competition and “aggressive rates” but there is no quantitative evaluation of the degree of competition or its elasticity effect on rates.
4. Thirdly, both (i) and (ii) were directed only to the question of *effect* or *likely effect* and not to *purpose.* As we have explained, the increase in overall prices permitted the airlines to derive additional revenue and, by agreeing the surcharges, they could do so without competing in relation to that increase. But even if this is not correct as an *effect* it was the airlines’ *purpose*. In other words, independently of whether the effect or likely effect of the surcharges was to increase prices, the airlines must have had some purpose in taking the joint action that they took. The surcharges were imposed for the purpose of recouping additional outgoings to be incurred by the airlines in purchasing fuel and making security arrangements. In particular, we find improbable the submission that the airlines imposed the surcharges for reasons of transparency to send a message to customers about their costs rather than to increase overall prices. If the airlines intended to send a message about their increased costs, then that message could have been most effectively communicated by raising the overall price rather than a line item which did not change the price, and which would not have been of any real interest to freight forwarders or other customers. The “transparency” submission also fails to explain why the airlines wished to, and did, move together. The obvious inference was that by moving together, each had the purpose of minimising the risk of losing market share.
5. Unlike the position before the primary Judge, who reached this conclusion concerning purpose by reference to a large volume of evidence, we were not taken to much evidence concerning the airlines’ purpose. But the evidence to which we were taken supports the inference that such purpose was to control prices. For instance, in the Air NZ weekly sales report on 11 December 2002, Mr Chew informed Mr Gregg that in relation to the ISS, “As for NZ (SIN) we will hold on to it for as long as possible (revenue to us)” (Tab [0060.117]).
6. There are further examples in the evidence concerning other airlines. On 2 October 2001 Mr Martin Christensen, the Country Manager Indonesia (Sales) of Lufthansa Cargo, sent an email to representatives of other airlines saying (emphasis added):

In order ***to compensate*** some of the extra burden placed on our industry, Lufthansa Cargo will by October 8th, 2001 impose a Security Surcharge for the Indonesian market.

1. In response to this email, on 3 October 2001 Mr Jefry Chandra, the Cargo Sales Manager at SIA Cargo, said, “every carrier should apply the surcharge to reduce the [increased insurance] cost.” He continued, saying:

In the end of the day, it will be benefiting airlines, and I believe that you all agree that this surcharge cannot be used as pricing tools to attract business (for those who think do not want to apply). So IT IS THE TIME FOR AIRLINES TO BE IN ONE VOICE to protect our interest.

## Conclusion

1. The appeal should be allowed subject to the matters at [469] and [520]. Save in respect of those matters, the notices of contention should be dismissed. The parties should confer about the form of orders to deal with the matters raised at [469] and [520].

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| I certify that the preceding five hundred and seventy-one (571) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justices Dowsett and Edelman. |

Associate:

Dated: 21 March 2016

REASONS FOR JUDGMENT

YATES J:

1. There are two appeals before the Court, which have been heard together: *Australian Competition and Consumer Commission v PT Garuda Indonesia Ltd* (NSD 1330 of 2014) (**the Garuda appeal**) and *Australian Competition and Consumer Commission v Air New Zealand Limited* (NSD 1331 of 2014) (**the Air NZ appeal**).
2. With regard to the Garuda appeal, the primary Judge found that the respondent, PT Garuda Indonesia Ltd (**Garuda**), had arrived at a number of separate understandings containing provisions that had the purpose, effect or likely effect of substantially lessening competition. These understandings were described in the primary Judge’s reasons(*Australian Competition and Consumer Commission v Air New Zealand Limited* (2014) 319 ALR 388; [2014] FCA 1157 (**the reasons for judgment**)) as:
* The Hong Kong Imposition Understanding;
* The First Hong Kong Surcharge Extension Understanding;
* The October 2001 Hong Kong Insurance Surcharge Understanding;
* The December 2002 Hong Kong Insurance Surcharge Understanding;
* The October 2001 Fuel Surcharge Understanding;
* The October 2001 Air Freight Rate Understanding;
* The April 2002 Fuel Surcharge Understanding;
* The June 2002 Fuel Surcharge Understanding;
* The September 2002 Fuel Surcharge Understanding;
* The January 2003 Fuel Surcharge Understanding;
* The May 2003 Fuel Surcharge Understanding;
* The May 2004 Customs Fee Understanding;
* The September 2004 Fuel Surcharge Understanding;
* The April 2005 Fuel Surcharge Understanding;
* The July 2005 Fuel Surcharge Understanding;
* The September 2005 Fuel Surcharge Understanding (in relation to IATA Cargo Tariff Conferences - Area 1 and IATA Cargo Tariff Conferences - Area 2 only);
* The October 2001 Security Surcharge Understanding;
* The January 2003 Indonesia Security Surcharge Understanding;
* The May 2003 Security Surcharge Understanding;
* The September 2004 Security Surcharge Understanding; and
* The July 2005 Indonesia Security Surcharge Understanding.
1. The primary Judge also found that Garuda had given effect to the relevant provisions, other than those in:
* The October 2001 Fuel Surcharge Understanding;
* The October 2001 Air Freight Rate Understanding;
* The April 2002 Fuel Surcharge Understanding; and
* The June 2002 Fuel Surcharge Understanding;
1. With regard the Air NZ appeal, the primary Judge found that the respondent, Air New Zealand Limited (**Air NZ**) had arrived at a number of separate understandings containing provisions that had the purpose, effect or likely effect of substantially lessening competition. These understandings were described in the reasons for judgment as:
* The 2002 Hong Kong Lufthansa Methodology Understanding;
* The Hong Kong Imposition Understanding;
* The October 2001 Hong Kong Insurance Surcharge Understanding;
* The December 2002 Hong Kong Insurance Surcharge Understanding;
* The Singapore ISS Understanding
1. The primary Judge also found that Air NZ had given effect to the relevant provisions.
2. The appellant, the Australian Competition and Consumer Commission (**the Commission**), had alleged that, in each case, this conduct contravened s 45(2) of the *Trade Practices Act 1974* (Cth) (**the TPA**) (now the *Competition and Consumer Act 2010* (Cth)) having regard to the operation of s 45A(1) of the TPA. The primary Judge was satisfied that s 45A(1) of the TPA was engaged. The impugned provisions concerned the imposition of surcharges. The primary Judge found that these provisions had the purpose, effect or likely effect of controlling the price which airlines charged for their services. However, his Honour concluded that no contravention was established because the purpose, effect or likely effect of each impugned provision was not to substantially lessen competition in *a market in Australia*.
3. The relevant provisions of the TPA are as follows.
4. Section 45(2) of the TPA provides:

A corporation shall not:

(a) make a contract or arrangement, or arrive at an understanding, if:

(i) the proposed contract, arrangement or understanding contains an exclusionary provision; or

(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, whether the contract or arrangement was made, or the understanding was arrived at, before or after the commencement of this section, if that provision:

(i) is an exclusionary provision; or

(ii) has the purpose, or has or is likely to have the effect, of substantially lessening competition.

1. Section 45A(1) of the TPA is a deeming provision, which provides:

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

(Emphasis added.)

1. However, s 45(3) provides:

For the purposes of this section and section 45A, ***competition***, in relation to a provision of a contract, arrangement or understanding or of a proposed contract, arrangement or understanding, *means competition in any market* in which a corporation that is a party to the contract, arrangement or understanding or would be a party to the proposed contract, arrangement or understanding, or any body corporate related to such a corporation, supplies or acquires, or is likely to supply or acquire, goods or services or would, but for the provision, supply or acquire, or be likely to supply or acquire, goods or services.

(Emphasis added.)

1. A “market” is defined in s 4E of the TPA as follows:

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 added.)

1. The primary Judge concluded that each market under consideration consisted of the services of flying cargo, together with certain ancillary services, from a port of origin (in Hong Kong, Singapore or Indonesia) to a port in Australia. However, as I have noted, his Honour found that none of these markets was a market *in* Australia. But for that conclusion, the primary Judge would have found that Garuda and Air NZ had, respectively, contravened s 45(2) of the TPA. As a result, the primary Judge dismissed the proceeding against Garuda and the proceeding against Air NZ.
2. The central issue in each appeal is the correctness of the primary Judge’s conclusion that none of the relevant markets was a market in Australia within the meaning of s 4E of the TPA.
3. In the Garuda appeal, Garuda has filed a notice of contention containing 94 grounds on which it says that the judgment in its favour should be affirmed. All but grounds 6 to 9, 14 to 15, 19, 28 to 34, 76 to 78, and 86 to 92 were pressed. Grounds 79 to 85 were pressed only in respect of the Indonesian Customs Fee Understanding.
4. In the Air NZ appeal, Air NZ has filed a notice of contention containing 11 grounds on which it says the judgment in its favour should be affirmed.
5. Garuda and Air NZ adopted a common position in relation to a large number of the issues raised in the appeals. When it is not necessary to distinguish between Garuda and Air NZ, it is convenient to refer to them simply as **the airlines**.

# MARKET

## The primary Judge’s findings and conclusions on market definition

1. The primary Judge’s analysis of the market commenced with the proposition that the concept of substitution is basic to the process of market definition. This is confirmed by s 4E of the TPA. His Honour noted that the “substitution effect” must be strong (ie there must be “close competition”) and that such an assessment was one of fact, involving questions of degree and evaluation.
2. His Honour observed that market definition usually involves the ascertainment of the market’s product, geographical and functional “dimensions”. He then said that the product dimension is the “what” question; the geographical dimension is the “where” question; and the functional dimension is concerned with the location of the market participants along the supply chain.
3. The primary Judge considered market definition from the perspective, firstly, of Hong Kong as the port of origin. He later dealt with the market for the carriage of air cargo from Singapore and Indonesia.
4. As regards the product dimension, the primary Judge concluded that there were individual markets for air cargo services on individual routes from Hong Kong to ports in Australia such as, for example, Hong Kong to Sydney. His Honour rejected broader formulations of the product dimension, such as a single market for all cargo flights originating from Hong Kong to anywhere in the world, or a single market for air cargo services from Hong Kong to anywhere in Australia.
5. There is no appeal from this finding. It is important to note, however, that each proffered definition of the product dimension includes a geographical component that includes Australia, or is Australia, or is a part of Australia.
6. The primary Judge then turned to consider aspects of the services provided by airlines in transporting cargo from a port of origin to a port of destination. The primary Judge referred, in particular, to transport services, ground handling services and inquiry services.
7. As to transport services, the primary Judge found (at [254]):

This consisted of the familiar service of transporting the cargo from a port of origin to a port of destination. It included the service, where necessary, of special handling requirements (for example, those obtaining with respect to perishable cargo) which could include temperature and pressure stipulation. In a broad sense it included meeting timetabling requirements. The air service might be direct (that is directly from origin to destination) or often enough indirect (via intermediate ports).

1. As to ground handling services, the primary Judge found (at [255]):

These are provided at the origin and destination airports and any intermediate ports where the cargo is unloaded. They include getting the cargo into [Unit Load Devices] or pallets (if this has not been done by the relevant freight forwarder), getting the cargo to the plane, formulating a load plan and then loading the cargo. At the destination end it includes unloading the plane and storing the cargo for collection. It also includes special handling requirements for some classes of cargo (that is lobster, flowers and so on).

1. As to inquiry services, the primary Judge found (at [256]):

The relevant airline also provided services for tracing delayed or lost shipments and dealing with issues arising from damaged cargo at destination. Generally speaking the ground handling services at any particular origin airport were provided by the home airline for that airport. For example Cathay Pacific would provide ground services at Hong Kong airport but Qantas would provide them in Sydney. Airlines would typically engage third party contractors in countries where they did not themselves provide ground handling services and, on occasion, this would be done by the home airline for that airport. This is of little moment, however, as in each case the relevant home airline or third party contractor acted as the other airlines’ agents for those purposes.

1. The primary Judge recognised that each of the services had a geographical element. His Honour found (at [257]):

It would be obvious that each of these services had a geographical element to it. The ground handling services were provided physically at both the origin and destination airports and the transportation service was provided along a geodesic line across the surface of the globe corresponding with the route taken by the plane. It was provided at all points along that path including over countries where the plane did not stop. The inquiry services were provided principally at the destination airport although their very nature dictated interaction with other elements of each airline’s international network.

1. As to payment for the services, the primary Judge found that, in the vast majority of cases, airlines were paid at the port of origin, relevantly, Hong Kong.
2. The primary Judge then turned to consider the identity of market participants. His Honour noted that there were two debates.
3. The first debate concerned how persons might choose to switch patronage. His Honour noted the airlines’ position that the market participants were airlines and freight forwarders at the port of origin and that the port of origin was the place where switching decisions were made. For example, with respect to Hong Kong, the primary Judge noted the following argument (at [260]):

… The airlines maintained the position that the participants were airlines in Hong Kong and freight forwarders in Hong Kong and that any withdrawal from patronage from one airline to another had to occur necessarily in Hong Kong. The only place in which one could choose which airline to fly from Hong Kong to Sydney was Hong Kong.

1. The second debate concerned the identity of the persons who made switching decisions and where those decisions were made. The Commission’s case was that switching decisions could be made by an importer, rather than a freight forwarder at the port of origin. Such a decision could be made wherever the importer happened to be. The Commission argued that this could well be Australia.
2. The primary Judge concluded that freight forwarders in Hong Kong generally made the decision as to which airline to use to transport cargo from Hong Kong to Australia although, on some occasions, the decision could be made by large importers or exporters notwithstanding that they continued to use freight forwarders. As to importers, the primary Judge found (at [264]):

Some of these importers may well have been located in Australia. Some of them may have been located at an international headquarters in Europe. I accept that it is quite possible in the case of significant shippers that the actual decisions about importation, including when it arises, the issue of which carrier to use, need not occur at the origin. The evidence of Mr Nelson supports this view as does a moment’s reflection. Because it will be relevant when examining the functional aspects of the relevant markets it is to be observed, however, that regardless of where the event consisting of the subjective decision to switch from one airline to another might be made, the only place in which it could be given effect would be Hong Kong. The range of choices from amongst which a person might choose an airline to fly cargo from Hong Kong to Sydney is inherently limited to those firms having operations in Hong Kong. Even if there were a supply side substitute it would still have to be provided in Hong Kong.

1. The primary Judge detailed and considered a large body of evidence concerning the interactions between airlines and shippers and the marketing activities of airlines directed to shippers. This evidence was not specific to markets where the port of origin was in Hong Kong, Singapore or Indonesia. The principal points of contention between the parties were, as they are on appeal, the conclusions, if any, that could be drawn from that evidence about the markets. Before the primary Judge, the airlines submitted that the competitive forces in the various markets were different and that it could not be assumed that functional factors in one market were applicable to others. The upshot of this was, according to the airlines, that the Commission had not proved that the relevant markets had the qualities or characteristics which it said they had concerning the involvement of shippers in switching decisions.
2. The primary Judge rejected the airlines’ position on the basis that it was contrary to common sense and, in the case of Air NZ, also contrary to its documents. As to the first basis, the primary Judge said (at [305]):

... It is contrary to common sense because it is plain that a number of shippers controlled significant volumes of cargo. I cannot imagine a universe of discourse in which a rational business would ignore these significant economic actors. No doubt small shippers were of little interest to the airlines but this related to the economic significance of their custom.

1. The primary Judge expressed the following conclusions (at [309]):

…

(a) the participants in the relevant markets were airlines, freight forwarders and shippers (be they exporters at origin or importers at destination) whose cargo volume was sufficiently significant for the airlines to be commercially motivated to pursue it;

(b) shippers of that kind often (but not always) made decisions about which airlines they would use. Where the shipper was an importer in Australia this decision was likely to be made in Australia;

(c) shippers of that kind continued (aside from the situation of integrators) to use freight forwarders who provided an indispensable set of services for dealing with the ancillary transport issues which the airlines themselves would not deal with. Relationships erected in the case of shippers of this kind were often tripartite. In some cases the tripartite nature of what was taking place was consummated with a contract but this was not a necessary nor even particularly common feature;

(d) shippers of that kind, wherever located were therefore capable, at least in theory, of operating as a constraint on airlines’ cargo rates because of their ability, again in theory, to switch to alternate sources of supply and to outflank any exercises of market power at the relevant origin airport; and

(e) smaller shippers who had no view about which airline to use and who left matters entirely to their freight forwarders were not participants in any of these markets.

1. Having made these findings, the primary Judge turned to consider the critical question of whether there was a market in Australia. His Honour posed (at [321]) the following overarching question: Where are the relevant substitutable services provided to consumers of those services? His Honour also noted (at [311]) that, despite the length of the parties’ submissions, the debate between them was, in fact, narrow and centred on the following issues:
* whether the fact that the airlines competed against each other in Australia in the provision of carriage through Australian airspace, ground handling services in Australia, and handling inquiries about lost and damaged cargo in Australia, was sufficient to locate the markets in Australia;
* whether the fact that the source of some of the demand for the services was ultimately in Australia was sufficient to locate part of each market in Australia; and
* whether the market in Hong Kong [and elsewhere] was constrained by the abilities of importers in downstream markets in Australia to switch to alternate sources of supply, and if so, whether it was appropriate to characterise the downstream markets as part of the upstream market.
1. As to the first two issues, the primary Judge was not persuaded that there was a market in Australia by reason of the fact that rival services were provided in Australia. The primary Judge reasoned that, if it was sufficient to locate a transportation market wherever rival services were provided, it would follow that the market in Australia for packaged tours to Europe would be located “wherever the tour bus happened to be”. The primary Judge was also not persuaded that there was a market in Australia simply because the ultimate source of some demand was in Australia.
2. The primary Judge reasoned that the question of whether the relevant market was in Australia was most usefully analysed through the “prism” of substitution. In this connection, there was no evidence of supply side substitution. As to demand side substitution, the primary Judge said (at [319]):

The issue of demand side substitution is more illuminating. The range of airlines who are available to be selected in any of the relevant route specific markets is limited by the fact that each needs to have a presence in Hong Kong where possession is taken of the cargo from the freight forwarder. There is in every cargo transaction a legal moment when that possession is transferred and that event can only occur in Hong Kong. The service of taking possession of the cargo in Hong Kong with a view to flying it to Sydney cannot be performed anywhere but in Hong Kong.

1. The primary Judge accepted the airlines’ submission that the place where customers turn to choose between various providers of the service is strictly limited to the port of origin.
2. As to the third issue—namely, the possible effect on market definition brought about by downstream substitution (the primary Judge referred to *Australian Competition and Consumer Commission v Metcash Trading Ltd* (2011) 198 FCR 297; [2011] FCAFC 151 (***Metcash***)at [252])—his Honour concluded that there was no evidence that any such effect would have occurred in the markets under consideration.
3. In the end result, the primary Judge concluded that the relevant markets for the transport of air cargo to ports in Australia from Hong Kong were not markets in Australia. His Honour reached the same conclusions in relation to the transport of air cargo from Singapore and Indonesia to individual ports in Australia.

## The Commission’s case

1. The Commission’s case on appeal is, essentially, that the primary Judge’s market definition put the product and geographic dimensions of the market in conflict. The Commission submitted that a service which must be supplied at both a particular origin and at a particular destination has a fixed geographical aspect. The Commission referred, in this regard, to the requirement, in each relevant market, for appropriate delivery capabilities to the relevant port of destination in Australia; the ground handling services at that port of destination; and the inquiry services, including tracking services and dealing with lost, delayed or damaged cargo, provided at that port of destination.
2. The Commission submitted that, having found that each of the services that form the product dimension of the relevant markets was provided in Australia, and that competition for the supply of those services physically took place in Australia, the primary Judge should have concluded that each market was also a market in Australia within the meaning of s 4E of the TPA.
3. The Commission emphasised that the geographic areas supplied, and where the airlines operate, is “over the origin to destination pair”. In order for airlines to operate, they must be able to transport goods from origin to destination, maintain operations at both places, and hold the necessary licences and permits (including Australian licences and permits) to do so.
4. The Commission also emphasised the relationship between market definition and the evaluation of market power: see, for example, *Queensland Wire Industries Pty Ltd v Broken Hill Proprietary Co Ltd* (1989) 167 CLR 177; [1989] HCA 6 (***Queensland Wire***) at 187 per Mason CJ and Wilson J. Here, the Commission submitted, an exercise of market power would not be restricted to the port of origin because it may consist of, for example, a withdrawal or diminution in quality of services at the port of destination or by introducing collection charges at that port. The Commission submitted that competition expresses itself as rivalrous market behaviour that is played out over the “price product service packages that are offered to consumers and customers”: *Re Queensland Co-operative Milling Association Ltd* (1976) 8 ALR 481 (***QCMA***) at 515. The Commission submitted that it is with respect to this complex that substitution possibilities are assessed.
5. The Commission criticised the primary Judge’s focus on where switching decisions are given effect, and his Honour’s apparent acceptance of the airlines’ submission that, in the markets under consideration, the place where customers turn to choose between various providers of the relevant air cargo service is limited to the port of origin. The Commission submitted that this “test” is not supported by authority. The Commissioner advanced five reasons why the “test” is incorrect.
6. First, the Commission submitted, this “test” proceeds by determining the locus of the market by a single aspect of the commercial transaction involved. The Commission referred to the primary Judge’s observation at [319] (quoted at [608] above) that in every cargo transaction there is a legal moment when possession of the cargo is transferred from a freight forwarder to an airline, which takes place at the port of origin. The Commission argued that the primary Judge should be taken as referring to the moment when the choice of a particular supplier for a particular service has become irrevocable. The Commission argued that this could as easily be the place of contracting, on the basis that once a contract for the carriage of goods has been made, it is too late to switch to another supplier. But, the Commission submitted, it had not been suggested below that the place of contracting could be used to determine the geographic market and that such an approach was, in any event, contrary to the expert evidence and relevant authority.
7. Secondly, the Commission submitted, there is no demand, and hence no market, for the mere commencement of a transport service at the port of origin.
8. Thirdly, the Commission submitted, the primary Judge’s finding that the range of airlines which are available to be selected in any of the relevant route-specific markets is limited by the fact that each needs to have presence in the port of origin (for example, Hong Kong) is inconsistent with the finding that the relevant product is air cargo services supplied in respect of unidirectional flights from origin to destination. The Commission argued that there was inconsistency because the consumer’s choice was also, and equally, limited to suppliers who can supply services at the port of destination.
9. Fourthly, the Commission submitted, the geographic market is the area of effective competition in which buyers and sellers operate. Quoting, in part, from the Australian Competition Tribunal’s reasons in *Re Fortescue Metals Group Ltd* (2010) 271 ALR 256; [2010] ACompT 2 (***Fortescue Metals Group***) at [1022], the Commission submitted that “what is relevant … [are] actual sales patterns, the location of customers and the place where sales take place”. The Commission submitted that this must mean a geographic area that is identified by the activities of demand and supply that relevantly affect competition for air cargo services. The Commission submitted, further, that the primary Judge’s “test” necessarily excludes the attributes of competition at places where the air cargo services are supplied, where the quality of services is assessed and where the suppliers must maintain operations in order to meet demand. The Commission went so far as to submit that the “test” adopted by the primary Judge excluded delivery to the port of destination.
10. Fifthly, the Commission submitted, the primary Judge’s “test” focused on individual flights and thereby failed to have regard to the temporal dimension of competition in a market.
11. As I have noted (at [606] above), when considering whether each of the relevant markets was a market in Australia, the primary Judge posed the overarching question: Where are the relevant substitutable services provided to consumer of those services? On appeal, the Commission accepted that this was the correct question. However, it submitted that, having posed the correct question, the primary Judge, when considering it, erroneously excluded services provided at the port of destination. The Commission submitted that the relevant inquiry must be about “substitution possibilities over the origin to destination pairs” because the relevant product—air cargo services from a port of origin to a port of destination—is only demanded as a suite of services.

## Consideration

1. The cases are replete with general statements of principle about the notion of the “market” in competition law and the process of defining markets for competition law purposes. The statements of principle are applicable to the present case. But, being directed to concepts, they do not provide a ready answer to the question of where a market is to be regarded as located in circumstances where the acquired product is a service provided or delivered transnationally. It would be true to say, as the primary Judge appeared to suggest (at [317]), that the language employed in the cases to describe these concepts can be interpreted in ways that might be thought to support each of the competing positions that were advanced by the parties.
2. Thus, to speak of a market as a “field of rivalry” (see, for example, *QCMA* at 517) or as “the geographic space in which rivalry and competition take place” (Australian Competition and Consumer Commission, *Merger Guidelines—November 2008* (Commonwealth of Australia, Canberra, 2011 at [4.6])) is to provide a convenient metaphor for something that is “an analytical tool devised by economists, not a feature of the real world”: *Seven Network Ltd v News Ltd* (2009) 182 FCR 160; [2009] FCAFC 166 (***Seven Network***) at [827]. But in order for the metaphor to be meaningful, especially when the market concept is instrumental to establishing legal liability, more is required. The quest for meaning is advanced by overlaying other economic concepts. One indispensable concept is substitution. Indeed, in *Queensland Wire*, Mason CJ and Wilson J at 188 referred to substitution as the defining feature of a market. As I have noted, the primary Judge approached the task of market definition through what he described as the “prism” of substitution. There is no suggestion in these appeals that this was an error. All parties advocated the correctness of that approach.
3. Substitution, as an economic concept, speaks of the *possibilities* for substitution brought about by the influence and exercise of market power. In the present case, as in a number of other cases before the Court, the economic evidence proceeded with an acceptance that the hypothetical monopolist test is an accepted methodology for market definition. The test involves determining whether a hypothetical monopolist supplier in a given area could profitably impose a small but significant non-transitory increase in price—a SSNIP. Starting with the firm and product in issue, the market borders are expanded to include all sources of close substitutes that would defeat the increase. The product and geographic dimensions of the market are represented by the smallest area over which the hypothetical monopolist (who can also be conceived of as all suppliers of a particular product acting collusively) can profitably impose the increase: *Metcash* at [247]-[251]; *Seven Network* at [625]; *Re Tooth & Co Ltd* (1979) 39 FLR 1 (***Re Tooth***) at 38-39.
4. In *QCMA*, the Trade Practices Tribunal said (at 517):

It is the possibilities of such substitution which set the limits upon a firm’s ability to “give less and charge more”. Accordingly, in determining the outer boundaries of the market we ask a quite simple but fundamental question: If the firm were to “give less and charge more” would there be, to put the matter colloquially, much of a reaction? And if so, from whom? In the language of economics the question is this: From which products and which activities could we expect of relatively high demand or supply response to price change, ie a relatively high cross-elasticity of demand or cross-elasticity of supply?

1. How is substitution played out? This is typically seen as substitution between one product and another and between one source of supply and another. In *QCMA*, the Tribunal described (at 517) a market by reference to the dynamics of substitution in the following way:

So a market is the field of actual and potential transactions between buyers and sellers amongst whom there can be strong substitution, at least in the long run, if given a sufficient price incentive. Let us suppose that the price of one supplier goes up. Then on the demand side buyers may switch their patronage from this firm’s product to another, or from this geographic source of supply to another. As well, on the supply side, sellers can adjust their production plans, substituting one product for another in their output mix, or substituting one geographic source of supply for another. Whether such substitution is feasible or likely depends ultimately on customer attitudes, technology, distance, and cost and price incentives.

1. The Tribunal’s description of a market not just as a “field of rivalry” but as a “field of actual and potential transactions between buyers and sellers amongst whom there can be strong substitution” cannot be read as a casual observation. The Tribunal’s description focuses attention on the area in which transactions occur as setting the boundaries of the market. This understanding also assists in identifying the location of a market. I do not think that, by the word “transactions”, the Tribunal was referring to some limiting legal concept such as might apply when one is determining, for example, the place where a contract is made. Rather, the Tribunal must be taken as using the word “transactions” in a broader economic sense to refer to the exchanges between buyers and sellers to buy and sell the relevant market product (ie, the substitutable products within the market), and the switching and substitution that takes place in the course of those exchanges. Thus, speaking geographically, a market is the field or area in which these exchanges take place, and over which switching and substitution by and between buyers and sellers occur. This focus serves to distinguish the area in which and over which these activities take place from the product or products that are the subject matter of these activities. Hence the relevance of speaking of separate product and geographic dimensions of the market.
2. In *Re Tooth*, the Trade Practices Tribunal referred (at 38) to a market as corresponding to the activities and geographic area within which, if given a sufficient economic incentive, switching occurs by buyers on the demand side and sellers on the supply side.
3. In its First Annual Report for the year ended 30 June 1975, the Trade Practices Commission described (at [3.54]) the geographic dimension of a market in the following way:

Geographic Market

The geographic market can be described as *the geographic area or areas in which sellers of the particular product operate and to which purchasers can practicably turn for such goods or services*. The geographic market is a function of a variety of factors, including the pattern of demand and the value of the commodity in relation to the cost of transporting it or, in the case of services, the degree of inconvenience involved in obtaining them from another source. The internal organisation of an enterprise may itself cast light on the dimensions of the geographic market …

(Emphasis added.)

1. This description (which was also apparently given in the Trade Practices Commission’s Second Annual Report) was accepted by Spender J in *QIW Retailers Limited v Davids Holdings Pty Limited (No 3)* (1993) 42 FCR 255; [1993] FCA 287 at 267.
2. Similarly, in *Australian Competition and Consumer Commission v Cement Australia Pty Ltd* (2013) 310 ALR 165; [2013] FCA 909, Greenwood J described (at [972]) the geographic dimension of a market as:

… the area within which sellers offer the product for sale and includes areas of substitutable geographic sources of supply buyers might turn to in switching their patronage to another supplier of the same or substitutable product. …

1. In *Queensland Wire*, Dawson J (at 198-199) remarked that the concept of a market is sometimes dealt with in a more complex manner than is necessary. His Honour said:

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 … In setting the limits of a market the emphasis has historically been placed upon what is referred to as the “demand side”, but more recently the “supply side” has also come to be regarded as significant. The basic test involves the ascertainment of the cross-elasticities of both supply and demand, that is to say, the extent to which the supply of or demand for a product responds to a change in the price of another product. Cross-elasticities of supply and demand reveal the degree to which one product may be substituted for another, an important consideration in any definition of a market. This is reflected in s 4E of the Trade Practices Act …

1. These descriptions of the geographic market, although expressed in various ways, are all consistent with the description in *QCMA* of a market as the field of actual and potential transactions between buyers and sellers amongst whom there can be strong substitution.
2. The Commission placed considerable emphasis on the geographic element of the product dimension of the markets in question as determining, as well, their respective geographic dimensions and locations. Thus, it referred to the notion of an origin/destination “pair”, such that the mere fact that a port of destination is located in Australia meant, without more, that the market was located, at least, in Australia. Relatedly, the Commission placed considerable emphasis on the ways in which competition may be expressed or manifested. It relied on the fact that expressions or manifestations of rivalry in the form of the quality of services provided in Australia as part of the “price product service package” meant that the market was, at least, located in Australia.
3. In order to evaluate this approach it is necessary to distinguish between the following concepts.
4. The first distinction is the one to which I have already referred. It is the distinction between the transactions between buyers and sellers to buy and sell the market product, and the product itself. The product is the subject matter of these transactions but there is no necessary correlation between the location of the product (including where a service is physically provided or delivered) and the location of the field of transactions between buyers and sellers in respect of the product. The distinction between the two concepts should not be eroded simply because the product is a service which has a geographical element in terms of the place or places at which the service is or is to be physically provided or delivered.
5. The second distinction concerns the product itself. Here, the product is the service of flying cargo from a point of origin, say Hong Kong, to a point of destination in Australia, say Sydney. The product includes what the primary Judge described as ancillary services, for example ground handling and inquiry services. The product was regarded by the primary Judge as a suite of services, encapsulated by the expressions “air cargo services” or “air freight services”. The Commission does not dispute the characterisation of the product as a suite of services. Indeed, it relied upon it. It submitted, correctly, that the product is a suite of services that is only demanded and supplied as such.
6. The point of present significance is that while an airline might compete in its product offering through, for example, superior ground handling services at the port of destination, the product is not ground handling services at that port of destination. Thus, the market is not—to continue the example—a market for ground handling services in Sydney. Rather, it is the suite of services.
7. The primary Judge recognised this distinction, when his Honour said at [321]:

The ground handling services provided at the destination airport in Sydney are, no doubt, a part of a general suite of services making up the service provided by an airline but ground handling services at Sydney are not themselves a substitute for air cargo services from Hong Kong to Sydney any more than a tyre is a car. …

1. The third distinction concerns the ways in which competition may be expressed or manifested. In *Seven Network* at [585], Dowsett and Lander JJ identified a number of propositions about competition and markets emerging from the cases, including the proposition that “competition in a market is the sum of activity engaged in by persons in promoting the sale [and supply] of the goods or services with which the market is concerned”: see also *Dandy Power Equipment Pty Ltd v Mercury Marine Pty Ltd* (1982) 64 FLR 238 at 259. This is a statement about the way in which competition might be expressed or manifested. However, the place where competition is expressed or manifested is not necessarily the place where the market is located. This is because a market is not simply a field of rivalry but, as *QCMA* reminds us, a field of rivalry of a particular kind. It is the field of actual and potential transactions between buyers and sellers amongst whom there can be strong substitution. Thus, when the product is a particular suite of services, the market is the field of actual or potential transactions between buyers and sellers for the sale of the suite. This is not necessarily the place at which the suite of services or some part of it is physically provided or delivered in a way that will enable its qualities and attributes to be appraised or evaluated. This was the point made by the primary Judge when he said (at [322]):

If it was sufficient in the case of an international transportation market that it was located where rival services were provided then it would follow that the market in Australia for packaged tours of Europe would be located wherever the tour bus happened to be. …

1. Nevertheless, on appeal, as before the primary Judge, the Commission’s case was that if rivalry in an aspect of the “price product service package” was played out in the manner of delivery at a particular location, and that location was Australia, it followed inexorably that there was a market in Australia. Moreover, this was so even though the aspect of the “price product service package”, as so delivered, was not in fact “the product” with which the market is concerned. I am unable to accept those propositions.
2. The focus of market definition must be the identification and analysis of substitution possibilities. It is helpful to consider this from the model provided by the hypothetical monopolist test. Once the hypothetical monopolist controls all the alternative locations from which buyers can obtain the product in question (relevantly, the suite of services) and to which buyers would switch in order to avoid the imposition of a SSNIP, it can profit-maximise by imposing the SSNIP because the buyers of the product have nowhere left to turn to avoid its effect. As the airlines submitted, this proposition holds good regardless of where the services are, in fact, provided. Thus, when the product is a service, the hypothetical monopolist test is not concerned with where the service is provided but with where substitution occurs in respect of the sale and purchase of the service. And substitution occurs on the field of actual and potential transactions between buyers and sellers amongst whom there can be strong substitution.
3. The hypothetical monopolist test, as applied in the present case, is but an aid to arriving at the appropriate market definition. It is not a substitute for evidence. Recently, in *Australian Competition and Consumer Commission v Australia and New Zealand Banking Group Ltd* (2015) 324 ALR 392; [2015] FCAFC 103, the Court observed (at [138]):

Whilst a market is an analytical or economic tool designed to analyse the particular asserted anti-competitive conduct, a market definition must nonetheless be based on findings of fact: *Singapore Airlines Ltd v Taprobane Tours WA Pty Ltd* (1991) 33 FCR 158 at 174; 104 ALR 633 at 648 per French J. The premise of that proposition is that it has economic and commercial reality. 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. A court should be loathe to accept or act on a market definition which is an artificial construct that does not 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.

1. I stress this matter because the primary Judge’s conclusion that the relevant markets were not markets in Australia was based on findings that are peculiar to the case at hand. That is the case that must be considered on appeal. It is possible that different findings of fact may have resulted in a different evaluation and a different market definition. But, apart from his Honour’s finding that shippers were market participants (which I discuss below), there is no challenge to the findings of primary fact that informed his Honour’s conclusions on market definition. The challenge is to his Honour’s analysis and evaluation, based on those facts.
2. The primary Judge found that the understandings were arrived at in meetings held, or through conduct occurring, at the port of origin, whether that was in Hong Kong, Singapore or Indonesia. None of the price-fixing conduct occurred in Australia. It was appropriate for the primary Judge to focus attention, firstly, on the port of origin because this was the place where the impugned conduct occurred. As Allsop J observed in *Australian Competition and Consumer Commission v Liquorland (Australia) Pty Ltd* [2006] ATPR 42-123; [2006] FCA 826 at [437]:

… Market definition is to be approached by beginning with the problem at hand and asking what market identification best assists the assessment of the conduct and its asserted anti-competitive attributes…

1. For the purposes of present analysis, the product dimension of each relevant market is not in dispute. Once again, I emphasise that it concerns a suite of services that is only demanded and supplied as a suite. This is the market “product”.
2. As I have noted (at [605] above), the primary Judge found that the participants in the relevant markets were airlines, freight forwarders and shippers (either exporters at origin or importers at destination) whose cargo volume was sufficiently significant for airlines to be commercially motivated to pursue it.
3. With respect to the supply side, the primary Judge found that there would be no airlines seeking to enter the relevant markets if the incumbents imposed a SSNIP.
4. With respect to the demand side, the primary Judge made the following findings. The range of airlines available to be selected was limited by the need to have a presence in the port of origin where possession of the cargo to be transported was taken from the freight forwarder. The service of taking possession of the cargo in the port of origin with a view to flying it to a port of destination in Australia could not be performed anywhere but in the port of origin. Each local cargo sales office of Air NZ and Garuda at the port of origin published from time to time standard rates as “tariff” or “rate” sheets or schedules. Contract rates (as opposed to standard rates) were negotiated between freight forwarders and staff of the airlines at the local sales office. Even though shippers were market participants, and some may have made, in Australia, decisions about which airlines they would use, the shippers nevertheless continued to use freight forwarders who provided indispensable services in respect of transport issues with which the airlines would not deal. Leaving aside extremely rare occurrences (typically involving live animals), airlines carrying cargo from a port of origin such as Hong Kong (and, by implication, the other ports of origin relevant to the present question) generally dealt directly only with freight forwarders situated in Hong Kong (or the other ports of origin) or in nearby environs. The contractual relationship was between the airline and the freight forwarder, who “cut” or “raised” the air waybill at the port of origin. The airline and the freight forwarder were the parties to the air waybill whose terms governed the carriage of the cargo. In most cases, the freight forwarder at the port of origin was obliged to pay the airline for air cargo transport charges in the local currency of the port of origin, although some shipments may be “charges collect”, in which case the freight forwarder at the port of destination paid the charges on delivery. The freight forwarder’s obligation to pay the charges was not conditional on it receiving payment from the consignor or consignee.
5. These findings show that all the sources of supply of the market product (the suite of services) are located at the port of origin, not the port of destination. This is where the prices for the product are set and where the product is bought and sold. It is, as I have said, the place where the impugned conduct occurred. These findings thus point persuasively to the field of actual or potential transactions between buyers and sellers being the port of origin in respect of each relevant market, not some other place. Indeed, the Commission does not dispute that there was, in each case, a market at the port of origin. The Commission’s case is that there was also, correspondingly, a market in Australia because part of the suite of services was physically provided or delivered in Australia and that the manner in which this part was physically provided or delivered is an aspect of the way in which airlines compete with each other. For the reasons given in [636]-[642] above, I do not accept that these considerations demonstrate that there is a market in Australia. They conflate and confuse the product and geographical dimensions of the markets under consideration.
6. When s 45(2) of the TPA refers to the purpose, effect or likely effect of substantially lessening competition, it means competition “in any market” in which a relevant party supplies or acquires, or is likely to supply or acquire, or would (but for a provision in the contract, arrangement or understanding) supply or acquire or be likely to supply or acquire, goods or services. The inquiry is not simply: *Where* does the party supply or acquire goods or services or *where* is the party likely to supply and acquire, or would, or would be likely to supply or acquire, goods and services? It is not enough to attract the operation of s 45 of the TPA to do no more than point to the fact that goods or services are supplied or acquired in Australia. Rather, the provision is directed to “the market” in which the goods or services are supplied or acquired, and to competition in that “market”. Thus, the setting of “the market” is crucial. This then becomes the point of reference to which questions concerning the supply or acquisition of goods or services are then directed.
7. Here, the “goods or services” is the suite of services supplied by airlines in transporting cargo from a port of origin to a port of destination. The word “supply” is defined in the TPA to include, in relation to services, “provide, grant or confer”: s 4(1) of the TPA. The word “acquire” is defined to include, in relation to services, “accept”: s 4(1) of the TPA. In *Cook v Pasminco Limited* (2000) 99 FCR 548; [2000] FCA 677, Lindgren J remarked (at [26]) that the definitions of “supply” and “acquire” are symmetrical, such that a supply of goods must occur as part of a bilateral transaction or dealing under which the other party acquires them. These remarks are apposite when one is speaking of a market for goods. They also hold true when one is speaking of services and a market for services. It is appropriate and correct to speak, in the present case, of the suite of services being “supplied or acquired” in a market that is circumscribed as the port of origin, even though part of the services are to be physically provided or delivered at a port of destination, such as Sydney. It is also appropriate and correct to speak of “competition in a market” whose geographic area is a port of origin, even though the competition may be played out in the manner in which an aspect of the services is physically provided or delivered at a port of destination. This is because the sum of the activities engaged in by competitors in promoting the sale and supply of the goods or services with which the market is concerned, wherever those activities take place, is properly aligned to “the market” itself, in which the opportunities for substitution and switching are to be found. In the present case, when dealing with the suite of services, those opportunities are not found at the port of destination; on the findings of fact made by the primary Judge, they are only found at the port of origin where the suite, as such, is supplied and acquired, even though, having been supplied and acquired—which, on any view, can be no later than the point of departure of the aircraft from the port of origin—elements of the acquired suite are physically provided or delivered at a distant place.
8. The same framework applies when considering barriers to entry—yet another metaphor in the world of abstractions. Accepting that facilities, permits and authorisations (and the like) are required so that the suite can be supplied, and may constitute barriers to entry, it does not follow that the geographical dimension of the market is defined by the location of the facilities and/or the sources from which the permits and authorisations are acquired. In other words, if, for example, the requirement for cargo handling facilities at a port of destination is a barrier to entry, this does not mean that the geographical dimension of the market then becomes a place or includes one of a number of places where the barrier is, metaphorically speaking, perceived to have been erected. It is important to appreciate that, in order to participate in the market, suppliers have already surmounted the barrier (they have, for example, acquired the facilities) and stand in the market (here, at the port of origin) with their competitors to supply the suite of services to buyers who seek to buy that suite. To take the primary Judge’s example of the tour bus in Europe (see [607] and [641] above), various and different licences may be necessary to operate the tour bus on its journey through Europe. The need to obtain these licences may be a barrier to entry. But the market in Australia for packaged tours in Europe does not then become also a market in each of those other places.
9. I return to consider the Commission’s submissions I have summarised at [612]-[622].
10. With respect to the Commission’s first submission (see [617] above), I do not read the primary Judge’s reasons for judgment as seeking to establish some new “test”, still less a “test” not supported by authority. In my respectful view, the primary Judge focused, correctly, on the geographic area in which the market product—the suite of services—was bought and sold, and over which switching and substitution by and between buyers and sellers occurred. Further, I do not think that the Commission’s submissions accurately represent the primary Judge’s reasoning by arguing that his Honour determined the locus of the market by reference to a single aspect of the transaction between buyers and sellers, namely the place where possession of the cargo for transport is taken. The primary Judge plainly placed some significance on the fact that the service of taking possession at the port of origin, with a view to flying the cargo to the port of destination, cannot be performed anywhere but at the port of origin. But his Honour’s reference to that consideration was in connection with the airlines’ broader submission that the geographical dimension of the market is the area in which sellers of the product operate and to which buyers can practicably turn for such goods or services. The primary Judge’s reference to the place where possession of the cargo is taken was part of his Honour’s acceptance that the range of airlines which are available to be selected in any route specific market is limited by the need to have a physical presence in the port of origin for that purpose.
11. With respect to the Commission’s second submission (see [618] above), it may be accepted that, in the markets in question, there is no demand “for the mere commencement of a transport service at the port of origin”. But the primary Judge’s reasoning did not proceed on the flawed basis that there was such demand.
12. With respect to the Commission’s third submission (see [619] above), the primary Judge’s reasoning did not involve the inconsistency alleged. Plainly, the competing airlines supplying the suite of services had to supply services at the port of destination. This fact was not lost on the primary Judge who accepted and recognised that the product was a suite of services. Thus, the airlines supplying the services at the port of destination (which were part of the suite) were necessarily the same airlines supplying the services at the port of origin (which were also part of the suite). The Commission’s submission raises a false dichotomy.
13. With respect to the Commission’s fourth submission (see [620] above), the primary Judge’s conclusion on the geographical dimension of the market is not inconsistent with the general observations made in *Fortescue Metals Group* about markets, which are quoted by the Commission. *Fortescue Metals Group* does not stand for the proposition that the geographical dimension of the market is determined merely by the fact that the product dimension of the market is characterised, in part, by a geographical element. In that case, the Tribunal did refer (at [1022]) to actual sales patterns, the location of customers and the place where sales take place, as relevant considerations for determining the geographic market. The Tribunal’s reference to the location of customers must be considered having regard to the circumstances of the particular case. In the present case, it is to be remembered that, on the primary Judge’s findings of fact, customers (shippers) generally acted through intermediaries in Hong Kong and the other ports of origin. Thus, for all relevantly practical purposes, the customers (shippers) were, through their intermediaries, located at the port of origin in the markets in question.
14. With respect to the Commission’s fifth submission (see [621] above), there is nothing to suggest that the primary Judge’s consideration of the geographic dimension of the market was informed only by short-run considerations.
15. It is necessary for me to say something more about the shippers. Air NZ and Garuda each contended that the primary Judge erred in failing to find that the relevant markets were limited to transactions between airlines and freight forwarders, and in finding that some large importers in Australia were participants in the relevant markets.
16. The gravamen of Air NZ’s submission was that the primary Judge’s finding that shippers were participants in the relevant markets was based on theoretical considerations and not on evidence. Air NZ pointed, in particular, to the primary Judge’s finding (at [309(d)]) that shippers with significant cargo volume, wherever located, were capable, at least in theory, of operating as a constraint on airlines’ cargo rates because of their ability, again in theory, to switch to alternate sources of supply and to outflank any exercise of market power at the relevant origin airport.
17. Air NZ also pointed to what it said was an absence of evidence that large shippers imposed a real constraint on airlines operating out of Hong Kong and Singapore. Moreover, it submitted that, to the extent that there was evidence on the question, it tended to demonstrate that large shippers did not exert a substantial constraining effect on airlines.
18. Garuda’s submissions were to the same effect. It submitted that the primary Judge’s finding that a number of shippers controlled significant volumes of cargo (to the extent that the finding was made in respect of cargo on routes from Hong Kong or Indonesia to ports in Australia) was not open on the evidence. Garuda submitted that there was no evidence of the existence of such shippers and that the primary Judge made no finding or reference to evidence that a shipper actually made a switching decision. Thus, Garuda submitted, it was not open to the primary Judge to find that shippers (of the kind the primary Judge had in mind) made decisions, including decisions in Australia, about which airlines they would use. Further, the economic significance of any such decision could not be assessed. Garuda submitted that the primary Judge should have held that the Commission had not established that there were any switching decisions of significance to market definition that had been made in Australia in respect of any of the routes in issue.
19. Garuda’s submissions referred to evidence concerning a particular dealing between itself and an importer from the Sunshine Coast who wished to ship watches from Jakarta to Brisbane. Garuda submitted that this evidence showed that freight forwarders and shippers were not in the same market. Garuda also referred to a number of general findings made by the primary Judge concerning the role and function of freight forwarders. The thrust of these submissions was that the services supplied by airlines to freight forwarders, and the services supplied by freight forwarders to consignors or consignees, were in different markets having regard to differences in the scope of services provided and in their pricing.
20. The primary Judge’s finding was that the participants in the relevant markets were airlines, freight forwarders and shippers (be they exporters at origin or importers at destination) whose cargo volume was sufficiently significant for the airlines to be commercially motivated to pursue it. The cases recognise that the behaviour of participants at one functional level may have a constraining effect on the behaviour of participants at another functional level that is sufficient to warrant the inclusion of all those activities in the market the subject of attention: see, for example, the discussion in *Metcash* at [252]-[268]. However, I do not think that the primary Judge’s conception of the relevant markets in the present case was one in which two distinct functional levels—one between airlines and freight forwarders and the other between freight forwarders and shippers—should be combined (or “collapsed”) into the one market. After depicting the “vertical structure of the industry” with the progression Consignor 🡪 Origin freight forwarder 🡪 Airline 🡪 Destination freight forwarder 🡪 Consignee, the primary Judge said (at [269]):

This arrangement may not be so vertical as it appears. It is true that goods travel from the top to the bottom but often enough the consignee (as importer) may be the instigator of the particular shipment which will create the situation of importation. The services provided by the freight forwarders are necessary accompaniments to the services provided by the airlines themselves and neither makes much sense without the other.

1. Later, the primary Judge described (at [299]) the freight forwarders as intermediaries having fluctuating control over the cargo whose carriage they arranged. His Honour saw this characteristic as reflecting “economic substance”. The primary Judge also reasoned that the shippers were “significant economic actors”. His Honour said that he could not imagine a universe of discourse in which a rational business would ignore the role of shippers.
2. It seems to me that, after considering a large body of evidence directed to the relationship between airlines, freight forwarders and shippers, it was open to the primary Judge to define the market in a way which included all three as participants, without seeking to draw the “bright line” functional levels which the airlines urge.
3. It also seems to me that it was open to the primary Judge to draw broad conclusions about the markets in question based on how, generally, airlines, freight forwarders and shippers interact in relation to the supply and acquisition of air cargo services. The primary Judge noted, on a number of occasions in the reasons for judgment, the airlines’ submissions that the Commission had not established with respect to each relevant market, that shippers played the role that the primary Judge found them to play in other corresponding air cargo markets. But, having been alive to this issue, the primary Judge rejected the airlines’ submissions. He considered the airlines’ view as contrary to common sense. The primary Judge also reasoned (at [307]):

… There is no reason to think that the structural features of the air cargo business on different routes are different. In particular, there is no reason to think that the airlines on significant routes are not involved in the giving effect to international trade nor that international trade involves importers and exporters.

1. Air NZ and Garuda each referred to aspects of the evidence which, they argued, showed that the primary Judge erred in concluding that shippers were participants in the relevant markets. While an appellate court can draw its own inferences from primary facts, the cautionary observations of Davies J in *Australian Meat Holdings Pty Limited v Trace Practices Commission* [1989] ATPR 40-932; [1989] FCA 25 should be borne in mind. There, his Honour referred to an appeal court being taken to “snatches of the evidence only”. His Honour observed (at 50,091):

The Court must be careful not to draw inferences from evidence which is disputed by other evidence and which forms only part of the material before the Court.

1. That observation is applicable to the present appeals. The primary Judge’s discussion and findings on the functional dimension of the relevant markets at [266]-[309] of the reasons show that his Honour gave careful consideration to a very large body of evidence concerning the role of shippers. His Honour was able to conclude that across the Asia Pacific area the airlines recognised that shippers had demand for capacity and that airlines actively followed the position of shippers, recognising that they were “the economic foundation of the market”.
2. I am not persuaded that the broad conclusions reached by the primary Judge about the participation of shippers in the relevant markets (see the quotation at [605] above) were not open to be made in light of the evidence to which his Honour specifically referred.
3. But even if the primary Judge was in error in this respect, the error is without significance to the central issue in the appeals. The appeals are not about the functional dimension of the relevant markets, but their geographical dimension. Air NZ expressly conceded that the primary Judge’s findings as to the functional dimension of the relevant markets do not affect the result in the case. This concession was properly made. The airlines’ respective cases in support of the primary Judge’s conclusion that each market was not a market in Australia did not rely on the absence of shippers as relevant market participants. Equally, the Commission’s case on appeal did not rely on the inclusion of shippers as market participants. As I have noted on a number of occasions, the Commission’s case on appeal rested on the twin propositions that services were physically provided or delivered at the port of destination in Australia and that it was at these locations, amongst others, that the airlines were able to express or manifest rivalrous behaviour.
4. In making this observation, I do not wish to be taken as indicating that, under other circumstances, the finding that shippers were market participants would be of no significance. Once again, the case under appeal is one involving specific findings of fact. Here, the primary Judge was at pains to stress that, notwithstanding the participation of shippers, the market was not as “vertical” as might otherwise be suggested by the fact of that participation. This, no doubt, was because the shippers acted through freight forwarders who were intermediaries. I refer, again, to the primary Judge’s finding that airlines carrying cargo from a port of origin, such as Hong Kong (and, by implication, the other ports of origin relevant to the present question) generally dealt directly only with freight forwarders situated in Hong Kong (or the other ports of origin) or in nearby environs.
5. In support of the primary Judge’s finding that shippers were participants in the relevant markets, the Commission, in the course of oral submissions in reply, referred to some evidence (specifically, the evidence of Glenna Frances Cluff who was employed by Toshiba (Australia) Pty Limited as a Logistics Import Specialist) to support the proposition that a switching decision could be made in Australia. With respect to this evidence, it is important to understand that the question is not so much where the person who makes a switching decision is located, but where and how a switching decision, once made, is implemented. Here, the effect of the primary Judge’s findings was that the relevant switching decisions were implemented by intermediaries at the port of origin, not at the port of destination.
6. The Commission also referred to some evidence given by Dennis Ian Nelson who had worked for BAX Global in the “freight forwarding industry” in Australia. This evidence was to the effect that, for major inbound routes (for example, from the USA to Sydney), Mr Nelson and his staff could negotiate a price and service standards for freight forwarding services with local consignees in Australia without reference to BAX Global at the port of origin. This evidence was given at a high level of generality. It was not directed to the markets in question. I do not accept that snippets of evidence of this kind seriously call into question the correctness of the primary Judge’s overall evaluation of how, on the evidence before him, the markets in question functioned.
7. I should also briefly refer to the decision of the High Court of New Zealand in *Commerce Commission v Air New Zealand Ltd* (2011) 9 NZBLC 103,318; [2011] NZHC 1285 (***Commerce Commission v Air New Zealand***). In that case, which concerned price-fixing in relation to inbound and outbound air cargo services to New Zealand, it was found that there was a “market in New Zealand”. Section 3(1A) of the *Commerce Act 1986* (NZ) defines a “market” as a market in New Zealand for goods or services as well as other goods or services that, as a matter of fact and commercial common sense, are substitutable for them. The hearing in that case proceeded on the basis of agreed facts. It is clear that the court’s finding that there was a market in New Zealand was informed by its findings on the facts before it concerning the influence of downstream market effects. In the present case, the primary Judge observed (at [334]) that, in *Commerce Commission v Air New Zealand*, the court was willing to infer a number of matters concerning downstream effects which he could not embrace having had the benefit of a trial. Thus, the present case is immediately distinguishable on the facts.
8. The finding on market definition in *Commerce Commission v Air New Zealand* was also informed by the approach of the New Zealand Court of Appeal in *Port Nelson Ltd v Commerce Commissio*n [1996] 3 NZLR 554 in which it was said (at 560):

Generally a market will be identified by reference to the activities of those engaged in commerce, the structures underlying their activities and the perceived susceptibility to change in the medium-term future.

1. In *Commerce Commission v Air New Zealand*, the court expressed its preference (at [189]) for this general approach to market definition rather than “prescriptive definitions limiting a market to the outer geographic boundary of the immediately substitutable products”. This general approach places less emphasis on substitutability as the cornerstone of market definition than is accorded by s 4E of the TPA as interpreted by the Australian case law.
2. Finally, I should record my view that, on existing authority, there is no warrant for incorporating in the process of market definition an effects-based doctrine that would extend the geographic reach of a market to Australia on the basis that persons in Australia are or might be adversely affected by conduct outside Australia that is sought to be impugned.
3. On the facts found by the primary Judge, none of the relevant markets was a market in Australia. In my respectful view, the primary Judge did not err in the conclusion to which he came, based on those facts. It follows that each appeal should be dismissed.

# THE NOTICES OF CONTENTION

1. Having reached this conclusion, it is not necessary for me to reach a conclusion on the other matters raised by the airlines in their notices of contention.
2. The notices of contention raise a number of significant and, in some cases complex, legal questions. As, in my view, these questions do not arise for determination, I express no view on them.
3. The notices of contention also raise a number of challenges to the factual findings made by the primary Judge. These stand in a somewhat different position. I agree with Dowsett and Edelman JJ that the airlines have not shown error in the findings and conclusions to which the primary Judge came. I refer, in particular, to [289]-[482] of the majority reasons, with which I respectfully agree.

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| I certify that the preceding one hundred and thirteen (113) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Yates. |

Associate:

Dated: 21 March 2016