**FEDERAL COURT OF AUSTRALIA**

Australian Competition and Consumer Commission v Air New Zealand Limited [2014] FCA 1157

|  |  |  |
| --- | --- | --- |
| Citation: | | Australian Competition and Consumer Commission v Air New Zealand Limited [2014] FCA 1157 |
|  | |  |
| Parties: | | **AUSTRALIAN COMPETITION AND CONSUMER COMMISSION v AIR NEW ZEALAND LIMITED (ARBN 000 312 685)**  **AUSTRALIAN COMPETITION AND CONSUMER COMMISSION v P.T. GARUDA INDONESIA LTD (ARBN 000 861 165)** |
|  | |  |
| File numbers: | | NSD 534 of 2010  NSD 955 of 2009 |
|  | |  |
| Judge: | | **PERRAM J** |
|  | |  |
| Date of judgment: | | 31 October 2014 |
|  | |  |
| Catchwords: | | **TRADE PRACTICES** – price fixing – alleged arrangements or understandings between airlines to fix fees and surcharges in relation to the carriage of air cargo – *Trade Practices Act 1974* (Cth) ss 45 and 45A – whether airlines engaged in collusive practices – whether airlines bound by domestic law or practice of foreign countries to fix charges  **TRADE PRACTICES** – price fixing – whether alleged price fixes had purpose, or were likely to have the effect, of substantially lessening competition in a market in Australia – whether markets were ‘in Australia’ for the purposes of *Trade Practices Act 1974* (Cth) s 4E – definition of market – assessment of substitution and switching behaviour – assessment of product, geographical and functional dimensions  **EVIDENCE** – proving a contract, arrangement or understanding within the meaning of *Trade Practices Act 1974* (Cth) s 45 – circumstantial proof of collusive behaviour – evidence to be looked at as a whole |
|  | |  |
| Legislation: | | *Commonwealth Constitution* s 109  *Acts Interpretation Act 1901* (Cth) s 23(b)  *Air Navigation Act 1920* (Cth) ss 12,13, 22  *Air Navigation Amendment Act 1989* (Cth) s 3  *Aviation Transport Security Act 2004* (Cth)  *Civil Aviation Act 1988* (Cth)  *Competition Policy Reform Act 1995* (Cth) s 15  *Evidence Act 1995* (Cth) ss 63, 140, 144  *Foreign Antitrust Judgments (Restriction of Enforcement) Act 1979* (Cth)  *Foreign Proceedings (Prohibition of Certain Evidence) Act 1976* (Cth)  *Foreign Proceedings (Excess of Jurisdiction) Act 1984* (Cth)  *Trade Practices Act 1974* (Cth) ss 4, 4E, 5, 45, 45A, 46, 47, 51(1)(a), 51(1)(b), 51(1C), 112  *Transport and Communications Legislation Amendment Act 1992 (No 2)* (Cth) s 10  *Air Navigation Regulations 1947* (Cth) rr 16, 20, 258(1)  *Air Navigation Amendment Regulations 1998 (No 1)* (Cth)  *Air Navigation Amendment Regulations 2000 (No 3)* (Cth)  Explanatory Memorandum, Trade Practices Bill 1974 (Cth)  *Co-operation Act 1923* (NSW) s 82  *Co-operatives Regulations 1961* (NSW) reg 35A  *Agreement between the Government of the Commonwealth of Australia and the Government of Hong Kong concerning Air Services*, signed 15 September 1993, [1993] ATS 28 (entered into force 15 September 1993)  *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*, signed 7 March 1969, [1969] ATS 4 (entered into force 7 March 1969)  *Agreement between the Government of Hong Kong and the Government of the Republic of Indonesia Concerning Air Services*, signed 6 June 1997, [1981] I-33911 (entered into force 27 June 1997)  *Agreement between the United States and the United Kingdom relating to Air Services*, signed 11 February 1946, 3 UNTS 253 (entered into force 11 February 1946)  *Convention on International Civil Aviation*, signed 7 December 1944, 15 UNTS 295 (entered into force 4 April 1947)  *Exchange of Notes constituting an Agreement between the Government of Australia and the Government of Indonesia to amend the Annex to the Agreement for Air Services between and beyond their respective Territories of 7 March 1969*, signed 16 August 1986, [1986] ATS 23 (entered into force 16 August 1986)  *International Air Services Transit Agreement*, signed 7 December 1944, 84 UNTS 389 (entered into force 8 February 1945)  *Statute of the International Court of Justice*, 39 AJIL Supp 215 (entered into force 24 October 1945)  *Vienna Convention on the Law of Treaties*, opened for signature 23 May 1969, 1155 UNTS 331 (entered into force 27 January 1980)  *Air Transport (Licencing of Air Services) Regulations* (Hong Kong) cap 448A rr 3(1), 5(2)  *Competition Act* (Singapore, cap 50B, 2004) |
|  | | *Undang-Undang Republik Indonesia Nomor 15 Tahun 1992 Tentang Penerbangan* [Law No 15 of 1992 on Aviation] (Indonesia) Art 13(2)  *Peraturan Pemerintah Republik Indonesia Nomor 40 Tahun 1995 Tentang Angkutan Udara* [Government Regulation No 40 of 1995 on Aviation] (Indonesia) Arts 38, 40  *Undang-Undang Republik Indonesia Nomor 5 Tahun 1999 Tentang Larangan Pratek Monopoli Dan Persaingan Usaha Tidak Sehat* [Law No 5 of 1999 Regarding the Ban on Monopolistic Practices and Unfair Business Competition] (Indonesia)  *Federal Aviation Act of 1958*, 49 USC 1301 (1958) (USA) §§ 412, 414  *Sherman Antitrust Act*, 15 USC §§ 1 – 7 (1890) (USA) §§ 1 - 7 |
| Cases cited: | | *Apco Service Stations Pty Ltd v Australian Competition and Consumer Commission* (2005) 159 FCR 452 considered  *Australian Competition and Consumer Commission v CC (NSW) Pty Ltd (No 8)* (1999) 92 FCR 375 considered  *Australian Competition and Consumer Commission v Leahy Petroleum Pty Ltd* (2007) 160 FCR 321; [2007] FCA 794 considered  *Australian Competition and Consumer Commission v Metcash Trading Ltd* (2011) 198 FCR 297 cited  *Australian Competition and Consumer Commission v Mobil Oil Australia Ltd* [1997] ATPR ¶ 41-568 cited  *Bradshaw v McEwans* (1951) 217 ALR 1 cited  *Browne v Dunn* (1893) 6 R 97 cited  *Cadia Holdings Pty Ltd v New South Wales* (2010) 242 CLR 195 cited  *Commissioner of Police v Eaton* (2013) 294 ALR 608 cited  *Commissioner of Taxation v Qantas Airways Ltd* (2012) 247 CLR 286 distinguished  *Currie v Dempsey* [1967] 2 NSWR 532 cited  *Habib v Commonwealth* (2010) 183 FCR 62 cited  *Heli-Aust Pty Ltd v Cahill* (2011) 194 FCR 502 cited  *International Air Transport Association* [1984] ATPR (Com) ¶ 150-083 considered  *International Air Transport Association* [1986] ATPR (Com) ¶50-101 considered  *Maricic v Dalma Formwork (Australia) Pty Ltd* [2006] NSWCA 174 cited  *Palmer v Dolman* [2005] NSWCA 361 cited  *Qantas Airways Limited* [1987] ATPR (Com) ¶ 150-056 considered  *QIW Retailers Limited v Davids Holdings Pty Ltd (No 3)* (1993) 42 FCR 255 cited  *Queensland Wire Industries Pty Ltd v Broken Hill Proprietary Company Ltd* (1989) 167 CLR 177 cited  *Re Fortescue Metals Group Ltd* (2010) 271 ALR 256 cited  *Re Ku-ring-gai Co-operative Building Society (No 12) Ltd* (1978) 36 FLR 134 distinguished  *Re Queensland Co-operative Milling Association Ltd* (1976) 8 ALR 481 cited  *Refrigerated Express Lines (Australasia) Pty Limited v Australian Meat and Livestock Corporation (No 2)* (1980) 29 ALR 333 cited  *The Queen v Halton; ex parte A.U.S. Student Travel Pty Limited* (1978) 138 CLR 201 distinguished  *Thiel v Commissioner of Taxation* (1990) 171 CLR 338 cited  *Trade Practices Commission v David Jones (Australia) Pty Ltd* (1986) 13 FCR 446 cited  *Trade Practices Commission v Email Ltd* (1980) 31 ALR 53 considered  *Trade Practices Commission v Service Station Association Ltd* (1993) 44 FCR 206 considered  *Hartford Fire Insurance Co v California*, 509 US 764 (1993) cited  *In re Coordinated Pretrial Proceedings in Petroleum Products Antitrust Litigation*, 906 F 2d 432 (9th Cir, 1990) cited  *In re Flat Glass Antitrust Litigation*, 385 F 3d 350 (3rd Cir, 2004) cited  *Monsanto Co v Spray-Rite Service Corp*, 465 US 752 (1984) considered  *Re Uranium Antitrust Litigation*, 480 F Supp 1138 (9th Cir, 1979) cited  *Re Uranium Antitrust Litigation* 617 F 2d 1248 (7th Cir, 1980) cited  *Serfecz v Jewel Food Stores*, 67 F 3d 591 (7th Cir, 1995) cited  *Theatre Enterprises Inc v Paramount Film Distributing Corp*, 346 US 537 (1954) cited  *United States v Aluminium Co. of America*, 148 F.2d 416, 443 (CA2 1945) cited  *Williamson Oil Co Inc v Phillip Morris USA*, 346 F 3d 1287 (11th Cir, 2003) cited  *Commerce Commission v Air New Zealand Ltd* (2011) 9 NZBLC 103 (24 August 2011) distinguished  *Case Concerning the Arrest Warrant of 11 April 2000* (*Democratic Republic of Congo v Belgium*) *(Judgment)* [2002] ICJ Rep 3 cited  *Case No COMP/M.5141 – KLM/Martinair* (European Commission decision of 17 December 2008) distinguished  *SS ‘Lotus’ (France v Turkey) (Judgment)* [1927] PCIJ (ser A) No 10. cited  *The Fisheries Case (United Kingdom v Norway) (Judgment)* [1951] ICJ Rep 116 cited  *Appellate Body Decision, United States – Sunset Reviews of Anti-Dumping Measures on Oil Country Tubular Goods from Argentina*, WTO Doc WT/DS268/AB/R, AB-2004-4 cited |
|  | |  |
| Texts cited: | | Beaton-Wells, C, and Fisse, B, *Australian Cartel Regulation: Law policy and practice in an international context* (Cambridge University Press, 2011)  Brunt, M, ‘Market Definition Issues in Australian and New Zealand Trade Practices Litigation’ (1990) 18 *Australian Business Law Review* 86  Corones, SG, *Competition Law in Australia* (Lawbook, 5th ed, 2010)  Fugate, WL, ‘Antitrust Jurisdiction and Foreign Sovereignty’ (1963) 49 *Virginia Law Review* 925  Haanappel, P, *Pricing and Capacity Determination in International Air Transport* (Kluwer Law and Taxation Publishers, 1984)  Kovacic, WE, ‘The Identification and Proof of Horizontal Agreements under the Antitrust Laws’ (1993) 38 *The Antitrust Bulletin* 5  Senz, S, and Charlesworth, H, ‘Building Blocks: Australia’s response to foreign extraterritorial legislation’ (2001) 2 *Melbourne Journal of International Law* 69 |
|  | |  | | |
| Dates of hearing: | | 6-9, 12-15, 20, 21, 23, 27-30 November 2012; 3-7, 11, 13, 14, 19 December 2012; 4-7, 11, 13, 14, 18, 19, 25, 27, 28 February 2013; 1, 4-8, 12, 14, 15, 19, 27 March 2013; 4, 11, 17, 18 April 2013; 9, 10, 13-15 May 2013; and 5 June 2013 | | |
|  | |  | | |
| Place: | |  | | |
|  | |  | | |
| Division: | |  | | |
|  | |  | | |
| Category: | | Catchwords | | |
|  | |  | | |
| Number of paragraphs: | | 1287 | | |
|  | |  | | |
| Counsel for the Applicant in NSD 534 of 2010 and NSD 955 of 2009: | | Mr JA Halley SC, Ms E Collins SC, Mr JR Clarke SC, Mr J Clark, Mr C Arnott, Ms N Shaw, Ms V Bosnjak and Ms T Dinh | | |
|  | |  | | |
| Solicitor for the Applicant in NSD 534 of 2010 and NSD 955 of 2009: | | Australian Government Solicitor | | |
|  | |  | | |
| Counsel for the Respondent in NSD 534 of 2010: | | Mr RM Smith SC, Mr NJ Owens and Mr R Yezerski | | |
|  | |  | | |
| Solicitor for the Respondent in NSD 534 of 2010: | | Corrs Chambers Westgarth | | |
|  | |  | | |
| Counsel for the Respondent in NSD 955 of 2009: | | Mr M Leeming SC and Mr T Brennan | | |
|  | |  | | |
| Solicitor for the Respondent in NSD 955 of 2009: | | Norton White | | |

|  |  |
| --- | --- |
| IN THE FEDERAL COURT OF AUSTRALIA |  |
| NEW SOUTH WALES DISTRICT REGISTRY |  |
| GENERAL DIVISION | NSD 534 of 2010 |

|  |  |
| --- | --- |
| BETWEEN: | AUSTRALIAN COMPETITION AND CONSUMER COMMISSION  Applicant |
| AND: | AIR NEW ZEALAND LIMITED (ARBN 000 312 685)  Respondent |

|  |  |
| --- | --- |
| JUDGE: | PERRAM J |
| DATE OF ORDER: | 31 OCTOBER 2014 |
| WHERE MADE: | SYDNEY |

THE COURT ORDERS THAT:

1. Vary Order 1 of 1 May 2013 in the manner foreshadowed at paragraph 1287 of these reasons.
2. The application be dismissed.
3. Direct the parties to file and exchange written submissions on costs by 4:15 pm on Friday 19 December 2014 together with any affidavit upon which reliance is placed.
4. Stand the matter over for a hearing on costs at 10.15 am on Wednesday 4 February 2015.

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

|  |  |
| --- | --- |
| IN THE FEDERAL COURT OF AUSTRALIA |  |
| NEW SOUTH WALES DISTRICT REGISTRY |  |
| GENERAL DIVISION | NSD 955 of 2009 |

|  |  |
| --- | --- |
| BETWEEN: | AUSTRALIAN COMPETITION AND CONSUMER COMMISSION  Applicant |
| AND: | P.T. GARUDA INDONESIA LTD (ARBN 000 861 165)  Respondent |

|  |  |
| --- | --- |
| JUDGE: | PERRAM J |
| DATE OF ORDER: | 31 OCTOBER 2014 |
| WHERE MADE: | SYDNEY |

THE COURT ORDERS THAT:

1. Vary Order 1 of 1 May 2013 in the manner foreshadowed at paragraph 1287 of these reasons.
2. The application be dismissed.
3. Direct the parties to file and exchange written submissions on costs by 4:15 pm on Friday 19 December 2014 together with any affidavit upon which reliance is placed.
4. Stand the matter over for a hearing on costs at 10.15 am on Wednesday 4 February 2015.

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

|  |  |
| --- | --- |
| IN THE FEDERAL COURT OF AUSTRALIA |  |
| NEW SOUTH WALES DISTRICT REGISTRY |  |
| GENERAL DIVISION | NSD 534 of 2010 |

|  |  |
| --- | --- |
| BETWEEN: | AUSTRALIAN COMPETITION AND CONSUMER COMMISSION  Applicant |
| AND: | AIR NEW ZEALAND LIMITED (ARBN 000 312 685)  Respondent |

|  |
| --- |
| IN THE FEDERAL COURT OF AUSTRALIA |
| NEW SOUTH WALES DISTRICT REGISTRY |
| GENERAL DIVISION | NSD 955 of 2009 |

|  |  |
| --- | --- |
| BETWEEN: | AUSTRALIAN COMPETITION AND CONSUMER COMMISSION  Applicant |
| AND: | P.T. GARUDA INDONESIA LTD (ARBN 000 861 165)  Respondent |

|  |  |
| --- | --- |
| JUDGE: | PERRAM J |
| DATE: | 31 October 2014 |
| PLACE: | SYDNEY |

**REASONS FOR JUDGMENT**

# 1 INTRODUCTION

1. The Australian Competition and Consumer Commission (‘the Commission’) sues Air New Zealand Limited (‘Air NZ’) and P. T. Garuda Indonesia Limited (‘Garuda’) alleging collusive behaviour in the fixing of surcharges and fees on the carriage of air cargo from overseas into Australia, allegedly contrary to the combined effect of ss 45 and 45A of the *Trade Practices Act 1974* (Cth). The two airlines are not said to have acted alone but instead in the company of a large number of other international airlines. Whilst there were proceedings on foot against many of those airlines at an earlier time, all of those proceedings had been settled or were in the process of being settled prior to the present trial commencing.
2. Involved are four different kinds of charge:
3. *a fuel surcharge*: This was a charge usually calculated by reference to the weight of cargo and was designed to compensate airlines for fluctuations in the price of aviation fuel. The significance of it being levied as a surcharge was that it appeared as a separate charge on air waybills rather than being absorbed invisibly in an overall freight charge. An air waybill is the basic document of carriage in the air cargo market.
4. *an insurance and security surcharge (‘ISS’)*: This was a surcharge designed to compensate airlines for increased insurance costs in the wake of the attacks on the World Trade Center on 11 September 2001. Again it was charged by reference to weight and appeared as a separate charge on an air waybill.
5. *a customs fee*: This fee was imposed by the Indonesian Government on airlines by reference to the number of air waybills contained in a cargo manifest. The airlines passed this fee on to their customers. There were only two such fees imposed in this case and their role is peripheral. These also appeared on the air waybill.
6. *a freight rate*:There was a single example in Indonesia where it was alleged that Garuda had been involved in fixing an overall freight rate.
7. The Commission’s case was that anti-competitive conduct, including price fixing, had occurred in the markets in which cargo was flown into Australia from:
8. Hong Kong;
9. Singapore; and
10. Indonesia.
11. With one minor exception, the Commission’s case was not concerned with the imposition of surcharges or fees on flights out of Australia. As will be seen, this is significant.
12. As a matter of industry structure, the airlines imposed the fuel and insurance surcharges at the airport of origin. The customs fee in Indonesia, however, was imposed on flights both out of and into Indonesia, including from Australia.
13. In each of the three jurisdictions above, most international airlines were members of industry representative bodies which had so-called ‘cargo sub-committees’. In Hong Kong, the relevant body was the Hong Kong Board of Airline Representatives Cargo Sub-Committee (‘the HK BAR CSC’) and it met in Hong Kong. In Singapore, the equivalent body was the Singapore Board of Airline Representatives Cargo Sub-Committee (‘the Singapore BAR CSC’), whilst in Indonesia it was known as the Air Cargo Representative Board (‘the ACRB’).
14. Air NZ and Garuda, together with very many other international carriers, were members of these three industry bodies.
15. The Commission’s basic contention is that the HK BAR CSC, the Singapore BAR CSC and the ACRB became forums in which the airlines were either able directly to engage in price fixing with respect to the surcharges and customs fees or that they provided an environment in which such conduct was facilitated.
16. The personnel of the airlines was not the same in each of the three jurisdictions although there was some overlap. Consequently, the Commission’s case in each jurisdiction is different. Further, the internal mechanics of its case in the three jurisdictions is also different. Those differences require an appreciation of the common element in all three cases, ‘the Lufthansa Index’, also sometimes referred to as the ‘Lufthansa Methodology’. I will use both expressions interchangably.
17. Beginning in around the mid-1990s international airlines had sought to impose fuel surcharges to compensate them for fluctuations in the price of aviation fuel. This was organised initially by the International Air Transport Association (‘IATA’). It adopted a resolution, known as ‘resolution 116ss’, which specified an appropriate level of fuel surcharge depending upon the average of five spot prices for aviation fuel (Singapore, US Gulf, US West Coast, Rotterdam and Italy). The appropriate level was expressed as a percentage of the baseline price in June 1996 and each level indicated a specified or particular surcharge once that percentage was reached. If resolution 116ss had come into force, it would have provided a system in which international airlines charged the same fuel surcharges at the same time. In other words, it would have provided a framework which allowed the airlines to move in unison in the face of fluctuations in the price of aviation fuel.
18. Of course, many airlines have hedging programmes to protect against just such fluctuations. On that basis, and other bases too, on 14 March 2000 the United States Department of Transport declined to give IATA or the airlines anti-trust immunity (the complex regulatory régime is discussed below in Chapter 3). This prevented resolution 116ss from being given effect to in the United States. IATA consequently did not formally promulgate resolution 116ss. It notified its members of this development and warned them against publishing their own indexes, no doubt for anti-trust reasons.
19. Despite this, Lufthansa then began publishing an identical index to the, now defunct, resolution 116ss, which it did on its publicly available website. This index has given rise to a large amount of anti-trust litigation in many jurisdictions. In effect, a common theme has been that the Lufthansa Index facilitated price fixing by international carriers of fuel surcharges.
20. The Commission’s case in this litigation arises out of that general concept. However, there are significant variations.
21. In Hong Kong, the Commission alleges that the Lufthansa Index (and a later index created within the HK BAR CSC) was used as the basis for making joint applications to the Hong Kong Civil Aviation Department (‘the HK CAD’). That body’s approval was necessary for the imposition of any surcharge on flights out of Hong Kong and, through the HK BAR CSC, the airlines lodged joint applications for the approval of the Lufthansa (and later) indexes. The Commission alleges that this was price fixing. Both Air NZ and Garuda deny that they engaged in price fixing. They also say that they were obliged to lodge joint applications by Hong Kong law. I have concluded that they did engage in some, but not all, of the conduct alleged against them and that they were not required to act as they did by the law of Hong Kong.
22. In Singapore, only Air NZ was pursued. It was not directly alleged that Air NZ or other airlines had used the Lufthansa Index to set their surcharges. Instead, it was said that the approach of the index’s trigger points as the price of aviation fuel fluctuated provided multiple occasions for the airlines to discuss what surcharge they were going to impose and that this led to price fixing. Even if this practice was not price fixing in itself it was, so the Commission alleged, a practice which substantially lessened competition. In addition to its case about fuel surcharges, the Commission also alleged that the airlines had colluded on the imposition of an ISS.
23. I have concluded that the Commission has not demonstrated that Air NZ was involved in collusive practices with respect to the fuel surcharges in Singapore although it did engage in price fixing with respect to the ISS.
24. In Indonesia, the Commission pursued only Garuda. It was said that Garuda had engaged in price fixing with the other airlines using the Lufthansa Index as a means to determine fuel surcharges. This was alleged to have occurred at meetings of the ACRB. With one minor exception, I have accepted this case. I have also concluded that similar collusion took place with respect to the customs fee on outbound but not inbound flights.
25. Garuda argued that it was required to act as it did by Indonesian law or practice. This contention was of no substance.
26. Both airlines pursued a large number of technical defences. I have rejected all of these, including an ambitious submission that international commercial aviation in Australia is not subject to regulation under the *Trade Practices Act 1974.* These arguments were, in the main, of little merit and occupied much of a trial which spanned over six months.
27. Despite that, I have concluded that one of the airlines’ defences ought to be accepted. The Commission alleged conduct contrary to s 45 in respect of each act of collusion. Section 45 applies only to competition in a market in Australia. Because the Commission’s case was limited (in all but one minor case) to flights from airports outside Australia into airports inside Australia I have concluded that no market in Australia was involved. The evidence showed that the surcharges were imposed and collected at the origin airports. The competition which occurred between the airlines and which the surcharges interfered with was competition in markets in Hong Kong, Singapore and Indonesia and not competition in any market in Australia. Prices may well have been affected in Australia by the conduct but that does not mean the market in which the airlines were competing was located here.
28. In this regard, it is worth noting that the ‘market in Australia’ requirement is quite different to the effects doctrine in the United States under the *Sherman Antitrust Act*, 15 USC §§ 1 – 7 (1890) (USA) (‘the *Sherman Act*’), where a price effect in the United States will suffice to bring that legislation into play. That is not what the *Trade Practices Act 1974* does.
29. Accordingly, the actions will be dismissed. I will hear the parties on costs.
30. These reasons are set out as follows:

|  |  |
| --- | --- |
| 1 INTRODUCTION | [1] |
| 2 THE INTERNATIONAL CARGO INDUSTRY – A GENERAL DESCRIPTION | [24] |
| Judgment Acronyms | [25] |
| 2.1 International transportation of cargo | [25] |
| 2.1.1 Demand from consignors and consignees | [25] |
| 2.1.2 Modes of international cargo transport | [30] |
| 2.1.3 Categories of international air cargo | [35] |
| 2.2 Freight forwarders | [38] |
| 2.2.1 Services supplied by freight forwarders | [38] |
| 2.2.2 Consolidation | [39] |
| 2.2.3 Customs clearance services | [40] |
| 2.2.4 Tracking | [42] |
| 2.2.5 Types of freight forwarders | [43] |
| 2.2.6 Transactions between freight forwarders and consignors/consignees | [45] |
| 2.2.7 IATA accreditation of freight forwarders | [54] |
| 2.3 Integrators | [55] |
| 2.4 Air cargo transport | [56] |
| 2.4.1 Substitutable airports at which the airline first takes or relinquishes possession | [56] |
| 2.4.2 Substitutable intermediate airports | [58] |
| 2.5 Airline cargo operations | [60] |
| 2.5.1 Services supplied by airlines | [60] |
| 2.5.2 Types of airlines and aircraft | [63] |
| 2.5.3 Designation and capacity grants to airlines | [70] |
| 2.6 Domestic regulation of international transportation of cargo | [75] |
| 2.7 Landing slots | [77] |
| 2.8 Route network decisions | [79] |
| 2.9 Inter-airline arrangements | [84] |
| 2.9.1 Interlining | [84] |
| 2.9.2 Code share arrangements and airline alliances | [87] |
| 2.10 Prices charged by airlines | [89] |
| 2.10.1 Standard rates | [94] |
| 2.10.2 Contract/special rates | [95] |
| 2.10.3 Ad hoc rates | [98] |
| 2.10.4 TACT rates | [99] |
| 2.10.5 Surcharges | [100] |
| 2.11 Factors affecting prices | [102] |
| 2.12 Sales and marketing | [103] |
| 2.13 Negotiations | [107] |
| 2.14 Terms of supply | [108] |
| 2.15 Air waybills | [111] |
| 2.16 Payments for air cargo transport | [121] |
| 3 THE APPLICATION OF THE *TRADE PRACTICES ACT 1974* TO INTERNATIONAL COMMERCIAL AVIATION | [129] |
| 3.1 Background to the regulation of international commercial aviation | [131] |
| 3.2 Whether the *Trade Practices Act 1974* applied to international commercial aviation at all | [149] |
| 3.3 Was the *Trade Practices Act 1974* inconsistent with the Australia-Indonesia ASA as applied by the *Air Navigation Act 1920*? | [161] |
| 3.4 Did the *Air Navigation Act 1920* operate inconsistently with the *Trade* *Practices Act 1974* in the period 2001-2006? | [188] |
| 3.5 The application of the *Trade Practices Act 1974* to bundles of contractual rights | [207] |
| 4 WAS THERE A MARKET IN AUSTRALIA? | [210] |
| 4.1 The product dimension | [220] |
| 4.1.1 What were the relevant routes? | [224] |
| 4.1.2 Was mail included in the relevant markets? | [236] |
| 4.1.3 Were chartered flights included in the relevant markets? | [248] |
| 4.1.4 Was the use of integrators included in the relevant markets? | [251] |
| 4.1.5 Conclusions on product dimension | [252] |
| 4.2 Geographical dimension | [253] |
| 4.2.1 Transport services | [254] |
| 4.2.2 Ground handling services | [255] |
| 4.2.3 Enquiry services at airport | [256] |
| 4.2.4 Identity of market participants | [259] |
| 4.3 The functional dimension | [266] |
| 4.4 Market in Australia? | [310] |
| 4.4.1 Source of demand in Australia | [313] |
| 4.4.2 Downstream substitution in Australia | [327] |
| 4.4.3 Conclusion | [333] |
| 4.5 The market for flights ex Singapore and Indonesia | [336] |
| 5 THE EXTRA-TERRITORIAL OPERATION OF THE *TRADE PRACTICES ACT* | [339] |
| 5.1 The need for actual conduct | [340] |
| 5.2 Interference with sovereign rights of other States | [359] |
| 5.3 Whether Parliament intended the TPA to interfere with the sovereign affairs of other States | [388] |
| 6 HONG KONG LAW AND DOMESTIC PRACTICE | [390] |
| 6.1 The requirements of the law of Hong Kong | [395] |
| 6.1.1 The Hong Kong-New Zealand ASA | [401] |
| 6.1.2 The Hong Kong-Indonesia ASA | [413] |
| 6.1.3 The Australia-Indonesia ASA | [415] |
| 6.1.4 Obligations with respect to approved tariffs | [418] |
| 6.2 The requirements of the HK CAD | [428] |
| 7 INDONESIAN LAW AND DOMESTIC PRACTICE | [450] |
| 8 PROOF IN SECTION 45 CASES | [462] |
| 8.1 What needs to be proved? | [463] |
| 8.2 How is an understanding to be proved? | [464] |
| 8.3 Who bears the onus of proof? | [488] |
| 8.4 A *Jones v Dunkel* inference against the Commission? | [489] |
| 8.5 Standard of proof | [490] |
| 9 BACKGROUND TO THE UNDERSTANDINGS ALLEGED BY THE COMMISSION | [492] |
| 10 THE UNDERSTANDINGS ALLEGED BY THE COMMISSION IN HONG KONG | [508] |
| 10.1 Introduction | [508] |
| 10.2 Witnesses | [514] |
| 10.3 The 2002 Hong Kong Lufthansa Methodology Understanding | [520] |
| 10.3.1 Air NZ | [559] |
| 10.3.2 Garuda | [592] |
| 10.3.3 Implementation | [596] |
| 10.3.4 Were the provisions of the understanding ones to which s 45A applied? | [600] |
| 10.4 The Hong Kong Imposition Understanding | [623] |
| 10.4.1 Increase to Level 2 (Index Level: 135) | [631] |
| 10.4.2 Increase to Level 3 (Index Level: 165) | [634] |
| 10.4.3 Increase to Level 4 (Index Level: 190) | [637] |
| 10.4.4 Decrease to Level 3 (Index Level: 170) | [639] |
| 10.4.5 Decrease to Level 2 (Index Level: 145) | [641] |
| 10.4.6 Increase to Level 3 (Index Level: 165) | [643] |
| 10.4.7 Increase to Level 4 (Index Level: 190) | [644] |
| 10.4.8 Subsequent increases and decreases | [645] |
| 10.4.9 Was the Understanding reached and implemented? | [647] |
| 10.5 The First Hong Kong Surcharge Extension Understanding | [659] |
| 10.6 The Second to Eighth Surcharge Extension Applications | [668] |
| Second Extension (additional six months) | [669] |
| Third Extension (additional year, new levels 5 and 6) | [670] |
| Fourth Extension (new levels 7 and 8) | [671] |
| Fifth Extension (additional year, new levels 9 and 10) | [672] |
| Sixth Extension (new levels 11 and 12) | [673] |
| Seventh Extension (new levels 13 and 14) | [674] |
| Eighth Extension (additional year) | [675] |
| 10.7 The October 2001 Hong Kong Insurance Surcharge Understanding | [694] |
| 10.8 The December 2002 Hong Kong Insurance Surcharge Understanding | [698] |
| 10.9 Conclusions on the facts in Hong Kong | [702] |
| 11 THE COMMISSION’S CASE IN SINGAPORE | [706] |
| 11.1 Introduction | [706] |
| 11.1.1 The BAR CSC and the LIDC | [717] |
| 11.1.2 The Witnesses | [721] |
| 11.2 The Overarching Understanding | [734] |
| 11.2.1 FSC movements in the period September 2002 to September 2005 | [745] |
| Data for FSCs charged ex-Singapore in TC1 and TC2 | [750] |
| Data for FSCs charged ex-Singapore in TC3 North Asia | [751] |
| Data for FSCs charged ex-Singapore in TC3 SE Asia | [751] |
| Graphs | [752] |
| 11.2.2 The implementation of the FSCs | [752] |
| 11.2.2.1 The First Implementation Allegation | [753] |
| a The FSCs which were imposed | [753] |
| b The internal decision making process of SQ | [763] |
| c The decision making process of Air NZ | [771] |
| d Analysis | [772] |
| 11.2.2.2 The Second Implementation Allegation | [774] |
| a The FSCs which were imposed | [775] |
| b The internal decision making process of SQ | [781] |
| c The internal decision making process of Air NZ | [784] |
| d Analysis | [786] |
| 11.2.2.3 The Third Implementation Allegation | [787] |
| a SQ’s internal decision making process (increase to SGD0.38) | [810] |
| b Air NZ’s internal decision making process (non-increase) | [814] |
| c Analysis | [815] |
| d SQ’s internal decision making process on decreases | [817] |
| e Air NZ’s internal decision making process (SGD0.17) | [818] |
| f Analysis | [819] |
| 11.2.2.4 The Fourth Implementation Allegation | [823] |
| a The FSCs which were imposed | [823] |
| b The decision making process within SQ and Air NZ | [833] |
| c Analysis | [841] |
| 11.2.2.5 The Fifth Implementation Allegation | [842] |
| a The FSCs which were imposed | [842] |
| b SQ’s decision-making process | [853] |
| c Air NZ’s decision making process | [864] |
| d Analysis | [868] |
| 11.2.2.6 The Sixth Implementation Allegation | [869] |
| a The FSCs which were imposed | [869] |
| b SQ’s internal decision making process | [879] |
| c Air NZ’s internal decision making process | [887] |
| d Analysis | [888] |
| 11.2.2.7 The Seventh Implementation Allegation | [889] |
| a The FSCs which were imposed | [889] |
| b SQ’s internal decision making process | [896] |
| c Air NZ’s decision making process | [897] |
| d Analysis | [898] |
| 11.2.2.8 The Eighth Implementation Allegation | [899] |
| a The FSCs which were imposed | [899] |
| b SQ’s internal decision making process | [907] |
| c Air NZ’s internal decision making process | [912] |
| d Analysis | [913] |
| 11.2.2.9 The Ninth Implementation Allegation | [914] |
| a The FSCs which were imposed | [914] |
| b SQ’s internal decision making process | [927] |
| c Air NZ’s internal decision making process | [932] |
| d Analysis | [933] |
| 11.2.2.10 The Tenth Implementation Allegation | [934] |
| a The FSCs which were imposed | [934] |
| b SQ’s internal decision making process | [942] |
| c Air NZ’s internal decision making process | [945] |
| d Analysis | [948] |
| 11.2.2.11 The Eleventh Implementation Allegation | [949] |
| a The FSCs which were imposed | [949] |
| b SQ’s internal decision making process | [957] |
| c Air NZ’s decision making process | [960] |
| d Analysis | [962] |
| 11.2.3 The Commission’s circumstantial case | [963] |
| 11.2.3.1 The historical context of the airlines’ purpose in agreeing fuel surcharges | [967] |
| 11.2.3.2 The airlines’ admissions as to the purpose of their conduct | [975] |
| 11.2.3.3 Previous dealings between the airlines in Singapore | [996] |

|  |  |
| --- | --- |
| 11.2.3.4 Communications between airlines to settle on a co-ordinated outcome for the reintroduction of a fuel surcharge in Singapore | [1003] |
| 11.2.3.5 Communications between the airlines to settle on co-ordinated increases of FSCs | [1045] |
| 11.2.3.6 The extraordinary meeting of the BAR CSC on 8 December 2003 | [1049] |
| 11.2.3.7 Further BAR CSC meetings | [1056] |
| 22 April 2004 LIDC-C meeting | [1057] |
| 28 April 2004 BAR CSC meeting | [1059] |
| 24 September 2004 BAR CSC meeting | [1061] |
| 20 October 2004 BAR CSC meeting | [1066] |
| Conclusions on the Seventh Proposition | [1069] |
| 11.2.3.8 Fuel surcharge surveys | [1070] |
| 11.2.3.9 The *Singapore Competition Act 2004* | [1072] |
| 11.2.3.10 Implementations of the FSCs | [1074] |
| 11.2.4 Was the Overarching Understanding reached? | [1077] |
| 11.2.4.1 Mr Gregg | [1078] |
| 11.2.4.2 Mr Chew | [1079] |
| 11.2.4.3 Ms Goh | [1087] |
| 11.2.4.4 Was Air NZ a party to the understanding? | [1092] |
| 11.2.5 Was the understanding a price fix under s 45A? | [1106] |
| 11.2.6 Substantial lessening of competition? | [1107] |
| 11.3 The remaining Understandings | [1109] |
| 11.3.1 The December 2003 Singapore Understanding | [1110] |
| 11.3.2 The October 2004 Singapore Understanding | [1111] |
| 11.3.3 The Singapore ISS Understanding | [1112] |
| 11.4 Conclusions on the facts in Singapore | [1128] |
| 12 THE COMMISSION’S CASE IN INDONESIA | [1129] |
| 12.1 Introduction | [1129] |
| 12.2 Background | [1133] |
| 12.2.1 The Air Cargo Representative Board | [1133] |
| 12.2.2 Witnesses | [1140] |
| 12.3 The Understandings | [1141] |
| 12.3.1 The October 2001 Fuel Surcharge Understanding | [1141] |
| 12.3.2 The October 2001 Air Freight Rate Understanding | [1149] |
| 12.3.3 The April 2002 Fuel Surcharge Understanding | [1156] |
| 12.3.4 The June 2002 Fuel Surcharge Understanding | [1177] |
| 12.3.5 The September 2002 Fuel Surcharge Understanding | [1178] |
| 12.3.6 The January 2003 Fuel Surcharge Understanding | [1179] |
| 12.3.7 The May 2003 Fuel Surcharge Understanding | [1180] |
| 12.3.8 The May 2004 Customs Fee Understanding | [1190] |
| 12.3.9 The September 2004 Fuel Surcharge Understanding | [1205] |
| 12.3.10 The April 2005 Fuel Surcharge Understanding | [1209] |
| 12.3.11 The July 2005 Fuel Surcharge Understanding | [1214] |
| 12.3.12 The September 2005 Fuel Surcharge Understanding | [1217] |
| 12.3.13 The October 2001 Security Surcharge Understanding | [1227] |
| 12.3.14 The January 2003 Indonesia Security Surcharge Understanding. | [1230] |
| 12.3.15 The May 2003 Security Surcharge Understanding | [1231] |
| 12.3.16 The September 2004 Security Surcharge Understanding | [1233] |
| 12.3.17 The July 2005 Indonesia Security Surcharge Understanding | [1235] |
| 12.3.18 The Overarching Indonesia Understanding | [1237] |
| 13 THE AUTHORISATIONS | [1244] |
| 14 TIME AND LIMITATION ISSUES | [1273] |
| 15 REMAINING INTERLOCUTORY ISSUES | [1280] |
| 15.1 The Commission’s reply to Garuda’s defence | [1280] |
| 16 CONCLUSIONS | [1287] |

# 2 THE INTERNATIONAL CARGO INDUSTRY – A GENERAL DESCRIPTION

1. The industry involves a considerable amount of terminology. The purpose of this section is to introduce that terminology and also to highlight some structural aspects of the industry. This section is heavily drawn from the parties’ agreed statement of facts. In addition to the description below I will set out the acronyms often used in these reasons:

## Judgment Acronyms

|  |  |
| --- | --- |
| **ACRB** | Air Cargo Representative Board (Indonesia) |
| **Air NZ** | Air New Zealand Limited |
| **ANA** | *Air Navigation Act 1920* (Cth) |
| **ANR** | *Air Navigation Regulations 1947* (Cth) |
| **ARBN** | Australian Registered Business Number |
| **ASA** | Air Services Agreement |
| **AWB** | Air Waybill |
| **BAR CSC ExCom** | Hong Kong Board of Airline Representatives Cargo Sub-Committee Executive Committee |
| **BARINDO** | Board of Airline Representatives in Indonesia |
| **BSA** | Block Space Agreement |
| **CAB** | Civil Aviation Board (USA) |
| **CAD** | Civil Aviation Department (USA) |
| **CASA** | Civil Aviation Safety Authority (Australia) |
| **CASS** | Cargo Account Settlement System |
| **CIF** | Cost Insurance Freight |
| **EDN** | Export Declaration Number |
| **FSAG** | Fuel Surcharge Action Group |
| **FSC** | Fuel Surcharge for Cargo |
| **FOB** | Free On Board |
| **GSA** | General Sales Agents |
| **GSSA** | General Sales and Service Agents |
| **Garuda** | P.T. Garuda Indonesia Limited |
| **HAFFA** | Hong Kong Association of Freight Forwarding Agents Limited |
| **HAWB** | House Air Waybill |
| **HK BAR CSC** | Hong Kong Board of Airline Representatives Cargo Sub-Committee |
| **HK BAR CSC Ex Com** | Hong Kong Board of Airline Representatives Cargo Sub-Committee Executive Committee |
| **HK CAD** | Hong Kong Civil Aviation Department |
| **HMT** | Hypothetical Monopolist Test |
| **IATA** | International Air Transport Association |
| **IASC** | International Air Services Commission |
| **Indonesia ASA** | Australia-Indonesia Air Services Agreement |
| **ISC** | Insurance Surcharge for Cargo |
| **ISS** | Insurance and Security Surcharge |
| **LIDC-C** | Singapore Local Industry Development Committee - Cargo |
| **MAWB** | Master Air Waybill |
| **Qantas** | Qantas Airways Ltd |
| **Singapore BAR CSC** | Singapore Board of Airline Representatives Cargo Sub-Committee |
| **SPA** | Special Prorate Agreement |
| **SQ** | Singapore Airlines Ltd |
| **SSNIP** | Small but Significant Non-Transitory Increase in Price |
| **SWG** | Surcharge Working Group |
| **TACT** | The Air Cargo Tariff |
| **TC1** | IATA Cargo Tariff Conferences - Area 1 |
| **TC2** | IATA Cargo Tariff Conferences - Area 2 |
| **TC3** | IATA Cargo Tariff Conferences - Area 3 |
| **the Commission** | Australian Competition and Consumer Commission |
| **the Conferences** | IATA Cargo Tariff Conferences |
| **ULD** | Unit Load Device |

## 2.1 International transportation of cargo

### 2.1.1 Demand from consignors and consignees

1. There is a requirement for the transportation of cargo on the part of persons who wish to send cargo from a place of origin to an international place of destination and on the part of persons who wish to receive cargo at an international place of destination sent from an international place of origin.
2. Within the international cargo transport industry, a person who sends cargo, or from whom cargo is sent, is typically referred to as the ‘consignor’. A person to whom cargo is sent is typically referred to as the ‘consignee’. The consignor and consignee may be the same person or related bodies corporate. The transport of cargo between a consignor and consignee does not necessarily involve the sale of the cargo by one to the other or any commercial transaction between them.
3. The international transportation of cargo involves the following activities (amongst others):
4. transport of the cargo from the consignor to the sea or air port from which the cargo will be transported internationally;
5. when necessary, storage at the port;
6. transport from the origin port to the destination port;
7. customs handling at the destination port;
8. when necessary, storage at the destination port; and
9. transport of the cargo from the destination port to the consignee.
10. If there is a sale of the cargo involved then the terms of sale between a consignor and consignee relating to the transport of cargo may include terms as to risk and responsibility for arranging the transport and payment. Within the international cargo transport industry, there are a number of common arrangements, including ‘ex-works’, ‘free on board’ (‘FOB’) and ‘cost insurance freight’ (‘CIF’). The effect and nature of these arrangements are defined in the Incoterms published by the International Chamber of Commerce. For ex-works and FOB, the consignee is ordinarily responsible for making the arrangements for the cargo to be transported from the place of origin or the origin port as applicable to the place of destination and is liable for the cost and risk. For CIF, the consignor is ordinarily responsible for making the arrangements for the cargo transport and is liable for the cost and risk.
11. Most consignors or consignees who wish to transport cargo only require the transportation of the cargo in one direction, that is, from a specific place of origin to a specific place of destination. The uni-directional nature of nearly all cargo transport is materially different to passenger transportation. The vast majority of passengers acquire transport services from a place of origin to a place of destination and a return service back to the place of origin, although not necessarily from the initial destination.

### 2.1.2 Modes of international cargo transport

1. Cargo is transported internationally by air, land (road and rail), sea and combinations of these modes of transport. Cargo can only be transported to or from Australia by sea or air. The key differences between sea, air and land modes of international cargo transport include speed and cost. In respect of transport between Australia and other countries, sea transport is almost always the slower mode of international cargo transport and the lower cost mode of international cargo transport for high volume and/or heavy weight cargo. In respect of transport between Australia and other countries, air transport is almost always the quicker mode of international cargo transport and the higher cost mode of international cargo transport for most types of cargo.
2. Air transport is generally the preferred mode for the international transport of time-sensitive cargo (including perishable cargo) and cargo that is high value, low volume and/or low weight. In the relevant period there were frequent and material fluctuations in the cost of fuel used for transportation of air cargo between other countries and Australia.
3. The decision whether to transport cargo by sea or air between Australia and other countries is affected by a number of factors including:
4. relative transport costs, including to and from relevant ports and airports;
5. the value, size and weight of the cargo;
6. whether the delivery of the cargo is time-sensitive;
7. the delay in reaching the destination port; and
8. the distance between the place of origin and the place of destination and the directness of the available sea and air services.
9. Types of cargo that are frequently transported by sea:
10. to Australia, by weight, include coal tar, pitch and other crude oils; ores; and inorganic chemicals and, by FOB value, include motor vehicles, parts and accessories; coal tar, pitch and crude oil; and engines and motors; and
11. from Australia, by weight, include iron and other ores; mineral fuels; and unmilled grains and, by FOB value, include mineral fuels; iron and other ores; and fresh meat.
12. Types of cargo that are frequently transported by air:
13. to Australia, by weight, include engines and machines; motors and electrical appliances; and polymer plastics and, by FOB value, include motors and electrical appliances; engines and machines; and pharmaceutical goods;
14. from Australia, by weight, include fresh meat; fresh fruits and nuts; and seafood and, by FOB value, include precious stones and metals; medical products; and office machinery.

### 2.1.3 Categories of international air cargo

1. General air cargo is all cargo other than specialised air cargo and mail. Specialised air cargo are items which by their nature require special handling on the ground or in the air and includes items such as live animals, and oversize items such as boats or cars. Certain types of specialised cargo must be transported on freighters such as oversized items and some dangerous goods.
2. General air cargo is in turn usually classified as:
3. perishable cargo (that is, cargo that will deteriorate over a short period of time or if exposed to adverse temperature, humidity or other environmental conditions); and
4. non-perishable or dry cargo.
5. Perishable cargo ordinarily requires particular handling on the ground and/or in the air (e.g. cold storage) or may be subject to particular time pressures. The time-sensitivity of the transport of non-perishable cargo depends upon the nature of the cargo and the circumstances of the particular shipment. Transport of non-perishable cargo may also be required to occur quickly, for example when parts are required regularly or urgently for a production process that uses the part or otherwise required for urgent repairs. Certain types of goods need to be stored in particular conditions such as securely or at a particular temperature during transportation. The proportion of air cargo exported from Australia which is non-perishable is higher than the proportion of air cargo imported into Australia which is perishable.

## 2.2 Freight forwarders

### 2.2.1 Services supplied by freight forwarders

1. Freight forwarders offer to supply, and when engaged, do supply consignors and/or consignees with services associated with the transport of cargo from a place of origin to a place of destination. When these activities are performed by freight forwarders they are usually supplied by a freight forwarder located at the place of origin and a separate or related freight forwarder located at the place of destination.

### 2.2.2 Consolidation

1. Depending on the nature of the goods to be transported and the requirements of the consignor/consignee, freight forwarders endeavour to combine different shipments into one, larger, shipment, a process known as ‘consolidation’. Freight forwarders prefer to consolidate if practicable because the per kilogram cargo rate payable to an airline to carry the consolidated shipment usually decreases as the chargeable weight of a consignment increases. If a forwarder combines several small shipments into one large shipment the per kilogram rate payable by the freight forwarder is usually lower based on the total chargeable weight of the consolidated shipment. In addition, if a heavy, low volume consignment can be combined with a light, large volume consignment, the amount payable to the airline to carry the consolidated shipment is usually less than the amount that would be payable for the two shipments separately. Accordingly, consolidated cargoes usually qualify for better overall rates, by leveraging the volume and weight ratios of different cargo shipments. A freight forwarder may agree with another freight forwarder to consolidate cargo being handled by the two freight forwarders.

### 2.2.3 Customs clearance services

1. When cargo is delivered to an origin airport, customs clearance services are required to process the cargo through customs. For example, an export declaration must be submitted to Australian customs for cargo being transported from Australia. The Export Declaration Number (‘EDN’) assigned by customs is normally placed on the air waybill (in this chapter, ‘AWB’) in the box entitled ‘Accounting Information’. Australian Customs require the airline to lodge a main manifest within three working days after departure which lists all cargo loaded on the aircraft.
2. When cargo is delivered to the airport where the airline relinquishes possession, customs clearance services are required to process the cargo through customs. All cargo must be cleared at that airport by an entity authorised by the applicable customs authority to provide customs clearance services. This can be performed by a customs broker, integrator or a freight forwarder.

### 2.2.4 Tracking

1. Freight forwarders monitor the cargo’s progress from the place of origin to the place of destination. Most freight forwarders provide tracking facilities on their websites which enable a user with access to the relevant AWB number to monitor the progress of transportation.

### 2.2.5 Types of freight forwarders

1. Freight forwarders range from multinational firms with staff and branches throughout the world to firms that operate in a single country or city. To enable freight forwarders effectively to provide their services to consignors and consignees across several countries, freight forwarding companies generally establish, or participate in, freight forwarding networks. The type of network depends on the type of freight forwarder:
2. multinational freight forwarders generally operate and have offices in a number of countries. An example is DB Schenker, which has a worldwide network comprised of subsidiary companies. Some multinational freight forwarders operate only within particular regions. For example, the New Zealand-based company Mainfreight has a regional network in Asia, with some offices in the United States;
3. national or local freight forwarders are locally based companies without an established international presence. Such freight forwarders have arrangements with other freight forwarders, situated at various locations internationally.
4. Some freight forwarders have separate ‘export’ and ‘import’ divisions. Others will divide their business in terms of ‘sea’ and ‘air’ cargo and/or ‘perishable’ and ‘non-perishable’ cargo. There are also specialist freight forwarders for particular industries. Some freight forwarders operate as wholesale freight forwarders, providing services to other (often non-IATA-accredited) freight forwarders.

### 2.2.6 Transactions between freight forwarders and consignors/consignees

1. Major freight forwarders may approach major consignors or consignees at their global or regional headquarters to promote the services they provide. Where a consignor is responsible for initiating a shipment and it does not have a standing arrangement in place, it usually contacts one or more freight forwarders located at the place of origin to negotiate and contract for the acquisition of services (the origin freight forwarder). The origin freight forwarder provides the services required of it at the place of origin and in turn contacts a freight forwarder at destination (a destination freight forwarder) to provide services required of them at the place of destination.
2. Where a consignee initiates the shipment it may contact either a freight forwarder at the place of origin or the place of destination to negotiate and contract for the acquisition of services. Where it contacts the destination freight forwarder, the destination freight forwarder provides the services required at the place of destination and, in turn, contacts an origin freight forwarder to arrange the necessary services (including arranging for freight to be carried by air) at the place of origin. These origin and destination freight forwarders may be part of one multinational group, members of an alliance of independent freight forwarders or simply parties that deal with each other on a regular or ad hoc basis.
3. Where the origin freight forwarder and the destination freight forwarder are not part of the same company, the forwarder which transacts with the consignor or consignee (as the case may be) usually pays the other freight forwarder for the services provided by it. The amount paid by one freight forwarder to another in such circumstances depends upon the terms agreed between them.
4. Following this contact the freight forwarder may offer its standard rates to the consignor/consignee or, where the consignor or consignee sends or receives shipments regularly, the freight forwarder may offer a particular rate or rates to apply to those shipments (together, fixed rates). Fixed rates may apply for several months or a few weeks and change depending on the size of the shipment (larger or regular shipments attracting better rates) and the requirements of the consignor or the consignee.
5. Alternatively, where the consignor/consignee requires a price for a particular shipment, the freight forwarder may prepare a specific quote. Quotes are most often provided in relation to large orders where no fixed rates have been agreed with the consignor/consignee or unusual orders, such as transporting unusual cargo or transporting to an unusual place of destination. Quotes may be provided in a form which shows the various components of the quote.
6. On occasions, some consignors and consignees tender for, and then contract for, services they require from freight forwarders for set periods of time. Different rates may apply for faster or slower services, direct and indirect routes, dangerous goods or depending on other relevant considerations such as the nature of the services required (door-to-door, door-to-airport, airport-to-door, etc).
7. The price for the carriage of freight by air is normally based on the ‘chargeable weight’ of a shipment. The chargeable weight of cargo is the higher of the actual weight (in kilograms) or the volumetric weight of the cargo. Volumetric weight (sometimes also known as ‘dimensional weight’) is a measure of the volume or space that a consignment takes up, converted to be expressed in kilograms. Different freight forwarders may apply different conversion rates. AWBs have the two weights (i.e. actual weight and volumetric weight) identified in respect of any consignment.
8. Once the shipment is delivered to its final place of destination, the origin freight forwarder invoices the consignor or the destination freight forwarder invoices the consignee depending on whether it is the consignor or consignee that arranged the freight transaction and is responsible for payment of the overall freight cost.
9. If the consignor is responsible to the freight forwarder for the freight cost, it pays the origin freight forwarder for the overall freight cost. If the consignee is responsible to the freight forwarder for the freight cost, the consignee pays the freight cost to the origin or destination freight forwarder. The freight forwarders will then settle amongst themselves for their respective services.

### 2.2.7 IATA accreditation of freight forwarders

1. Freight forwarders may apply for accreditation with IATA. IATA accreditation is given to a freight forwarder in respect of its outbound cargo operations within a specified country, being the preparation of cargo for air carriage from that country. On accreditation, IATA assigns the freight forwarder a numeric code which covers the forwarder’s outbound cargo operations throughout the country concerned. In order to obtain accreditation with IATA, freight forwarders must meet certain minimum criteria including staff qualifications, financial requirements, suitability of premises and cargo handling equipment and appropriate licenses to trade. IATA accreditation enables freight forwarders to utilise IATA’s Cargo Account Settlement System (‘CASS’) clearing house and settlement system to remit transaction details and make payments to airlines (which is discussed later).

## 2.3 Integrators

1. Integrators may also use contracted space on freighter or passenger aircraft of third party airlines on particular routes and/or at particular times, according to demand and the capacity of the integrator to meet demand using capacity in its own aircraft.

## 2.4 Air cargo transport

### 2.4.1 Substitutable airports at which the airline first takes or relinquishes possession

1. The carriage of freight by air is more often than not undertaken by an airline from the airport closest to the place of origin of the cargo (primary origin airport) and to the airport closest to the place of destination of the cargo (primary destination airport). The carriage of freight by air may be undertaken by an airline to or from an airport other than the airport closest to the place of origin of the cargo (alternative origin airport) or to an airport other than an airport closest to the place of destination (alternative destination airport). Accordingly, the airport at which the international airline first takes possession or relinquishes possession of the cargo may not be the origin airport or destination airport respectively. Some international airlines use land transport between various airports selected by them so they can accept cargo from and to airports where they do not fly. For example, during the relevant period some international airlines accepted cargo to and from Brisbane but only flew to Sydney and used overnight road transport to transport cargo between Brisbane and Sydney and vice versa.
2. Whether an alternative origin or destination airport is a substitute for the primary origin or destination airport depends on factors such as the cost, timeliness, availability and capacity of the alternatives including the availability of land transport between alternative airports. In some cases where the carriage of freight by air is undertaken by an airline from an alternative origin airport and/or to an alternative destination airport the cargo does not arrive at its place of destination as quickly as if the cargo had been transported between the primary origin airport and the primary destination airport.

### 2.4.2 Substitutable intermediate airports

1. The carriage of freight by air between a particular origin airport and destination airport may involve:
2. no stops at intermediate airports;
3. a stop without change of planes at one or more intermediate airports which means that cargo continues to its destination airport without being unloaded; or
4. a stop and change of aircraft at one or more intermediate airports, in which case the cargo must be unloaded and reloaded.
5. Where the carriage of freight by air involves a stop at an intermediate airport, in most cases the cargo does not arrive at its destination airport as quickly as if the cargo had been transported on a non-stop service.

## 2.5 Airline cargo operations

### 2.5.1 Services supplied by airlines

1. In order to carry freight by air, an airline requires at least the following rights, facilities and services:
2. aircraft operated by it (which includes both aircraft that are leased or owned);
3. the right to fly aircraft of a specified capacity on specific routes pursuant to the applicable Air Services Agreements (‘ASAs’);
4. the right to access the international airports on specific routes (origin airport, destination airport and any intermediate airport used) including:
5. air traffic control services; and
6. landing slots (the right to schedule an aircraft arrival or departure, on a specific day within a specific time);
7. ground handling;
8. engineering services; and
9. sales and marketing staff and office facilities.
10. Ground handlers provide all ground handling for airlines, including receipt of export cargo for carriage, loading and unloading of the aircraft, warehousing (when required) and handling relevant documentation. The generic term ‘ground handlers’ includes ‘cargo terminal operators’ and ‘ramp’ handlers. Airlines may engage different companies to supply cargo terminal or ramp handling services.
11. Cargo terminal operators accept freight, and prepare freight for export on each flight. They also handle and release imported freight. Cargo terminal operators also provide warehousing when required. Ramp handlers are responsible for loading and unloading the aircraft, which includes the delivery and collection of freight to or from the ground handler’s warehouse.

### 2.5.2 Types of airlines and aircraft

1. Airlines carry freight by air using the cargo hold (also known as the bellyhold) of international passenger aircraft or dedicated air freighter aircraft. For international passenger aircraft, passengers are seated on the main deck of the aircraft and passenger luggage is stowed in the bellyhold of the plane. Remaining space in the bellyhold is available for the transport of cargo capable of being transported in the bellyhold.
2. For freighter aircraft, both the main deck and the bellyhold of the aircraft are available for cargo transport. Freighter aircraft by reason of the dimensions of their main deck allow for the loading and unloading of oversized and irregular cargo including, for example, cars. The revenue earned by airlines from carrying passengers on international passenger aircraft is greater than the revenue that is earned from the transport of cargo on the aircraft.
3. Airlines which carry freight by air can be divided into the following categories:
4. bellyhold only airlines;
5. cargo only airlines; and
6. combination airlines.
7. Cargo only airlines are airlines that operate only freighter aircraft. Cargolux is an example of a cargo only airline. Neither Air NZ nor Garuda operated as a cargo only airline during the relevant period.
8. Combination airlines operate both passenger aircraft (with cargo capacity in the bellyhold) and freighter aircraft. Air NZ was a combination airline. Garuda was not.
9. Wide-bodied aircraft are capable of carrying large Unit Load Devices (‘ULDs’). Examples of wide-bodied aircraft are the Boeing 777, Boeing 767, Boeing 747 and the Airbus A380. Narrow-bodied aircraft have less storage space than wide-bodied aircraft. For most narrow-bodied aircraft, cargo and baggage has to be stowed in the hold by hand. An exception to this is the A320 which is capable of carrying small ULDs. Examples of narrow-bodied aircraft are the Boeing 737 and Airbus A320. On both narrow-bodied or wide-bodied aircraft, part of the cargo holds may be kept at a special temperature for the transport of sensitive cargo requiring lower or higher temperatures, such as perishable cargo (as referred to in paragraphs 36 – 37 above).
10. During the relevant period, Garuda operated only wide-bodied passenger aircraft to and from Australia, Indonesia and Hong Kong. Air NZ operated narrow-bodied and wide-bodied aircraft between Australia and New Zealand during the relevant period.

### 2.5.3 Designation and capacity grants to airlines

1. An individual airline is not entitled to carry freight by air between two international airports unless the relevant traffic rights have been granted to it. The airline must first be designated under the ASA by one of the countries which is a party to the ASA in respect of the route, and then must be allocated capacity on the route by the relevant governmental authority of the designating country, and must hold the necessary regulatory approvals.
2. During the relevant period, some ASAs provided that signatories could refuse designation if, by way of example, the airline was not incorporated in a contracting state, did not have a principal place of business in a contracting state, was not substantially owned by entities domiciled in a contracting state or effective control was not vested in a contracting state. Except in the case of the Australia-Hong Kong ASA, the ASAs between each of New Zealand and Indonesia and Australia allowed a signatory to refuse designation if substantial ownership and control of the airline was not vested in the other party, or its nationals. The Australia-Hong Kong ASA provides that each signatory may refuse designation of an airline in its country where it is not satisfied that the airline is incorporated and has its principal place of business in the other signatory’s country.
3. Once designated by its ‘home’ country, an airline wishing to operate a service on a route governed by an ASA to which its ‘home’ country is a party must apply to the regulatory authority in its home country to obtain capacity rights.
4. In Australia, applications by Australian airlines for capacity to operate services on routes governed by ASAs to which Australia is a party, are made to a Commonwealth entity, the International Air Services Commission (‘IASC’). The IASC makes determinations on the allocation of scheduled international air route capacity to Australian airlines on public benefit grounds. Determinations allocating capacity are usually made for a period of five years for routes where capacity or route entitlements are restricted. In cases where capacity entitlements and route rights are unrestricted, determinations may be issued for a period of 10 years. In either case, the IASC has the discretion to make interim determinations, which are for a period of three years.
5. Airlines that intend to operate non-scheduled international air services need to obtain the approval of the aeronautical authorities in each country to be served. An airline usually has to be licensed by its home country to operate non-scheduled international air services. Non-scheduled international air services are not licensed in Australia. In Australia, foreign airlines may be required to obtain non-scheduled flight approvals in accordance with the *Air Navigation Act 1920* (Cth).

## 2.6 Domestic regulation of international transportation of cargo

1. Domestic regulations in Australia, Hong Kong, Singapore and Indonesia also control the carriage of freight by air to or from those countries. Such regulations govern matters including licensing, the granting of capacity for scheduled services and permission for non-scheduled services. Each of Australia, Hong Kong, Singapore and Indonesia has enacted legislation and regulations governing the operation of scheduled air services.
2. An airline seeking to provide international scheduled services to or from a country for the first time is required to seek multiple approvals from regulatory authorities in all countries involved. By way of example, any airline (whether Australian or foreign) seeking to operate international scheduled air services to or from Australia must:
3. obtain an International Airline Licence from the Department of Infrastructure and Transport.
4. obtain Civil Aviation Safety Authority (‘CASA’) clearances in accordance with the *Civil Aviation Act 1988* (Cth). Operators (Australian and foreign) seeking to commence scheduled international air services to and from Australia are also required to apply to CASA for an Air Operator’s Certificate or Foreign Aircraft Air Operator’s Certificate together with a certificate in respect of airlines liability insurance. CASA is responsible for all operational and safety approvals pertaining to civil aviation in Australia;
5. obtain the approval of the Office of Transport of the Department in accordance with the *Aviation Transport Security Act 2004* (Cth); and
6. obtain timetable approval from the Department. Timetable details include the type of aircraft to be used for each scheduled international air service in accordance with regulations 16 and 20 of the *Air Navigation Regulations 1947* (Cth).

## 2.7 Landing slots

1. Airports are constrained by the physical capacity of their facilities (the main constraint being the capacity of the terminal building and the number of runway slots available for landing or take-off) or restrictions in the form of night curfews. Further, some international airports have reached their capacity. Where, in practice, a constraint limits arrival and departure times, slot allocation is required and slot parameters are employed.
2. Once an ASA is negotiated between Australia and another country and an airline has obtained a licence from the Department, the airline then needs to arrange times to take-off and land at the airports it intends to serve in Australia and the other country. This is managed by the airports and airlines commonly using an IATA protocol for allocation of take-off and landing slots.

## 2.8 Route network decisions

1. Decisions about whether to operate on a particular route and, if so, the frequency and aircraft type on the route are decisions made by the head office of an airline. Most routes operated by Air NZ and Garuda for passenger aircraft are to and from an airport or airports in their home countries. Such airports are described as the airline’s ‘hub’. The location of the hub is primarily determined by the ‘flag’ or nationality of the airline, and the availability of air traffic rights for air services between countries.
2. The factors that are relevant to a decision to operate a passenger aircraft on a particular route include but are not limited to (with varying degrees of significance):
3. potential passenger demand on the route (both to and from the destination airport) and the revenue likely to be earned from carrying passengers, which is a primary factor in deciding whether to operate the service on routes;
4. whether the airline holds or is able to acquire traffic rights to operate a service on the route (if the appropriate ASAs are in place or can be negotiated) and the time it may take to acquire these rights (if possible), particularly in relation to new routes;
5. the availability of necessary airport infrastructure;
6. the nature and capacity of services offered by competing airlines on the route; and
7. indirect revenue or marketing effects arising from a change to the route network or schedule or linkages with other routes serviced by the airline.
8. The total revenue earned by airlines from carrying passengers on an aircraft is greater than the total revenue that is earned from the transport of cargo on the aircraft. For that reason, in relation to passenger aircraft, passenger rather than freight revenue considerations primarily determine routes, schedules and capacity.
9. Freighter aircraft routings can differ from passenger aircraft routings in that they often follow a scheduled sequence of stops within a multi-stage routing. Factors that are relevant to a decision to operate a freighter aircraft from a particular airport (as part of the freighter aircraft’s routing) include but are not limited to (with varying degrees of significance):
10. potential freight requirements from that airport and other airports on the routing and the revenue likely to be earned from carrying cargo;
11. whether the airline holds or is able to acquire traffic rights to operate a service on the route (if the appropriate ASAs are in place or can be negotiated) and the time it may take to acquire these rights (if possible), particularly in relation to new routes;
12. the availability of necessary airport infrastructure;
13. the nature and capacity of services offered by competing airlines from that airport; and
14. indirect revenue or marketing effects arising from a change to the route network or schedule or linkages with other routes serviced by the airline.
15. Similar factors to those listed in paragraphs 79 to 82 are relevant to a decision to increase, reduce or remove capacity on a particular route.

## 2.9 Inter-airline arrangements

### 2.9.1 Interlining

1. Airlines carry the majority of freight by air using aircraft operated by that airline. Airlines commonly refer to airports serviced using aircraft they operate as online airports. Airlines also have the option to and do carry freight by air by using another airlines’ capacity to carry freight by air. This practice is commonly known as interlining. Interlining occurs when:
2. an airline wishes to carry freight by air to or from an airport to which the airline does not operate its own aircraft (offline airport) including where it does not have the relevant traffic rights and/or slots; or
3. an airline is unable to carry freight by air on its own aircraft on a particular route at a particular time because of capacity constraints.
4. Interline agreements between airlines can take a number of different forms including:
5. a Special Prorate Agreement (‘SPA’), which is an agreement between two airlines that specifies the rates that one party will charge the other for the carriage of cargo on given sectors of its network, and vice-versa. Alternatively, though far less frequently, the agreements set a minimum amount for the sector to be paid to the operating carrier. It does not include any space commitment by either party; or
6. a Block Space Agreement (‘BSA’), which is a specific agreement between two airlines similar to an SPA but that includes a reservation of space (either hard or soft) on one or more specific sectors covered by the agreement.
7. Some international airlines share capacity on a freighter aircraft or share the operations of a freighter aircraft.

### 2.9.2 Code share arrangements and airline alliances

1. Code share arrangements enable one airline, which does not itself operate on a route (or if it needs more capacity), to sell space on a flight operated by another airline on that route under the first airline’s designated IATA code. The non-operating airline also requires traffic rights under the relevant ASA.
2. Airline alliances involve varying levels of marketing and/or operational cooperation.

## 2.10 Prices charged by airlines

1. The price charged for carrying freight by air is a combination of the air cargo rate plus any applicable surcharges.
2. There are four categories of air cargo rates charged by airlines:
3. ‘standard’ rates;
4. ‘contract’ or ‘special’ rates;
5. ‘ad hoc’ rates; and
6. ‘TACT’ rates.
7. Normally, air cargo rates are expressed in terms of a rate per kilogram based on the ‘chargeable weight’ of each consignment. Airlines typically offer a range of different rates based on:
8. different types of cargo (e.g. general or perishable);
9. different chargeable weights of consignments; and
10. different airports at which the airline first takes possession and the airport at which the airline relinquishes possession (or destination regions).
11. In addition, different rates may be offered for specific routings and particularly time sensitive cargo (the most time sensitive cargo is usually described as ‘express’ cargo, which has the shortest delivery or collection cut off times before the flight), for ULDs and valuable goods (e.g. bullion), or where special handling is required (e.g. live animals, human remains or flowers).
12. Airlines also impose a minimum charge per consignment. Air cargo rates per kilogram usually decrease with increasing chargeable weight.

### 2.10.1 Standard rates

1. 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.

### 2.10.2 Contract/special rates

1. 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.
2. 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.
3. 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.

### 2.10.3 Ad hoc rates

1. 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.

### 2.10.4 TACT rates

1. During the relevant period TACT rates were the rates shown in the TACT Manual published by IATA. TACT is an acronym for ‘The Air Cargo Tariff’. Generally, airlines only used these rates for unusual types of cargo (for example, human remains). Airlines may also use TACT rates as the basis for interlining, although only where no SPA was agreed between the airlines.

### 2.10.5 Surcharges

1. At various times during the relevant period, Air NZ and Garuda applied surcharges, including fuel surcharges and also ISSs which were charged after September 2001 and which are described variously as security, insurance, war risk or crisis surcharges.
2. In some countries including Hong Kong and Japan, and in Dubai, the relevant aeronautical authorities required surcharges to be approved before they could be imposed on the transport of cargo by air from that country.

## 2.11 Factors affecting prices

1. The air cargo rates offered by airlines for the transport of air cargo between two airports usually differ according to the direction of travel. Air cargo rates (both standard and contract rates) usually vary depending on route and carrier.

## 2.12 Sales and marketing

1. In locations where the airline’s cargo business volume is too small to justify dedicated cargo sales and marketing staff, the airline may appoint General Sales Agents (‘GSAs’) or General Sales and Service Agents (‘GSSAs’). GSAs perform some or all of an airline’s own sales and marketing function. The GSA may be a dedicated sales agent or, in some cases, another airline or an IATA freight forwarder. A GSSA is a GSA that also performs ground handling services.
2. Each of Air NZ and Garuda has a general website which can be viewed from anywhere in the world and which contains marketing and promotional information, including in relation to carrying freight by air. It was common for international airlines generally to have such a website.
3. Some international airlines have (at varying times) introduced functional website services accessible from Australia and other countries relating to carrying freight by air. The nature of these website services varies widely between airlines. Some provide only limited services such as general product and service information, flight timetables and shipment tracking. It is not clear whether this was done either by Air NZ or Garuda.
4. Some international airlines during at least part of the relevant period provided an online service available to Australian based freight forwarders registered with the particular airline to request capacity for cargo being transported from Australia (e.g. SQ, Cathay and Emirates). These services, among other things, allowed freight forwarders to enquire whether space was available for shipment on a particular day or flight and request capacity of the airline. Bookings could be made including by email and telephone.

## 2.13 Negotiations

1. Freight forwarders contact station employees (or the GSAs) of an airline by telephone, email or fax to make an enquiry about space and price for a particular shipment (and, where available, an enquiry about space through the airline’s website or other portals). The information provided to an airline for the purposes of carrying freight by air usually includes:
2. a general description of the cargo making up the shipment;
3. estimates of the weight and dimensions of the shipment (this information is required for pricing and logistics, i.e. how the shipment will be packed and loaded on to the aircraft);
4. the preferred date of shipment;
5. whether the cargo will be delivered to the cargo facility ready for loading onto the aircraft or will require further packing by the airline’s cargo terminal (e.g. loading onto a pallet or into a ULD with other cargo);
6. any specific packaging or handling requirements (e.g. for dangerous or perishable cargo);
7. when the shipment will be delivered to the ground handler for processing;
8. the level of service required (e.g. whether the freight forwarder requires an express service or guaranteed uplift on a particular flight); and
9. the airport at which the cargo is to be collected.

## 2.14 Terms of supply

1. When a freight forwarder books the carriage of freight by air, it may be booked either in blocks or on an ad hoc basis:
2. **Pre-purchased block space** (hard block space): ‘block space’ is available to be purchased from airlines. Pursuant to a BSA a freight forwarder has access to a pre-allocated amount of cargo capacity. Freight forwarders acquire block space on busy routes where they have regular demand and where there are limits on available capacity to carry freight by air. Under a hard BSA the freight forwarder must pay for the pre-allocated space regardless of whether or not the space is filled. Freight forwarders may also acquire hard block space on less busy routes where they have reliable, regular shipments or to ensure price stability;
3. **Pre-booked space** (allocation space): some airlines offer ongoing (but not necessarily guaranteed) bookings for regular air cargo shipments, which can be cancelled a few days prior to flight. This is sometimes referred to as a ‘space allocation arrangement’ or ‘soft’ BSA. A freight forwarder may have an ongoing forward booking for a pallet from the airport at which the airline first takes possession to the airport at which the airline relinquishes possession for regular freight. The freight forwarder has to notify the airline a few days in advance of each flight whether the freight forwarder requires that pallet. Unlike hard block space, pre-booked space is only paid for if it is used; and
4. **Ad hoc space:** where space has been neither pre-purchased nor pre-booked, transport of single or consolidated cargo is on an ad hoc basis and depends on the availability of space on a particular flight. Rates for ad hoc space are normally more variable than for pre-purchased or pre-booked space depending on demand and how far in advance a booking is made prior to departure. For ad hoc shipments, the freight forwarder contacts the airline at the place of origin, seeking a price as well as confirmation that space is available and that the required delivery time can be met. Such requests can be made as late as three or four hours prior to departure time.
5. The degree to which freight forwarders use BSAs is dependent upon the place of origin, the route and the characteristics of the consignors and consignees. Airlines and freight forwarders typically negotiate ‘hard block space’ and/or ‘soft block space’ agreements separately for each route (e.g. Sydney to Singapore).
6. Any additional terms on which the freight is carried by air are as negotiated between the airline and the freight forwarder. They may be recorded in a formal agreement such as a BSA, or recorded in a less formal document such as an email. Ordinarily, an airline which offers to carry freight by air has in place standard terms and conditions which are applicable to carrying freight by air.

## 2.15 Air waybills

1. The principal international standard document for carrying freight by air is the AWB. The AWB is prima facie evidence of the conclusion of a contract, the receipt of cargo, and conditions of carriage. Either an AWB or a substitute for an AWB is required before cargo can be loaded at the place of origin. Paper AWBs accompany the cargo to the destination airport where the airline relinquishes it.
2. There are two forms of AWB in use. An airline AWB contains the airline’s logo and unique AWB numbers printed on it. Neutral AWBs are template documents which have the same format and layout as an airline AWB but do not bear any logos and do not have AWB numbers printed on them. In respect of neutral AWBs, airlines issue freight forwarders with a range of valid AWB numbers, which the forwarders will then use to generate, or ‘cut’, the AWB for shipments to be consigned on that airline.
3. Airlines operating services from a particular airport of origin provide airline AWBs or a series of AWB numbers for use with neutral AWBs to authorised freight forwarders at the place of origin. Each AWB has an 11 digit serial number, commencing with a three digit code identifying the airline, which enables the issuing airline (and any other airlines participating in the carriage) to identify and account for all AWBs. This serial number provides a unique reference used to manage every shipment of cargo across all parties involved in the delivery of the shipment, including making bookings and checking the status of delivery and position of a shipment.
4. The freight forwarder ‘cuts’ or ‘raises’ the AWB at the place of origin. The AWB includes the following information:
5. airline details and AWB number (as noted above);
6. ‘shipper’ details – a name and address for the person or entity making available the cargo from the place of origin, who may also be the party sending the freight (for the purposes of the AWB, the person who makes the cargo available is also known as the ‘shipper’). Where cargo is consolidated by the freight forwarder, the ‘shipper’ named on the AWB is always the freight forwarder and this is sometimes the case for non-consolidated shipments;
7. ‘issuing agent’ or ‘issuing airline’s agent’ details – the person authorised to hold the airline’s AWB stock and therefore to authenticate and issue the AWB on the airline’s behalf. The issuing agent is almost always the freight forwarder;
8. ‘consignee’ details – a name and address for the person or entity who is the recipient of the cargo at the airport at which the airline relinquishes possession. This can be either a freight forwarder (and always is where cargo is consolidated) or the consignee;
9. weight and dimensions of cargo (i.e. the weight and size of the shipment that will be physically loaded on the aircraft);
10. general description of the cargo;
11. the nature of the cargo and any special handling requirements;
12. payment details – whether the shipment is ‘total prepaid’ (paid to the AWB issuing airline) or ‘charge collect’ (paid to the airline completing the carriage to the airport at which the airline relinquishes possession). The majority of shipments of Garuda and Air NZ are ‘prepaid’ with the freight forwarder paying the AWB issuing airline; and
13. certification by the ‘shipper’ that the contents of the AWB are correct and a specific declaration concerning dangerous goods.
14. The AWB for each cargo shipment is signed by the freight forwarder on behalf of the person sending the freight and the air cargo carrier at the airport at which the airline first takes possession.
15. AWBs for cargo are only ever issued for one way shipments. In those exceptional cases where cargo is transported to one country and then returned to the country of origin, a separate AWB is issued in respect of each of the two shipments by the freight forwarder at each airport at which the airline first takes possession.
16. The AWB also records on its face particular rates for the shipment and various other charges. Ordinarily, the rate shown on an AWB is the IATA TACT rate, although in most cases that is not the rate actually being charged by the airline. The AWB never incorporates any benefit, incentive or rebate paid by the airline to the freight forwarders.
17. Where a freight forwarder consolidates various shipments of cargo received from a number of consignors into one consolidated shipment or consignment, the freight forwarder delivers a Master Air Waybill (‘MAWB’) to the airline at the airport at which the airline first takes possession. ‘MAWB’ is simply the terminology used to denote an AWB that is used for a consolidated shipment. The MAWB always describes the ‘shipper’ as the freight forwarder and the bulk shipment simply as ‘consolidated’. In such instances the freight forwarder separately issues its own ‘House Air Waybill’ (‘HAWB’) to the consignor of each of the individual shipments comprising the consolidated shipment. The HAWB incorporates or makes reference to the terms and conditions between the person sending the freight and freight forwarder.
18. For non-consolidated cargo, freight forwarders may still either automatically generate a HAWB number and/or create the HAWB (as well as a MAWB – known as ‘back to backs’ i.e. the single HAWB is attached to the back of the MAWB). This is because many freight forwarders rely on HAWB numbers to drive their billing systems, even if no actual HAWB is printed or created.
19. Airlines do not generally see HAWBs. During the relevant period, HAWBs were generally sealed in an envelope with invoices and other relevant documentation, which was then attached with the MAWB and transported with the cargo. The HAWBs contain information confidential to the freight forwarder and thus are not seen by the airlines.

## 2.16 Payments for air cargo transport

1. In most cases, the origin freight forwarder is obliged to pay the airline for air cargo transport charges. Payment is usually made in local currency of the place of origin. In some countries with high currency volatility payment may be required in another currency. In the industry, this is generally known as ‘prepaid’.
2. Some shipments may be ‘charges collect’, in which case the destination freight forwarder pays on delivery.
3. The charges which are payable to airlines for carrying freight by air by freight forwarders, whether prepaid or charges collect, are not conditional upon the freight forwarder receiving payment from the consignor or consignee, as the case may be, for the freight forwarder’s services.
4. The freight forwarder makes the payment to the airline for the cost of carrying freight by air including via the IATA-operated CASS (where that system is available in the country of origin). As noted above, CASS is an accounts settlement system that facilitates the interaction and exchange of information and remittance between freight forwarders and airlines.
5. Freight forwarders are able to use CASS if they are accredited agents/intermediaries or non-accredited IATA ‘associates’. In order to obtain IATA accreditation freight forwarders must meet certain financial criteria. The requirements for associateship are less stringent than for accreditation. However, associateship still requires a freight forwarder to provide a financial undertaking and a bank account in the country of origin (and in certain circumstances, a bank guarantee).
6. Between 2000-2006, in those countries where CASS operated, freight forwarders were able to settle the invoices issued by airlines in that country in a single payment to CASS. CASS then made a single payment to each airline in that country covering such invoices for all freight forwarders. The airline charges for carrying freight by air for most cargo transported from Australia are paid for using this system.
7. CASS is available in a number of countries. However, its implementation has been gradual. If CASS is not available in a particular origin country (for example, India), payment is made directly by the freight forwarder to the airline. In those circumstances, some airlines will contract with some freight forwarders based in that country only if it supplies a bank guarantee or other security for payment.
8. Having clarified these matters of terminology it is useful to begin with the airlines’ legal arguments as to the non-applicability of the *Trade Practices Act 1974.*

# 3 THE APPLICATION OF THE *TRADE PRACTICES ACT 1974* TO INTERNATIONAL COMMERCIAL AVIATION

1. Garuda, supported by Air NZ, submitted that Part IV of the TPA had no application to the regulation of international commercial aviation under the *Air Navigation Act 1920* (Cth) (‘the ANA’). There were five arguments in all:
2. the background to the regulation of international commercial aviation showed that at the time of the introduction of the TPA, the majority of bilateral air transport agreements provided for rate fixing machinery;
3. a consideration of the terms of the ANA showed that the TPA could *never* apply to international commercial aviation;
4. alternatively, the TPAcould not apply where Australia had entered into an ASA with another nation which required or permitted rate or tariff fixing;
5. consequently, the TPAcould not apply to the conduct alleged against the airlines in the period 2001-2006;
6. further, the TPA did not apply to the service provided by the airlines which was not the carriage of goods by air but instead the provision to consumers of bundles of contractual rights.
7. It is convenient to deal with these in turn.

## 3.1 Background to the regulation of international commercial aviation

1. Garuda began its argument by drawing attention to the nature of the regulation of international civil aviation at the time at which the TPA came into force on 24 August 1974. At that time, the regulation of international civil aviation was quite different to the situation which presently obtains and reflected arrangements which had been reached between a large number of nations in the aftermath of World War II.
2. That aftermath had left the United Kingdom and the European nations with substantially weakened economies and the United States in a very much stronger economic position. Further, the end of the war had seen the United States having left over from its war efforts not only a very large number of air freighters which were readily suitable to being converted to commercial airliners but also a large number of pilots with which to fly them. Although the United Kingdom also had a significant number of pilots following its war effort it had not been involved in operating air freighters to the extent that the United States had. In addition, the United States’ economy in 1946 was, in stark contrast to the economy of the United Kingdom, in a position to continue manufacturing even more planes.
3. There was a general sense towards the end of the second world war that given the great advances in aviation technology in the preceding six years, international civil aviation would need to be regulated afresh and this led rapidly to the *Convention on International Civil Aviation*,signed 7 December 1944, 15 UNTS 295 (entered into force 4 April 1947) (‘the Chicago Convention’). Although the Chicago Convention achieved many things it did not achieve a consensus on the economic issues which arose between the various states. A multilateral agreement reached at the same time, the *International Air Services Transit Agreement*, signed 7 December 1944, 84 UNTS 389 (entered into force 8 February 1945) (‘the Air Transit Agreement’), recognised what are termed the first and second freedoms. These are respectively: the right of the civil aircraft of one country to fly over the territory of another without landing provided advance notice is given and approval given (the first freedom); and the right to land in another country for technical reasons such as maintenance or refuelling but without offering commercial services (the second freedom). Despite multilateral agreement on those matters no equivalent multilateral agreement could be reached about the operation of purely commercial services between states or through several states.
4. The reasons for this were related to the economic matters just mentioned. The United States, with its much greater economic position favoured ‘open skies’ and free trade, whereas the Europeans, and particularly the United Kingdom, were concerned that untrammelled competition with United States carriers would see their national air industries overrun.
5. The consequence of this impasse was that the terms on which international civil aviation operations were to be conducted between any two given states required bilateral agreement, a multilateral approach having failed at Chicago in 1944.
6. The first and most important of these bilateral agreements was that reached between the United Kingdom and the United States. Officials from these two countries met in Hamilton, Bermuda between 15 January and 11 February 1946. This meeting resulted in the *Agreement between the United States and the United Kingdom relating to Air Services,* signed 11 February 1946, 3 UNTS 253 (entered into force 11 February 1946), sometimes also known as the Original Bermuda Agreement or, amongst the cognoscenti of bilateral air transport treaties, more often as ‘Bermuda I’. I will call it ‘Bermuda I’, although I do not mean by that to suggest that I am one of those cognoscenti. Its significance is that it has served as a template for many other bilateral air service agreements subsequently reached between other states.
7. The provisions of Bermuda I dealt with five principle issues: entry, capacity, rates, discrimination and dispute resolution. For present purposes only the issue of rates is relevant.
8. Paragraphs (a) to (e) and (h) of Annexure II to Bermuda I were as follows:

(*a*) Rates to be charged by the air carriers of either Contracting Party between points in the territory of the United States and points in the territory of the United Kingdom referred to in this Annex shall be subject to the approval of the Contracting Parties within their respective constitutional powers and obligations. In the event of disagreement the matter in dispute shall be handled as provided below.

(*b*) The Civil Aeronautics Board of the United States having announced its intention to approve the rate conference machinery of the International Air Transport Association (hereinafter called (“I.A.T.A.”), as submitted, for a period of one year beginning in February 1946, any rate agreements concluded through this machinery during this period and involving United States air carriers will be subject to approval by the Board.

(*c*) Any new rate proposed by the air carrier or air carriers of either Contracting Party shall be filed with the aeronautical authorities of both Contracting Parties at least thirty days before the proposed date of introduction; provided that this period of thirty days may be reduced in particular cases if so agreed by the aeronautical authorities of both Contracting Parties.

(*d*) The Contracting Parties hereby agree that where-

(1) during the period of the Board’s approval of the I.A.T.A. rate conference machinery, either any specific rate agreement is not approved within a reasonable time by either Contracting Party, or a conference of I.A.T.A. is unable to agree on a rate, or

(2) at any time no I.A.T.A. machinery is applicable, or

(3) either Contracting Party at any time withdraws or fails to renew its approval of that part of the I.A.T.A. rate conference machinery relevant to this provision,

the procedure described in paragraphs (*e*), (*f*) and (*g*) hereof shall apply.

(*e*) In the event that power is conferred by law upon the aeronautical authorities of the United States to fix fair and economic rates for the transport of persons and property by air on international services, and to suspend proposed rates in a manner comparable to that in which the Civil Aeronautics Board at present is empowered to act with respect to such rates for the transport of persons and property by air within the United States, each of the Contracting Parties shall thereafter exercise its authority in such manner as to prevent any rate or rates proposed by one of its carriers for services from the territory of one Contracting Party to a point or points in the territory of the other Contracting Party from becoming effective, if in the judgment of the aeronautical authorities of the Contracting Party whose air carrier or carriers is or are proposing such rate, that rate is unfair or uneconomic. If one of the Contracting Parties on receipt of the notification referred to in paragraph (*c*) above is dissatisfied with the new rate proposed by the air carrier or carriers of the other Contracting Party, it shall so notify the other Contracting Party prior to the expiry of the first fifteen of the thirty days referred to, and the Contracting Parties shall endeavour to reach agreement on the appropriate rate. In the event that such agreement is reached, each Contracting Party will exercise its statutory powers to give effect to such agreement. If such agreement has not been reached at the end of the thirty-day period referred to in paragraph (*c*) above, the proposed rate may, unless the aeronautical authorities of the country of the air carrier concerned see fit to suspend its operation, go into effect provisionally pending the settlement of any dispute in accordance with the procedure outlined in paragraph (*g*) below.

…

(*h*) The rates to be agreed in accordance with the above paragraphs shall be fixed at reasonable levels, due regard being paid to all relevant factors, such as cost of operation, reasonable profit and the rates charged by any other air carriers.

1. Before considering what these provisions required, it is useful to know something of IATA (referred to in (b) and (d) of the Bermuda I extracts above). IATA is the international trade association for airlines. It was founded as a result of the International Air Transport Operators Conference held in Havana in 1945. It is a corporate body under Canadian law with its headquarters in Montreal. It represents the great majority of the world’s scheduled international airlines (scheduled services being separately regulated from chartered flights). The reference to IATA in the rate fixing machinery in Bermuda I in (b) of Annexure II (and its subsequent multitudinous progeny) has given IATA a very important public function even though it is a private organisation. Its rate fixing machinery is conducted through its tariff coordinating conferences: see Peter Haanappel, *Pricing and Capacity Determination in International Air Transport* (Kluwer Law and Taxation Publishers, 1984) at 96. IATA membership is open to any airline operating a scheduled international air service, although membership rules for participating in the tariff coordinating conferences are quite complicated. At present, approximately 230 of the world’s airlines are members. Although formal IATA membership only applies to airlines, other industry stake-holders can participate in different IATA programs including airports, travel agencies and other travel and tourism intermediaries, freight forwarders and other industry suppliers. IATA works with governments to establish uniform standards and procedures for commercial air operations.
2. All members of IATA must elect whether they wish to become a member of a Tariff Coordinating Conference of which there are in broad terms two kinds, Passenger Tariff Conferences and Cargo Tariff Conferences. The members may elect to join one or neither of the conferences. The passenger conferences may be put to one side. There are three Cargo Tariff Conferences reflecting the Tordesillan division by IATA of the world into three broad areas:
3. Area 1 – encompassing all of the north and south american continents and the islands adjacent thereto, Greenland, Bermuda, the West Indies and the islands of the Caribbean Sea and the Hawaiian Islands including Midway and Palmyra;
4. Area 2 – encompassing all of Europe and the islands adjacent thereto, Iceland, the Azores and Madeira, all of Africa and the islands adjacent thereto, Ascension Island and that part of Asia laying west of the Ural mountains including Iran and the Middle East;
5. Area 3 – encompassing all of Asia and the islands adjacent thereto except the portion included in Area 2, all of the East Indies, Australia, New Zealand and the islands adjacent thereto and the islands of the Pacific Ocean except those included in Area 1.

This case is largely concerned with Area 3 which was called by all parties in the case ‘TC3’ (the other two areas being referred to as Traffic Conference (‘TC’) TC1 and TC2).

1. The Conferences originally fixed minimum rates. Speaking in 1984 Haanappel puts it this way (at 104):

Finally, it should be mentioned that strictly speaking all IATA agreed fares and rates are *minimum* fares and rates. In principle, IATA carriers are free to charge higher fares and rates than the ones agreed upon through the IATA Tariff Coordinating machinery and approved by Governments. For two reasons, however, IATA carriers will seldom or never do so in practice. The first reason is economic in nature, and the second relates to the regulatory aviation systems of many countries. Economically, IATA carriers cannot afford to charge higher tariffs than the minimum tariffs agreed upon in the Tariff Conferences. All IATA carriers basically offer the same *undifferentiated* product, i.e. rapid point - to - point transportation. When an IATA carrier would charge a higher price for that product than its fellow member airlines do, it would automatically put itself into an impossible competitive position. Passengers and shippers would ignore this carrier and prefer the others. In addition hereto, once IATA airlines have had their IATA agreed tariffs approved by the various interested Governments, these tariffs become, in the regulatory aviation systems of many nations, the *actual*, Governmentally sanctioned tariffs. Therefore, one can say that the *minimum* IATA fares and rates in practice always become the actual, *uniform* fares and rates.

[emphasis in original; footnotes omitted]

1. As discussed later in these reasons, (at [189] and [1247]), prior to 1981 it was unlawful for a carrier in Australia to discount below the approved tariff, which in cases involving Bermuda I style treaties was generally the IATA fare. Increasing deregulation since that time has meant that the IATA tariffs are no longer, in practice, minima. For present purposes, what is important is that IATA rates are not now, and have never been, maximum limits imposed on fares and tariffs. There is a related debate in this case as to whether Art 6(2) of the *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,* signed 7 March 1969, [1969] ATS 4 (entered into force 7 March 1969) (‘the Australia-Indonesia ASA’) requires agreement on the minimum or maximum tariffs. That debate raises a slightly different question to whether IATA’s rate fixing machinery results in a minimum rate. Insofar as that former question is concerned I am prepared to accept the statement appearing in Haanappel as a statement of ‘general facts’ by a ‘serious historian’: cf. *Cadia Holdings Pty Ltd v New South Wales* (2010) 242 CLR 195 at 223 [76]. I deal with the issue of the proper construction of Art 6(2) below at [163] and [415].
2. Returning then to Bermuda I, it will be seen that its terms required the United Kingdom and United States carriers to reach agreement on rates through the IATA Passenger and Cargo Tariff Conferences and thereafter to have them approved through the relevant national regulators.
3. On its face this procedure may appear to be directly inimical to antitrust legislation such as the *Sherman Act* or Pt IV of the TPA. Between 1958 and 1979, however, § 412(b) of the United States *Federal Aviation Act* *of 1958*, 49 USC 1301 (1958) (and after 1946, other legislation antecedent to that Act)authorised the Civil Aviation Board (‘the CAB’) to disapprove arrangements between airlines establishing fares and rates if the CAB had found them adverse to the public interest. In practice, the CAB required all IATA Conference resolutions in relation to, *inter alia*, fares and rates to be filed with it for approval. It was through this procedure that IATA arrangements obtained (in general) default antitrust immunity under United States law. After 1979, antitrust immunity was no longer automatically granted through the approval of an application, but rather a discretion rested with the CAB to grant antitrust immunity. As will be seen subsequently, the facts of this case include an actual example of the CAB refusing approval under §§ 412 and 414 of the *Federal Aviation Act*.
4. It might be wondered why the United States agreed to the rate fixing arrangements in Bermuda I when it favoured competition between carriers. According to Haanappel this arose from the desire of the United States to obtain access to the Atlantic routes into Europe. He says (at 27):

The final events which brought Britain and the United States to the negotiating table at Bermuda were the desire of American carriers to increase their frequencies to London beyond the limits allowed by the pre-war bilateral arrangements still in force in early 1946 and, in the fall of 1945, the announcement by Pan Am of its intention to cut considerably fares from the United States to Britain and France. These intentions had met with fierce French and British resistance. Under these circumstances, a compromise was reached whereby the Americans accepted governmental tariff control, which they had been unwilling to do at Chicago in 1944, and whereby the British accepted the idea that airlines themselves would fix capacity and frequencies of flights, instead of following the system which they had proposed in 1944 and which involved intergovernmental predetermination of capacity and frequencies. Some say that the compromise was perfectly acceptable to both parties. Others say that it had only become possible by the promise of an American loan to rebuild the British aviation industry. Wherever the truth may lie, and it probably lies in the middle, in the long run, *Bermuda 1* proved to be satisfactory to both the Americans and the British.

[footnotes omitted]

1. After Bermuda I, the United States and the United Kingdom issued a joint statement proclaiming Bermuda I as the basis for their future bilateral air transport arrangements and a large number of other nations thereafter followed suit. The deviations from the Bermuda I model in the post-war period were principally related to issues of capacity and frequency rather than rates: Haanappel (at 34). Also, different arrangements had to be reached where particular national carriers were not members of IATA, for example, Aeroflot of the then USSR.
2. Writing in 1984 Haanappel described the situation which then existed in relation to rate fixing in bilateral arrangements as follows (at 37):

In the field of pricing or ratemaking clauses, most nations have stayed more faithful to the *Bermuda 1* principles than they have with respect to capacity and frequency. Most existing bilateral air transport agreements explicitly delegate the determination of fares and rates for scheduled international air services, covered by those agreements, to IATA, but virtually always under the reservation that such rates and fares shall be subject to Government approval, i.e. approval by the aeronautical authorities of both Contracting Parties to a bilateral air transport agreement. This system of Governmental tariff approval has now become known as the ‘double’ or ‘dual approval’ rule. Very seldom, however, do bilateral agreements make the use of the IATA ratemaking machinery mandatory. Practically all bilateral agreements which explicitly delegate ratemaking to the IATA Traffic Conference machinery state that rates and fares shall be determined by the airlines designated under the agreements in question, and that ‘where possible’ or ‘wherever possible’ the IATA machinery shall be used for that purpose.

A rather small number of bilateral air transport agreements implicitly delegate international ratemaking to IATA. These agreements delegate international ratemaking, again mostly ‘subject to Government approval’ and ‘where’ or ‘wherever possible’, to ‘*an* association of air carriers’ or ‘*an* international air transport association’.

[emphasis in original; footnotes omitted]

1. I propose to proceed on the basis that at the time of the introduction of Part IV of the TPA on 1 October 1974 the vast majority of bilateral air transport agreements (including those concluded by Australia) provided for rate fixing machinery of the style seen in Bermuda I.

## 3.2 Whether the *Trade Practices Act 1974* applied to international commercial aviation at all

1. Bilateral agreements with rate fixing machinery within them would not have been sufficient to prevent Pt IV of the TPA from applying to international civil aviation for, as international instruments, they could have no direct domestic effect in themselves. If Pt IV was not, therefore, to apply to international civil aviation it must be as a result of the operation of its own terms, the provisions of the ANA or the *Air Navigation Regulations 1947* (Cth) (‘the ANR’) or some combination of some or all of these.
2. In 1974 the critical provisions of the ANA for present purposes were ss 12, 13 and 22. These provided as follows:

**12 International airline licences**

(1) An international airline of a country other than Australia shall not operate a scheduled international air service over or into Australian territory except in accordance with an international airline licence issued by the Director-General in accordance with the regulations.

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

**13 Suspension or cancellation of international airline licences**

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

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

or

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

**22 Offences**

(1) A person who contravenes or fails to comply with a provision of this Act is guilty of an offence.

(2) The owner, the operator and the hirer (not being the Crown), and the pilot in command and any other pilot, of an aircraft that flies in contravention of, or fails to comply with, a provision of this Act is guilty of an offence.

(3) An offence against this Act may be prosecuted either summarily or upon indictment, but an offender is not liable to be punished more than once in respect of the same offence.

(4) The punishment for an offence against this Act is-

(a) if the offence is prosecuted summarily-a fine not exceeding four hundred dollars or imprisonment for a term not exceeding six months, or both;

or

(b) if the offence is prosecuted upon indictment-a fine not exceeding One thousand dollars or imprisonment for a term not exceeding two years, or both, or, if the offender is a body corporate, a fine not exceeding Ten thousand dollars.

1. As I understood the Commission’s submission in relation to a subsequent, but not materially different, form of these provisions, they were not to be seen as having the effect of requiring an international carrier to comply with any relevant bilateral agreement. The obligation was instead not to conduct an international air service without a licence (s 12(1) of the ANA). It was true that s 13(b) authorised the Minister to cancel or suspend such a licence if the terms of the relevant bilateral agreement had not been complied with, but a breach of the bilateral agreement was not in itself a breach of the ANA or the ANR, so that the offence provision (s 22) was never engaged by such a failure and, concomitantly, the ANA could not be seen as imposing a norm of conduct requiring compliance with the relevant bilateral agreement.
2. There is, with respect, an air of unreality about this submission. An international civil aviation carrier operator must have a licence. If it does not comply with the relevant bilateral agreement then it is at risk of losing its licence. If it loses its licence it must either cease operations altogether between Australia and the other country involved, or, alternatively, commit a serious offence under the ANA. I do not think it can be suggested that a carrier confronted with this dilemma has any real choice about compliance with the relevant bilateral agreement. I accept, therefore, and contrary to the Commission’s submission, that s 13(b) when viewed in a context which includes ss 12(1) and 22, requires international civil aviation operators to comply with the terms of any relevant ASA. That is the point of the provision and that is what it does.
3. This is, however, not the only feature of the régime. As at 1 October 1974 there were also some regulations. These were regs 106A, 255 and 258 of the ANR. Regulations 255 and 258 in substance simply repeated ss 12 and 13 of the ANA, i.e. an international carrier needed to operate in accordance with a licence issued pursuant to the relevant bilateral agreement (reg 255) and if it did not do so then its licence could be cancelled by the Minister (reg 258(1)). Again, as with ss 12 and 13 of the ANA these two regulations did not explicitly require a carrier to comply with a relevant bilateral agreement, but, in their substantial operation they had precisely that effect.
4. The relevant portions of ANR reg 106A provided as follows:

**106A Tariffs of charges**

(1.) The holder of a licence to operate an international air service to or from Australian territory shall submit to the Director-General his tariff of charges for the carriage of persons and cargo on that service and such tariff shall include charges for carriage of persons and cargo between all stopping places on the route authorized in the licence.

(2.) The Director-General may-

(*a*) approve any tariff of charges submitted or deemed to have been submitted under this regulation;

(*b*) approve any such tariff subject to such variations as he directs; or

(*c*) reject any such tariff, and direct the adoption in its stead of such tariff as he considers fair and reasonable for the service provided.

…

(6.) The holder of the licence or any other person shall not charge, demand, collect or receive, or advertise that he will charge, for the carriage of persons or cargo on an international air service to or from Australian territory, an amount less than the amount approved or deemed to have been approved, or directed to be adopted, in accordance with this regulation.

1. The effect of this was to require lodgement with, and government approval of, any relevant tariff and thereafter to prohibit the holder of the licence from the discounting of its prices below that tariff unless approval for a variation was obtained. The regulation did not say that the tariff lodged had to have resulted from an agreement on tariffs reached between airlines, nor does it even require airlines to lodge the same tariff. Under ANR reg 106A it was, therefore, legally possible for airlines to lodge different tariffs, and indeed, this would be likely to occur where the relevant ASA did not include any requirement as to rate fixing. During the course of the trial Garuda made reference to the fact that as late as 1978 a charter airline had been prosecuted for discounting a fare (*The Queen v Halton; ex parte A.U.S. Student Travel Pty Limited* (1978) 138 CLR 201) which was said to be diametrically opposed to the idea that Pt IV could possibly apply to air navigation. But *The Queen v Halton* was not concerned with price fixing between airlines. It was concerned with charging less than an approved tariff. That an offence of discounting existed tells one nothing about price fixing.
2. A significant element in the ANA/ANR régime is that it neither necessarily requires nor authorises rate fixing of the kind contemplated in Bermuda I. The ANA on 1 October 1974 was wholly silent upon this issue. There can be no doubt that where Australia had entered into a bilateral agreement either in a Bermuda I form or in some other form providing for rate fixing, then the effect of the ANA and ANR was to require compliance with that rate fixing régime, but this was a feature of the relevant ASA rather than the ANA/ANR. Nor, as I have indicated, was the requirement that carriers lodge tariffs or the prohibition on them thereafter discounting those tariffs in ANR reg 106A, in principle, inconsistent with the operation of Pt IV of the TPA. The regulation did not prevent carriers from charging higher tariffs and it certainly did not require them to charge the same tariff. In principle, at least, there was no legal collision between such a régime and one such as Pt IV, prohibiting price fixing between competitors.
3. In his closing submissions, Mr Leeming SC placed much reliance upon the decision of Deane J in *Refrigerated Express Lines (Australasia) Pty Limited v Australian Meat and Livestock Corporation (No 2)* (1980) 29 ALR 333. In that case, his Honour concluded that the régime contained in Pt X of the TPA excluded any operation for Pt IV. Part X dealt with overseas cargo shipping. It contemplated the making of conference agreements on rates. Section 112 explicitly exempted from the operation of Part IV conduct which was done pursuant to such an agreement but did not exempt, in terms, the conduct involved in reaching such an agreement. It was not a difficult conclusion to reach, as his Honour did, that a set of provisions which exempted conduct pursuant to conference agreements was inconsistent with the operation of Pt IV, including the making of conference agreements.
4. But that is not this case. The ANA/ANR do not require or authorise conference arrangements at all. Although Garuda in its submissions repeatedly suggested that the ANA/ANR created a régime involving IATA rate fixing, in my opinion, they did no such thing. What they created was a régime in which carriers had to comply with any bilateral air transport agreement which was in place. But the ANA/ANR were silent on what those agreements required. This is a critical distinction between Pt X of the TPA and the ANR/ANA.
5. Nor do I accept that this argument is assisted by the Full Court of this Court’s decision in *Heli-Aust Pty Ltd v Cahill* (2011) 194 FCR 502 (FC) which held that the *Civil Aviation Act 1988* (Cth) covered the field when it came to the regulation of air safety so that a State law also regulating that topic could not apply to civil aviation. That decision was concerned with a different Act and with inconsistency between State and Federal law. It has nothing to say in a case such as the present.
6. That is not to say that there could not be circumstances in which Pt IV and the ANA/ANR might have come into conflict. I accept that wherever Australia had entered into a Bermuda I style ASA then the potential effect of ss 12 and 13 as they stood in 1974 may well have been to require what Pt IV prohibited, namely, an agreement between carriers to fix prices. The present point is that such a conflict would arise only in those cases involving such an ASA and would not arise if the relevant ASA did not itself provide for rate fixing. For that reason I cannot conclude the operation of the ANA/ANR on 1 October 1974 was inherently inimical to the operation of Pt IV of the TPA and I reject the submission that Pt IV had no application at all to international civil aviation at that time.

## 3.3 Was the *Trade Practices Act 1974* inconsistent with the Australia-Indonesia ASA as applied by the *Air Navigation Act 1920*?

1. A more modest form of Garuda’s argument relied upon the terms of the actual ASA between Australia and Indonesia which was reached between the two nations on 7 March 1969. I accept Garuda’s submission that the Australia-Indonesia ASA was, in substance, a Bermuda I style arrangement. Article 2 permitted each nation to designate a single airline to operate on the routes contained in the annex to it. There is no need to set those out; they are routes involving ports in both countries.
2. Initially there were only two designated airlines, Garuda and Qantas. An exchange of notes between the two nations (*Exchange of Notes constituting an Agreement between the Government of Australia and the Government of Indonesia to amend the Annex to the Agreement for Air Services between and beyond their respective Territories of 7 March 1969*, signed 16 August 1986, [1986] ATS 23 (entered into force 16 August 1986)), however, whilst perhaps not drafted with perfect clarity, appears to have permitted both nations after that time to designate more than one carrier under the Australia-Indonesia ASA.
3. From 1969 until 2013, and at all times material to this litigation, Art 6 of the Australia-Indonesia ASA provided as follows:

**Article 6**

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

(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. Article 6(2) did not make the IATA rate fixing machinery compulsory, although it did require it wherever possible, and when it was not possible, Garuda and Qantas were to agree the rates between them which were then to be approved by the respective aeronautical authorities.
2. It is difficult to avoid the conclusion that on 1 October 1974 when Pt IV first became law, the combined operation of Art 6(2) and ss 12 and 13 of the ANA (and also ANR regs 255 and 258(1)) was to require collusive behaviour by the two airlines of the very kind prohibited by Pt IV on that day. I accept, therefore, that there was a conflict, in their practical operation, between the ANA/ANR régime and Pt IV in relation to flights to and from Indonesia on 1 October 1974.
3. Part IV of the TPA as originally enacted foresaw the possibility of such conflicts. Section 51(1) at that time 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. The first matter to note about this provision is that it applied to ‘acts or things’ done under another statute or regulation. It did not seek to mediate the conflicts it managed at the level of the actual laws in question (unlike, for example, s 109 of the *Constitution*). It awaited instead some event under those provisions. To consider its operation one needs, therefore, to posit some action onto which the provision may then attach. In this case, it is convenient to assume the existence of conduct under Art 6(2) of the Australia-Indonesia ASA between Garuda and Qantas by which the two airlines, on or around 1 October 1974, reached an agreement to charge a particular rate.
2. The second matter to observe is the need for the second law to render the conduct ‘specifically authorised or approved’. It is apparent, I think, that the words ‘specifically’ qualifies both ‘authorised’ and ‘approved’ – it is hard to see why one would need to be specific but not the other. But the question then arises: what is an authorisation or approval which is specific?
3. One matter which is clear is that the specific authorisation or approval must be found in the Act or regulation mentioned in s 51(1) and not some subordinate instrument made under that Act or regulation. The terms of s 51(1) do not include in their exempting scope matters or things specifically authorised or approved under instruments which are not themselves Acts or regulations. Thus, to take an example which will be relevant in due course, the imposition by the Director-General of Civil Aviation in Australia of a condition on an international air carrier’s licence to comply with an ASA containing rate fixing machinery would not engage s 51(1) because, whether this was a *specific* authorisation or approval, it was not an authorisation or approval ‘by, or by regulations under, an Act’. Put another way, the specificity involved must emerge at the level of the Act or regulation in question.
4. In *Re Ku-ring-gai Co-operative Building Society (No 12) Ltd* (1978) 36 FLR 134 the Full Court of this Court had occasion to consider whether s 82 of the *Co-operation Act 1923* (NSW) and reg 35A of the *Co-operatives Regulations 1961* (NSW) specifically authorised co-operative building societies to compel loan applicants to insure mortgaged premises with a particular insurer. That conduct would have been exclusive dealing within the meaning of s 47 of the TPA.
5. Section 82 of the *Co-operation Act* required, inter alia, that the rules of a co-operative building society should set forth ‘such other matters as may be prescribed by regulation’. Regulation 35A of the *Co-operatives Regulations* provided:

The following matter is prescribed pursuant to section 82 (3) (*e*) of the Act to be set forth in the rules of a building society:-

The manner in which the insurance of any building or premises the subject of a mortgage to the society is to be effected and whether the insurance of that building or those premises is required to be effected with an insurance company or insurance society specified, nominated or approved by the society or the board.

1. Deane J was of the view that reg 35A authorised the co-operative building societies to nominate an insurer in the way that they had but he did not accept that it did so ‘specifically’. His Honour reasoned as follows (at 164):

The requirement in reg 35A, that the rules set forth whether insurance is required to be effected with a nominated insurer, may properly be seen as constituting legislative approval or authorization of the inclusion in the rules of an unspecified statement on that subject. In my view, however, it no more constitutes *specific* authorization or approval of any particular statement on that subject matter which the rules of a particular society might contain than does, for example, the common legislative requirement specifying that particular matters be set out in the prescribed written memorandum of a money-lending contract constitute specific legislative authorization or authority for the particular provisions which appear in a particular contract (see, for example, *Money-lenders and Infants Loans Act 1941-1948* (N.S.W.), s 22(2)).

1. Brennan J approached the matter a little differently. At 152 his Honour said:

Section 51 (1) (*b*) limits the operation of s. 47 so that the laws of a State may define the acts or things which do not fall within the prohibitions of s. 47. The boundaries of this Alsatia are to be chosen, in the first instance by the laws of the relevant State. But the appropriate State legislation which exercises the exempting power must specifically authorize or approve the act or thing, that is, it must manifest a legislative intention that the act or thing; if done or existing, shall not be a link in the chain of proof of a liability, whether civil or criminal. To be sure, the laws of a State do not usually trouble to give legislative affirmation of the lawfulness of acts or things which are not otherwise proscribed, but a legislative assumption of the lawfulness of an act or thing is not tantamount to a specific authorization or approval of that act or thing. What is necessary is that the State law should exhibit a specific legislative intention to authorize or approve that act or thing, even though the act or thing would not–but for the provisions of the *Trade Practices Act*–be unlawful.

Regulation 35A is not so drawn as to give that specific authorization or approval to the act of lending on condition that the borrower effect insurance with an insurer nominated by a building society.

1. Bowen CJ was of the contrary view. The Chief Justice reasoned, at 144, this way:

But s. 51 (1) (*b*) does not require the authorization to be express or direct. It requires simply that it should be specific. It does not appear to me that reg. 35A lacks the quality of being specific. It refers precisely to the class of acts in question, namely, the act of requiring insurance of premises to be effected with an insurance body specified by the society. It could hardly be more specific in this relevant respect, without descending to the specification of particular cases.

It is true that the regulation requires to be set forth in the rules whether such insurance is a requirement. A society would have a choice whether or not it included such a requirement in its rules. But this only means that the regulation involves authorization or approval to the rules either requiring or not requiring it.

It is further true that, even if the requirement be included in the rules the authorization or approval inherent in the regulation will not be availed of unless the society in fact engages in the practice. We are asked in these proceedings to proceed upon the basis it has been included in the rules. Certainly, the applicant societies proceeded to engage in the practice. In the circumstances, it is my view, the societies in doing so engaged in a practice which was specifically authorized or approved by the reg. 35A.

1. The application of these statements to the situation which existed on the passage of Pt IV of the TPA on 1 October 1974 is not without some difficulty. The Court in *Ku-ring-gai* was considering s 51(1)(b) rather than s 51(1)(a) but I do not think, subject to one matter to which I will return, that this is a compelling distinction. The language ‘specifically authorised or approved’ is the same in subsections (a) and (b) and one ought, if possible, to read the same phrases in different parts of the same section as having a consistent meaning.
2. So far as the reasoning of Deane J is concerned, the position of reg 35A and that of the Australia-Indonesia ASA is indistinguishable. Sections 12 and 13 (and ANR regs 255 and 258(1)) may well authorise or approve rate fixing under Art 6(2) but they do not do so ‘specifically’.
3. The reasoning of Brennan J requires one to ask whether the Act or regulation manifests ‘a legislative intention that the act or thing, if done or existing, shall not be a link in the chain of proof of the liability, whether civil or criminal’. In the case of ss 12 and 13 (and ANR regs 255 and 258(1)) I do not think such an intention is manifest. It becomes manifest only when account is taken of a relevant ASA having a rate fixing clause. In *Ku-ring-gai*, as Bowen CJ observed (in dissent), the Court was invited to proceed on the basis that the societies in question had included the rule contemplated by reg 35A. This does not appear to have led Brennan J, however, to the conclusion that reg 35A specifically authorised the action taken under the rule it authorised. I am unable to distinguish that situation from the one obtaining where ss 12 and 13 of the ANA (and ANR regs 255 and 258(1)) require compliance with ASAs but any rate fixing provision is contained only in a particular ASA itself.
4. The result of *Ku-ring-gai* is that the approach of either of the judges in the majority leads to the conclusion that s 51(1)(a) would not have exempted conduct of Garuda and Qantas in reaching an agreement on rates under Art 6(2).
5. That, however, is not the end of the matter. Garuda submitted that such an outcome would place Australia in breach of its obligations to Indonesia under the Australia-Indonesia ASA and the Court should be slow to interpret domestic legislation in a way which resulted in a breach by Australia of its international obligations.
6. I do not think that I should lightly conclude that Australia was in breach of the Australia-Indonesia ASA. During the trial, the question of whether the Commonwealth was cognisant of the treaty implications of the arguments which were being advanced by the Commission was expressly raised. The Commission’s position was that whilst it did not represent, or at least was not, the Commonwealth, those parts of the Commonwealth which should be informed that its submissions in this case involved treaty implications had been informed that this was so. I am dubious about the first proposition in the present context but, in light of the second, consider myself at liberty, if necessary, to consider the legality of Australia’s position.
7. For present purposes, I do not propose to draw a conclusion on this issue. I will, however, assume in Garuda’s favour that its submission is correct and that the application of Pt IV of the TPA to Qantas and Garuda and thereby the imposition of a prohibition by domestic Australian law on what both nations had agreed should occur by way of rate fixing under Art 6(2), is a breach of Australia’s obligations under public international law. I emphasise, so that there can be no doubt, that this is an assumption and not a conclusion.
8. Making that assumption does not, however, assist Garuda. My hands are tied in relation to the meaning of the expression ‘specifically authorised or approved’ in s 51(1)(b) of the TPA by the Full Court’s decision in *Ku-ring-gai*. The question in s 51(1)(a) is concerned with exactly the same expression but, purely viewed as a matter of precedent, I could in theory arrive at a different construction of the same phrase in s 51(1)(a). To do so would, however, contradict the canon of construction which requires that the same expression should be interpreted consistently throughout a section. I could do that, at least in principle, because the context might unavoidably require it. On this view, the context would include Australia’s obligation under the Australia-Indonesia ASA.
9. There would then be a tension between the need to interpret the expression ‘specifically authorised or approved’ consistently throughout s 51(1) and the need, if at all possible, to avoid putting Australia in breach of the Australia-Indonesia ASA. I have come to the conclusion that the latter principle would have to yield in this case to the need to maintain a consistent interpretation of s 51(1) but I have done so principally because of my inability to formulate a construction of the expression ‘specifically authorised or approved’ which would permit due regard to be had to the Australia-Indonesia ASA. In effect, the only way forward on this point would be to apply the dissenting reasoning of Bowen CJ to s 51(1)(a) but this would have a much larger effect than merely solving the inconsistency which arises with the Australia-Indonesia ASA. It would have the effect of permitting s 51(1)(a) to operate even where the Act or regulation in question did not specifically authorise the activity in the same way that s 51(1)(b) did. Although this would solve the problem with the Australia-Indonesia ASA it would give s 51(1)(a) a much narrower operation than s 51(1)(b). This anomaly is, I think, too much to be tolerated even allowing due regard to Australia’s international obligations.
10. For that reason, I conclude that as at 1 October 1974 it was a breach of Pt IV for the two designated carriers to engage in the rate fixing process contemplated by Art 6(2). This conclusion gives rise to a number of consequential problems which should perhaps be briefly noted, some soluble, perhaps some not.
11. The first consequence is that it means that the effect of ss 12 and 13 of the ANA (and ANR regs 255 and 258(1) on the Australia-Indonesia ASA would require compliance with Art 6(2) and, therefore, rate fixing and with it conduct contrary to Pt IV. Having concluded that Pt IV prevails in this contest, some adjustment to the ANA/ANR must be accommodated to give the two statutory schemes a harmonious operation: *Commissioner of Police v Eaton* (2013) 294 ALR 608 at 621 [45], [48]. The appropriate one is that s 13 (and ANR reg 258(1)) did not authorise the Minister to cancel or suspend a licence for breach of an ASA where the conduct constituting the breach was in fact required by Pt IV.
12. A second consequence is potentially more intractable. To the extent that Indonesian domestic law (or the domestic law of any other State with whom Australia has a Bermuda I style ASA) requires, as Australian law does, compliance with the relevant ASA between the two States there is a conflict between Australian domestic law and the domestic law of that other State for one requires what the other forbids. Later in these reasons, however, I conclude that neither the law nor administrative practices of Hong Kong or Indonesia required Air NZ or Garuda to collude on surcharges. This difficulty does not therefore arise for consideration in this case.
13. In any event, I conclude:
14. Part IV of the TPA was not excluded in its entirety by the form of the ANA and ANR as they stood at 1 October 1974; and
15. as at that date the existence of Art 6(2) of the Australia-Indonesia ASA and s 13 of the ANA (and ANR reg 258(1)) did not require or authorise Garuda to breach Pt IV of the TPA and Pt IV applied to any rate fixing conduct engaged in under that Article.

## 3.4 Did the *Air Navigation Act 1920* operate inconsistently with the *Trade Practices Act 1974* in the period 2001-2006?

1. The primary question which arises in this litigation is not concerned, however, with the form of the ANA/ANR as at 1 October 1974. It is instead concerned with that legislative régime as it stood in the period between 2001 and 2006 when the contraventions are alleged to have occurred. Apart from some minor peripheral matters such as relocation and renumbering the ANA, at least in so far as price fixing is concerned was essentially, if not precisely, identical to that which had obtained in 1974. Section 13 was amended by the *Air Navigation Amendment Act 1989* (Cth) s 3 to permit the Secretary to vary the terms of a licence, a power which had previously been lacking. New penalty provisions were inserted into s 12 of the ANA by the *Transport and Communications Legislation Amendment Act (No 2) 1992* (Cth), s 5 for flying without a licence and, in addition, the application of s 12 of the ANA was extended to Australian airlines (curiously this does not appear to have been a feature of the legislation before 1992). Additionally, s 16(1) of the ANA by force of the *Transport and Communications Legislation Amendment Act (No 2) 1992* (Cth) s 10 now imposed on the licence a condition that the owner, operator, hirer or pilot must comply with ‘all applicable laws of the Commonwealth or of a State or Territory’. Contrary to the submissions of the Commission, I do not accept that s 16(1) of the ANA as amended advances matters very far. Part IV of the TPA is either applicable by force of s 51 or it is not. Section 16 of the ANA does not throw any light on what the ‘applicable’ Commonwealth laws are; it just imposes compliance with them as a licence condition with the sole effect being that a breach of such a law would then authorise cancellation or suspension of a licence as well as whatever remedies are provided for by the Commonwealth law in question.
2. Perhaps more significant were the changes made to ANR reg 106A (which, it will be recalled, required lodgement of a tariff by an international airline and which prohibited discounting from that tariff). Regulation 106A was renumbered on 29 March 1999 by the *Air Navigation Amendment Regulations 1998* *(No 1)* (Cth) Sch 3 and became reg 19 but, again, this was not materially different to reg 106A. On 20 December 2000 however, reg 19 was itself amended by the *Air Navigation Amendment Regulations 2000* *(No 3)* (Cth) and was substituted with a new reg 19 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. The prohibition on discounting ceased to be a feature of the regulation. As noted far below at [1247] the Commonwealth formally announced in September 1981 that it would not prosecute that offence.
3. Significantly, under additional ANR reg 19A, if the Secretary did not make a decision under reg 19(1) within seven days of the lodgement of the tariff it was deemed to have been approved by reg 19(4). The practical operation of regs 19 and 19A was one in which airlines were not obliged to lodge a tariff, but, should they choose to do so, the tariff would be approved if no decision was taken within seven days. In any event, any tariff approved had no legal effect on the rates which an airline could charge.
4. Since I have already concluded that reg 106A (and therefore reg 19) was not inconsistent with Pt IV of the TPA these developments are, so it seems to me, of no great moment. Of much greater significance, however, are the amendments to s 51 of the TPA brought about by the *Competition Policy Reform Act 1995* (Cth). This statute (by force of s 15) re-enacted s 51(1) of the TPA by altering its layout. Subsection (1)(a) and (1)(b) as amended read:

**51 Exceptions**

(1) In deciding whether a person has contravened this Part, the following must be disregarded:

(a) anything specified in, and specifically authorised by:

(i) an Act (not including an Act relating to patents, trade marks, designs or copyrights); or

(ii) regulations made under such an Act;

(b) anything done in a State, if the thing is specified in, and specifically authorised by:

(i) an Act passed by the Parliament of that State; or

(ii) regulations made under such an Act;

1. This amendment to s 51(1) had no effect upon its meaning. This is not so, however, in the case of ss 51(1A) and 51(1C). These were in the following terms:

**51 Exceptions**

(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;

…

[emphasis in original]

1. These amendments are antithetical to Garuda’s basic contention. I have already concluded that the ANA/ANR régime as at 1 October 1974 did not specifically authorise or approve rate fixing behaviour by Garuda or Qantas in consequence of the form that s 51 of the TPA had in 1974. With the insertion of the new s 51(1C) into the TPA by the *Competition Policy Reform Act 1995* (Cth) Garuda’s argument becomes even more difficult for on no view did the ANA/ANR régime expressly refer to the TPA. Further, although I have already rejected Garuda’s argument based upon reg 106A, its complete deletion from the legislative régime by 2001 makes Garuda’s arguments in that regard unsustainable.
2. Garuda also submitted that it was required to engage in rate fixing under Art 6(2) of the Australia-Indonesia ASA by the very terms of its licence. This was an unattractive submission in so far as the legislative régime stood in 1974 for, as I have already indicated at [183], the presence of such a licence condition could not have been a specific authorisation or approval under the ANA/ANR. After the passage of the new s 51(1C) in 1995, the same problem existed now further exacerbated not only by the fact that the ANA/ANR did not expressly refer to the TPA but also by the fact, leaving that problem to one side, that Garuda’s licence did not refer to it either.
3. That conclusion makes it unnecessary for me to determine whether, in fact, Garuda’s licence did contain such a condition. In the interest of completeness, however, I will state my conclusion that I do not think that it did. The only licence placed before the Court by Garuda (or the Commission) was one dated 12 December 1994. It was in the following terms:

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 curious will note the reference to ‘a designated airline’ of Indonesia in the second line of the licence which is consistent with the Exchange of Notes done on 16 August 1986 which permitted (or perhaps more accurately assumed) that each State could designate more than one airline.
2. The textual question which arises is whether the licence is reciting that it has been issued in accordance with the Australia-Indonesia ASA or whether, instead, the licence to operate conferred by it is one which is subject to a condition that the scheduled air services to which it refers must be carried out in accordance with that ASA.
3. Garuda stressed the prominence of the licence condition and both parties traded blows on what might properly be gleaned from the apparent absence of a numbered paragraph 1. I do not think very much is to be obtained from such matters. The difficulty is that the licensing condition is ambiguous. It is not clear whether the words ‘in accordance with’ govern the phrase ‘is hereby licensed’ or the phrase ‘to operate scheduled international air services’. The actual location of this ambiguous expression on the page constituting the licence does not seem to me to affect, one way or the other, the resolution of its ambiguity and I do not think that the absence of paragraph number 1 tells one much either.
4. That said, three matters incline me to the view that the proper construction of the licence is that the words ‘in accordance with’ refer to the issue of the licence rather than a condition imposed by it upon carriage. The first is that the existence of an ASA is the sine qua non for the issue of a licence. The power of the Director-General to issue a licence is constrained by the necessity for there to be a relevant ASA or Air Transit Agreement (see ANA s 12(2)). This may suggest that it would be natural for a licence to recite one of the jurisdictional prerequisites for its own existence.
5. Secondly, the imposition by the Director-General of a requirement that a licence holder comply with the terms of the ASA is unnecessary for s 13(b) of the ANA already requires the relevant airline to comply with the ASA upon pain of forfeiture of the licence. I do not mean to suggest, thereby, that the power to impose conditions did not extend to the imposition of a condition requiring compliance with the ASA (although that may be arguable). Rather, the point is that when construing an ambiguous part of the licence it is relevant to observe that one of the proposed readings appears to involve a redundant obligation.
6. Thirdly, the terms of the licence contain further redundancies if the opening words are read as imposing a condition upon Garuda’s operations that it comply, as a licence condition, with the terms of the agreement. In particular, paragraph two would then unnecessarily require compliance with other aspects of the same agreement.
7. In those circumstances, I conclude that Pt IV of the TPA applied to Garuda’s conduct between 2001 and 2006 and neither the terms of the ANA/ANR at that time nor the terms upon which Garuda’s licence was issued to it, brought about any different result.
8. Part of Garuda’s response to this form of the Commission’s argument was to retreat to the proposition that ss 51(1)(a) and 51(1C) of the TPA did not, on the passage of the *Competition Reform Act 1995* (Cth), bring international civil aviation within the purview of Pt IV because Pt IV, at least as originally enacted, had never extended to the regulation of international civil aviation in the first place. It was said that s 51(1C) could not alter what had been the original meaning of Pt IV of the TPA in 1974. It was, in that sense, irrelevant.
9. It will follow from my conclusion that Pt IV did apply to international civil aviation in 1974 that the premise upon which this argument rests fails. In any event, it seems to me that even if that were not so, s 51(1C) must have been ambulatory in effect and, if necessary, had the effect of expanding in 1995 Pt IV’s operation into fresh fields. Regardless, I have concluded that the fields were not fresh.
10. Garuda’s submission was principally directed to Art 6(2) of the Australia-Indonesia ASA. A similar argument is, at least theoretically available, for Garuda’s and Air NZ’s direct flights from Hong Kong which were governed by the terms of the *Agreement between the Government of the Commonwealth of Australia and the Government of Hong Kong concerning Air Services*, signed 15 September 1993, [1993] ATS 28 (entered into force 15 September 1993) (‘the Australia-Hong Kong ASA’). This agreement, at least in relation to this topic, did not feature heavily in this litigation. Article 7(3) of the Australia-Hong Kong ASA provided as follows:

The tariffs referred to in paragraph (2) of this Article may be agreed by the designated airlines of the Contracting Parties seeking approval of the tariffs, which may consult other airlines operating over the whole or part of the same route before proposing such tariffs. However, a designated airline shall not be precluded from proposing, nor the aeronautical authorities of the Contracting Parties from approving, any tariff if that airline shall have failed to obtain the agreement of the other designated airlines to such tariff, or because no other designated airline is operating on the same route. Reference in this and the preceding paragraph to “the same route” means the route operated, not the specified route.

1. Article 7(3) did not invoke IATA rate fixing machinery but it did authorise, if not require, agreement between designated airlines by the seeking of tariff approval. However, as the discussion above indicates, the outcome of any collision between the terms of an ASA to which Australia is party and Pt IV in the period 2001 to 2006 is that the latter prevails. Even assuming that Art 7(3) of the Australia-Hong Kong ASA rises as high in its effect as Art 6(2) of the Australia-Indonesia ASA (a doubtful proposition) this has no impact on the outcome of that question. A similar conclusion attends the position of the Hong Kong-Indonesia ASA *Agreement between the Government of Hong Kong and the Government of the Republic of Indonesia Concerning Air Services*, signed 6 June 1997, [1981] I-33911 (entered into force 27 June 1997) which Garuda invoked for flights between Hong Kong and Indonesia. I reject also, for the same reasons, Air NZ’s parallel arguments about its position in Hong Kong.

## 3.5 The application of the *Trade Practices Act 1974* to bundles of contractual rights

1. Garuda submitted that it did not provide the service of flying cargo (or presumably passengers) from one location to another. Instead the service provided by it to its customers was said to be the bundle of contractual rights which arose on the ‘cutting’ of an AWB. The price fixing alleged against Garuda was the fixing of a price for a service, whereas, in fact what had occurred (if it was ultimately established) was price fixing in relation to a contractual right. Put another way, what the customers were buying were contractual rights relating to a service, i.e. carriage. Section 45A was only concerned with price fixing for services and not in relation to contractual rights.
2. The basis of Garuda’s startling submission that it did not provide the service of flying cargo from one locale to another was the High Court’s decision in *Commissioner of Taxation v Qantas Airways Ltd* (2012) 247 CLR 286. In that case it was held that Qantas did not supply the service of flying passengers from one location to another on aircraft but instead only the service of providing a bundle of contractual rights on the purchase of a ticket (for the purposes of the GST legislation). It is very unlikely that the High Court’s reasoning applies outside the context of GST legislation. In any event, the argument fails even on its own terms. A supply of contractual rights is a supply of a service under the TPA for ‘services’ in s 4 includes ‘rights’.
3. I turn then to the airlines’ contention that the TPA did not apply due to an absence of a market in Australia.

# 4 WAS THERE A MARKET IN AUSTRALIA?

1. In order to succeed the Commission must show that fixing the levels of the various surcharges had the purpose, or was likely to have the effect, of substantially lessening competition in a ‘market in Australia’: s 4E. The airlines contended that whatever else might be said, the markets for airborne cargo out of Hong Kong, Singapore and Indonesia were not ‘in Australia’. I propose for now to put the position of Singapore and Indonesia to one side and to return to them only after I have dealt fully with the position of Hong Kong.
2. The operation of s 4E in respect of markets not wholly located in Australia has not yet been authoritatively settled in this country. A quartet of interlocutory determinations has established that a market need not be wholly in Australia to be ‘in Australia’ but none of these have involved any application of s 4E to facts found at trial: see *Riverstone Computer Services Pty Limited v IBM Global Financing Australia Ltd* [2002] FCA 1608 at [21] per Hill J (discovery); *Australian Competition and Consumer Commission v Qantas Airways Limited* (2008) 253 ALR 89; [2008] FCA 1976 at [33] to [36] per Lindgren J (penalties); *Emirates v Australian Competition and Consumer Commission* (2009) 255 ALR 35; [2009] FCA 312 at [55], [74] per Middleton J (s 155 notice); *Auskay International Manufacturing and Trade Pty Ltd v Qantas Airways Limited* (2010) 188 FCR 351 at [33] to [47] per Jessup J, Moore and Dodds-Streeton JJ agreeing (pleadings). The explanatory memorandum which accompanied the Trade Practices Bill 1974 (Cth) on its introduction suggested that, as with s 5, the expression ‘market in Australia’ controlled the extraterritorial reach of the Act: see paragraph [87]. The airlines submitted that the nature of s 4E as a territorial limitation might require that the words ‘market’ be given a confined construction in s 4E on the grounds that this was necessary to observe the requirements of international comity. Without such a reading, so it was put, Pt IV might well interfere with the sovereign powers of Hong Kong by penalising conduct which was either lawful or required under its domestic laws. The conclusion I have reached is that that orthodox approach required by the current state of Commonwealth law requires the rejection of the Commission’s case so that this question does not arise.
3. The initial question then is one of market definition. A market is an area of close competition between firms or the field of rivalry between them. What is in this field? In this field or area substitution in response to competitive pressures occurs. 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. To give an example, an increase in the price of Coco Pops may cause some consumers to switch to other types of breakfast cereal such as muesli but none of them, aside from a small class of outlying eccentrics, is likely to switch to fish fingers. Breakfast cereals are certainly in one market and fish fingers in another (although both markets may be distinct sub-markets in a larger market, that for groceries). Whether the market in question is limited to breakfast cereals depends upon whether consumers might respond by switching to something else confronted with price or quality changes in cereals. Maybe instead there is a breakfast food market consisting of cereals, bacon, eggs and sausages but whether this is so will depend upon whether these are reasonable substitutes. The boundaries of the area or field are marked, therefore, by the limits of substitution. This concept may be dressed up in various lingual variations none of which differ as a matter of substance: see, for e.g., *Re Queensland Co-operative Milling Association Ltd* (1976) 8 ALR 481 (‘*QCMA’*) at 190; *Queensland Wire Industries Pty Ltd v Broken Hill Proprietary Company Ltd* (1989) 167 CLR 177 at 195-196 per Deane J and 199 per Dawson J; *Re Fortescue Metals Group Ltd* (2010) 271 ALR 256 at 419.
4. The concept of substitution is basic to the process of market definition and ‘market’ is defined in s 4E in a way which confirms this. That definition shows that in so far as Australian law is concerned it is relevant to consider not only demand side substitution (such as occurs when the consumer above switches from Coco Pops to muesli) but also supply side substitution. This phenomenon occurs when firms not presently providing the goods or services in question find it profitable to enter the field of rivalry and provide them. A price increase or quality decrease in Coco Pops may tempt another manufacturer of rice crispies into coating them with cocoa and setting them up as a Coco Pop alternative. Put more formally, products are substitutes in demand if purchasers will switch between them in response to a change in price, output or the cumulative package of goods and/or services offered. Products are substitutes in supply if other producers of those products will use their existing capacity to switch between production of those products (either generally or at specific locations) in response to competitors’ changes in price or output or if other firms can competitively enter the market (which involves an assessment of the relevant barriers to entry): see *Re Tooth & Company Limited and Tooheys Limited* (1979) 39 FLR 1 at 38 per Keely J and Shipton and Brunt MM.
5. How strong must the substitution effect be? It must be ‘strong’ which is alternatively expressed as requiring ‘close competition’. Questions of degree and evaluation are unavoidably involved. Underlying these notions is the idea that the existence of substitutes operates to restrain the market power of those who are in the market: the price of Coco Pops is constrained by the price of Rice Bubbles and Corn Flakes; it is not constrained by the price of fish fingers or bicycle pumps. Whether the price of Coco Pops is also constrained by the price of sausages will involve assessments of matters of degree. Further, the price of Coco Pops is also constrained by the ever-present risk of opportunistic predatory behaviour by other cereal manufacturers. All of those questions are ones of fact.
6. Part IV of the TPA is concerned with the promotion of competition: see, for example, TPA s 2 and *Moral Besser Masonry Ltd v Australian Competition and Consumer Commission* (2003) 215 CLR 374 at 391. The interests of competition and consumers will often coincide but not everything which is bad for consumers is necessarily anticompetitive nor is the converse invariably true. Although barriers to entry restrict competition, not all such barriers are bad for consumers. Consumers would not be aided by allowing anyone to practice surgery although prices would probably drop. So too, although consumers are disinclined to favour increased costs, a mere price rise is not by itself a sign of anticompetitive behaviour or market inefficiency.
7. The purpose of market definition is to provide ‘a tool to facilitate a proper orientation for an analysis of market power’ see Professor Maureen Brunt, ‘Market Definition Issues in Australian and New Zealand Trade Practices Litigation’ (1990) 18 *Australian Business Law Review* 86. Usually it is approached, as I will approach it, by seeking to ascertain its product, geographical and functional ‘dimensions’. These terms are not mentioned in the TPA but economists, tribunals, regulators and judges all appear to accept them as useful conceptual tools for analysing markets and market power.
8. 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.
9. Three economists were called to assist in the resolution of these and related issues: Professor Church, Professor Gilbert and Dr Williams. They each agreed that market definition begins by identifying a product and location based on the alleged anticompetitive conduct although Dr Williams thought some other matters needed to be attended to before that step was taken. Dr Williams thought it necessary first to identify a putative set of activities and then to identify the material constraints on those activities.
10. The basic difference in these approaches is that Dr Williams’ methodology brings to the front of the debate the possibility of downstream switching behaviour by importers into Australia whereas this was thought by Professors Church and Gilbert properly to belong in a functional analysis. Since I propose to examine that issue I see little profit in working out the taxonomic issue of where the enquiry properly belongs. It is useful to begin with the product dimension.

## 4.1 The product dimension

1. The expert witnesses agreed that the product dimension of the market identifies competing products, that is, products which are reasonably good substitutes. In that regard, and consistently with the authorities in this Court, each expert thought that the hypothetical monopolist test (‘HMT’) was an accepted methodology for market definition. Through the lens of the HMT the relevant product market was generally the smallest collection of products or services such that a hypothetical monopolist over those products would find it profit maximising to impose a small but significant and non-transitory increase in price (a ‘SSNIP’) on at least one of the products or services.
2. The appropriate place to start then is with the identification of the relevant product dimension using, if necessary, a SSNIP to help clarify the situation. One should put aside at the outset the debate between the parties as to whether the airlines provided ‘air cargo services’ or ‘air freight services’. The difference between the parties in this terminological battle related to the identity of the persons seeking the service. I resolve that issue a little later in this section, concluding that the customers were principally freight forwarders but that there were also large shippers who had substantive relations with the airlines. Since I do not think a terminological battle adds much enlightenment to the debate once that factual finding is made, I will use the expressions interchangeably and as connoting no difference.
3. The remaining and substantive debate between the Commission and the airlines was fourfold. The questions were:
4. *What were the relevant routes?* The Commission contended that there was a market for airfreight services from Hong Kong to ports outside Hong Kong, that is, a single market for all cargo flights originating from Hong Kong to anywhere in the world (including Australia). Alternatively, it submitted that there was a market for air cargo services from Hong Kong to anywhere in Australia. Finally it contended for individual markets from Hong Kong to individual ports in Australia. The airlines saw the relevant markets as being route specific;
5. *Was mail included in the relevant markets?* The Commission argued, but the airlines denied, that the relevant markets included the carriage by air of mail;
6. *Were chartered flights included in the relevant markets?* The Commission submitted that the relevant market included specially chartered flights in addition to regular scheduled flights; and
7. *Was the use of integrators to be included in the relevant markets?* The Commission submitted that the services provided by integrators were also in the relevant market.
8. It is convenient to deal with these in the order set out above.

### 4.1.1 What were the relevant routes?

1. The Commission’s primary contention was that there was a Hong Kong originated market which described routes over which air freight services were supplied and acquired between Hong Kong and ports in other countries (including ports in Australia) both by direct routes and by indirect routes via intermediate ports. As will be seen, the fuel surcharges themselves were agreed between the airlines in relation to all destinations outside Hong Kong so, in a sense, the Hong Kong originated market is a sensible place to begin the process of analysing the product dimension of the market.
2. The airlines emphasised that on the demand side it was difficult to see that anyone who wanted to fly cargo from Hong Kong to London would be satisfied by freight services from Hong Kong to say, Buenos Aires, a point not without some force. The Commission submitted that this criticism paid insufficient attention to supply side substitution. It particularly drew my attention (more than once) to the Full Court’s decision in *Auskay International Manufacturing & Trade Pty Ltd v Qantas Airways Ltd* (2010) 188 FCR 351. In that case, which was concerned with the adequacy of a pleading, the primary judge struck out a pleading of a global market for airfreight services. The airlines specifically made the submission in that case that the market could not be global because customers would not be satisfied with carriage to any different destination to the one each had initially wanted. The Full Court concluded that the primary judge had erred in accepting that proposition. The reasons of the Court were given by Jessup J in these terms (367 [44]-[45]):

44 The same reasoning may be applied to the transport of goods by air. A customer would never accept the transport of his or her goods from Melbourne to Tokyo as a substitute for transporting them from Melbourne to Boston. But, if there were suppliers who would, given a sufficient price signal, devote their resources to the former in preference to the latter, those suppliers should be regarded as doing business in the same market. From the supply side perspective, the Melbourne-Tokyo service should be regarded as a substitute for the Melbourne-Boston service. And the same conclusion would apply with respect to the example given by the primary judge, namely, the potential for a Hong Kong to Moscow service to be a substitute for a Dubai to Sydney service. By “service” here I use, of course, the economic rather than the operational sense of the word: the service is the product supplied by the carrier, not merely the identification of the route followed by a particular aircraft.

45 For the above reasons, I consider that his Honour was in error in two related respects in the approach he took to the applicant’s allegation that there was a global market. His Honour ought not to have treated the routes followed by aircraft as effectively defining the service which was supplied by the respondents; and he ought to have recognised that the applicant’s factual case was that there was global supply-side substitutability for the provision of airfreight services, however improbable that circumstance may appear at this interlocutory stage of the proceeding.

1. Earlier in his Honour’s reasons Jessup J had identified an error in the primary judge’s treatment of routes as constituting a market saying (at 365 [39]):

39 I agree with his Honour that para 34 comprehends “a myriad of routes”, but I consider, with respect, that his Honour’s next proposition — that all of those routes could not “possibly be said to form part of the same market” — answers the wrong question. The question was not whether different routes could form part of the same market, but whether different carriers might supply, or seek to supply, any one service. The way it is put in para 34(a) of the Fourth Amended Statement of Claim is that the different carriers could supply the service of transporting airfreight between any one hub and any other hub. It is as clear as may be from the pleading that their ability to do so does not depend on them operating aircraft over the route which runs directly between those hubs. When understood in this sense, what his Honour described as a “myriad of routes” is no more than an operational circumstance by which any two or more carriers might compete to provide the same service. It does not, with respect, imply the existence of “thousands of discrete markets”.

1. The Commission is, of course, correct to draw attention to supply side substitution but the evidence does not permit me to make any findings about it. My attention was not drawn to any particular route for which such substitution was said to be possible. It was not, for example, suggested that I should examine the Hong Kong to London route to see if airlines providing that service could also provide services along the Hong Kong to Sydney route.
2. At an instinctive level it is perhaps not too difficult to imagine that an airline flying, for example, from Hong Kong to Denpasar might be able to provide the service of flying cargo from Hong Kong to Sydney or perhaps from Hong Kong to Los Angeles. But this vague impression does not provide a secure basis for finding that firms flying cargo from Hong Kong to any one destination outside of Hong Kong could readily switch to providing the service of flying cargo from Hong Kong to any other destination outside of Hong Kong. Not the least of the problems facing such a contention is the fact, agreed between the parties, that it is predominantly passenger traffic and not cargo volume which dictates the routes selected by airlines (see [81]). The ability to switch to providing a service on a particular route is for bellyhold airlines and, to an extent, combination airlines therefore constrained by passenger volumes and not pricing considerations in the cargo market (see Section 2.8).
3. Further, it will matter considerably where the origin or destination airports fit into the putative supply side entrant’s network (see Section 2.8). Qantas may fly to London but opening a London – New York service for it is by no means a plausible network decision.
4. Then there are other unexplored barriers to entry such as the ability of the proposed supply side entrant to obtain the regulatory approvals necessary from the relevant States. As discussed in Section 2.5.3 any airline opening up a new route needs to obtain regulatory approval. At least in Australia, that approval process involves an assessment of the public interest. There are significant difficulties for entrants on some routes; cf. the Sydney to Los Angeles route where trade issues constrain the number of airlines entitled to fly. Further, there are other issues such as the ability of the proposed supply side entrant to obtain landing slots at the airports in question (see Section 2.7) and also issues about airport infrastructure. I do not suggest that any of these have a particular answer. The point, rather, is that before one could say anything meaningful about supply side substitutes one would need to gauge these effects. This evidential deficiency is not, with respect to the Commission, addressed by repeated incantations of *Auskay.* Nor is the absence of evidence about these matters cured by suggesting that air transport markets should be defined by aggregating routes operated on a continent-to-continent basis. No doubt this was done by the European Commission in *Case No COMP/M.5141 – KLM/Martinair* (European Commission decision of 17 December 2008) at [35]-[39] but what was before the Commission was not before me. Here the problem is not a lack of theoretical possibilities; it is an absence of any attempt to address how these factors would have affected the plausibility of a supply side entrant.
5. The next market alleged was more focussed and consisted of those firms transporting cargo by air ex Hong Kong into Australian airports.
6. The evidence does not satisfy me that freight forwarders or other participants regarded flights from Hong Kong to one city in Australia to be substitutable for flights to another city in Australia. In a vacuum it is difficult to see that a consignee or freight forwarder would be satisfied with having goods shipped to Perth which were intended for Sydney. In order to assess this properly, however, it would be necessary to know what transport options were available between the various airports in Australia and their relative pricing structures.
7. There was evidence that on occasion the airlines themselves would transport cargo by truck between Melbourne and Sydney, Melbourne and Adelaide, and Sydney and Brisbane. However, these trucking services were provided as an aspect of the air service which each airline itself had provided. In order to be satisfied that a service provided from Hong Kong to Melbourne was, or could be, a reasonable substitute for a service provided from Hong Kong to Sydney I would need to know something about the costs of shipping cargo between Melbourne and Sydney. I was taken to no evidence about this beyond the airlines’ own trucking arrangements which, for the reason I have given, I do not think is material.
8. In those circumstances, I cannot conclude that there was demand side substitutability. Still less does the evidence establish supply side substitutability. Here, following *Auskay*, the question must be whether airlines flying on individual routes from Hong Kong to a given port in Australia could provide the service of flying from Hong Kong to a different port in Australia. Again there is simply no way on the evidence I could assess this. I do not know the proposed airlines, their location, the regulatory constraints on their entry in the market or the landing slot situation. This assessment would also need to include an analysis with respect to the operation of the demand of passenger flights and its impact on cargo. Accordingly, I cannot find any supply side substitutability. In those circumstances, I cannot accept the existence of a Hong Kong to Australia market.
9. I do, however, accept that there could be individual markets from Hong Kong to individual airports in Australia. Customers may switch between the airlines providing services on any given route. I am far from clear which ports in Australia were involved but I am prepared to assume that they include at least Sydney, Melbourne, Perth and Brisbane. Further, given the way the cargo market is arranged I do not have any difficulty in accepting that between these ports indirect routes were reasonable substitutes for direct routes.

### 4.1.2 Was mail included in the relevant markets?

1. The Commission contended that the relevant product included the carriage of mail by air. This was denied by the airlines. The first question which arises is whether the service of flying mail from Hong Kong to any given port in Australia is a close substitute for the service of flying cargo on the same route (i.e. a demand side analysis). My attention was not drawn to any information either about the kinds of items which might be sent by mail or the cost of doing so. The airlines submitted that from the consumer’s perspective they were not substitutable services. Certainly if the service of flying mail consists only of flying envelopes this may well be true. There was no attempt in any of the parties’ submissions to explain what the mail service was although the Commission did refer me to a postal agreement between Garuda and the International Postal provider (PT POS Indonesia) dated 28 April 2006. That agreement defines that expression ‘postal item’ to mean as follows:

Is a postal satchel containing a collection of postal letters and/or goods, excluding dangerous goods, perishable goods and live animals, of a certain shape and size with a maximum weight of 30 kgs which is properly closed and sealed (sealed), accompanied by postal item (postal item) shipping advice (carrier register), and transferred by POS to Garuda to be transported and transferred to an agreed upon place.

1. This certainly seems to contemplate that categories of goods up to 30 kilos could be carried through the postal system. Much more than that from the agreement I cannot tell.
2. Mr Gregg of Air NZ also gave evidence explaining the materially different ways in which mail was handled by airlines in comparison to cargo. I accept this aspect of his evidence.
3. None of this tells one very much about the question of substitutability. The top five categories of imports from Hong Kong into Australia in the period 2004 to 2006 were:

|  |  |
| --- | --- |
| Motors, appliances, radio, TV | 22.98% |
| Engines and machines | 13.32% |
| Clothes and others | 9.35% |
| Clothes – knitted | 7.71% |
| Books, paper, art | 6.51% |

1. In order to assess substitutability one would need to have some idea as to the extent to which items of that kind could be put through the postal system. It is, for example, far from obvious to me that one could send a television by post although books and paper obviously could be sent in this fashion. What is not obvious is whether items which could obviously be sent via post as a matter of practicality, would in fact be sent by post in the context of a SSNIP.
2. The airlines submitted that the freight forwarders had no access to the mail system (that access being limited to national postal providers). That argument assumes that the relevant functional aspects of the market include only the freight forwarders. It is possible (I do not say correct) to take a broader view and to ask whether consignors might choose to send items by post rather than by airfreight if confronted by an unacceptable increase in freight rates. If one took that view I am certainly able to grasp that some consignors might switch their sending practices. Persons sending a small fluffy toy from Hong Kong to Sydney to their grandchild might find, at a particular price point, that it was cheaper to put the item into the post. But that observation conceals so many unknown factors that it lacks any useful content from my perspective.
3. I do not know what the cost of postage rates are (or were at the relevant time). I do not know who the consignors were. Nor what their particular importation needs were. I do not know whether the postal system will accept significant shippings of consumer items (in terms of load). Assuming that the 22.98% of Hong Kong to Australia air imports consisting of motors, appliances, radios and TVs was mostly destined for wholesale markets, I do not know whether it could plausibly be put through the postal system. I do not know what the insurance arrangements might be on such items if sent by post although I am sure that the question of insurance is very important in the business of importing goods into Australia.
4. These uncertainties are only the ones which emerge on a brief examination of the problem. In light of just those problems, I cannot be satisfied that from the demand side the service of moving mail from Hong Kong to an Australian port was a close substitute for air freight between those places.
5. The Commission’s answer to this was, once more, that it painted an incomplete picture since it failed to give attention to supply side substitution. It was said that in terms of supply, capacity or space mail was substitutable for other types of cargo. That of course is not the question. The issue is not whether the capacity or space to carry mail is substitutable with cargo, but rather, whether those providing the service of carrying mail can operate to hinder a SSNIP in the cargo market either by offering up mail services in direct competition with air cargo or alternatively making some modification to the mail service allowing it to compete directly with air freight. Mr Gregg gave evidence that mail was an important source of revenue for Air NZ and that it ‘could’ compete with other kinds of cargo. But, for the same reason, this does not seem to me to be the correct question.
6. Once that is appreciated, the Commission’s factual contention that cargo and mail competed for space in the holds of planes seems to me to be beside the point. In a sense passengers and mail compete for space on a plane but it would be more than odd to suggest that they were in the same market.
7. Once the correct supply side substitution question is posed, i.e. could mail carriers restrain a SSNIP in the cargo market, the same difficulties which arose on the demand side analysis re-emerge. Whether mail carriers could compete with cargo carriers (leaving to one side the conceptual confusion that these are often likely to be the same entities) depends on the extent to which consumers would be willing to use the postal system, a question which has no answer on the evidence before me. Whether mail carriers could produce some new mail related service which might operate as a competitor in the cargo market is an imponderable which cannot be answered on the state of the evidence before me.
8. I reject the proposition that mail services are part of the cargo market.

### 4.1.3 Were chartered flights included in the relevant markets?

1. The Commission submitted that charter flights should be seen as being a close substitute for air cargo services. I accept that for consignors who were moving enough cargo to fill an entire plane chartering a flight might well be a rational response in the face of a SSNIP in the cargo market, but, with respect to the Commission, I fail to see how it was much of an option for consignors who had less than a plane load of cargo.
2. Mr Cleary’s evidence was that Qantas was able quickly and without substantial investment to provide charter services using its freighters. He instanced two examples. One was moving V8 supercars and the other was Toshiba Australia who had needed to move a large consignment.
3. I do not think that this evidence goes close to showing that the air cargo market included those firms providing charter services. In order to answer that question one would need to know if the charter flight providers could limit the ability of the cargo carriers to impose a SSNIP in the cargo market. I do not think that highly unusual chattels such as V8 supercars are the kinds of chattels which tell one anything about the air cargo market – cars, perhaps unsurprisingly, were not on the list of the top ten imports by air from Hong Kong to Australia in the period of 2004 to 2006. Normally cars are transported by sea. I accept that a plane load of cargo from Toshiba Australia tells one that a well-known electronics firm had sufficient cargo transportation needs to use a whole plane but that does not come close to telling me what I would need to know to answer the question which arises. There are so many types of cargo involved in this market that it is, in my opinion, not even speculation to point to the matters which the Commission relies upon. I conclude that chartered flight services are not part of the cargo market.

### 4.1.4 Was the use of integrators included in the relevant markets?

1. Integrators provide door to door services (amongst other services) generally using their own aircraft. In a sense they are a form of vertical integration between an airline and a freight forwarder. In the period 2002 to 2006 international integrators included Federal Express, TNT, UPS and DHL. The evidence of Mr Nelson was that integrators typically handled express cargo for satchels and small packages. There may be an interesting question as to whether the services of integrators are substitutable with those provided by airlines in terms of cargo. This question does not, however, arise in Hong Kong because the evidence showed that integrators did not operate on routes between Hong Kong and Australia in the period 2002 to 2006 but purchased cargo services from other airlines such as Air NZ.

### 4.1.5 Conclusions on product dimension

1. 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.

## 4.2 Geographical dimension

1. As foreshadowed above it is useful now to explain the service provided by the airlines, which had a number of features. In essence there were four elements:

### 4.2.1 Transport services

1. 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 (i.e. directly from origin to destination) or often enough indirect (via intermediate ports).

### 4.2.2 Ground handling services

1. These are provided at the origin and destination airports and any intermediate ports where the cargo is unloaded. They include getting the cargo into ULDs 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 (i.e. lobster, flowers and so on).

### 4.2.3 Enquiry services at airport

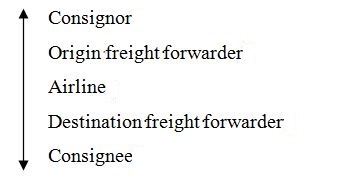
1. The relevant airline also provided services for tracing delayed or lost shipments and dealing with issues arising from damaged cargo at destination. Generally speaking the ground handling services at any particular origin airport were provided by the home airline for that airport. For example Cathay 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.
2. 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 enquiry services were provided principally at the destination airport although their very nature dictated interaction with other elements of each airline’s international network.
3. So far as payment is concerned, there seems little doubt that in the vast majority of cases airlines were paid at the origin airport (i.e. Hong Kong). It was possible, as the witness Mr Sim explained, for a carrier to be paid at destination but this was very rare and I do not propose to include it in the analysis.

### 4.2.4 Identity of market participants

1. There was debate between the parties as to whether the participants in each market included only the airlines and the freight forwarders or also, in some cases, the shippers. The relevance of that debate was the potential influence it could have on geographical issues. There were, in essence, two debates.
2. The first concerned the correct way to consider how persons might choose to switch patronage in the face of a SSNIP in a relevant market. 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.
3. The second issue was raised by the Commission who thought it necessary to identify who made the switching decisions and having done so, to identify where those decisions were made. There were cases, so the Commission submitted, particularly in the case of large importers, where a freight forwarder did not select the airline to be used and instead this was a decision made by the downstream importer. In such cases, so the Commission contended, the switching decision happened where the importer was located which might well be in Australia.
4. The relevance of whether the shippers were market participants turned on the discipline which might be imposed on an upstream market such as air cargo by a downstream market (such as goods importers). One effect that a price increase might well have in the Hong Kong air cargo market could be to cause importers in Australia to stop importing from Hong Kong altogether. An analysis of market power in Hong Kong would therefore necessitate an assessment of that phenomenon which would be Australian in origin. It would be to encourage error not to take into account the location of the source of that effect.
5. The first issue, but perhaps not the second, requires one to identify the market participants. I do so below concluding that the decision as to which airline to use to transport cargo from Hong Kong to Australia was generally made by freight forwarders but that, on some occasions, it could be made by large importers or exporters notwithstanding that they continued to use freight forwarders. 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.
6. 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.
7. I turn then to the correct approach to the functional characterisation of these markets.

## 4.3 The functional dimension

1. Some aspects are not in dispute. Leaving aside extremely rare occurrences (typically those involving live animals) airlines carrying cargo from Hong Kong to Australia generally dealt directly only with freight forwarders situated in Hong Kong or its nearby environs. The contractual relationship was between the airline and the freight forwarder and it was they which were the parties to the air waybill whose terms governed the carriage of the cargo.
2. The market involved, however, is a transportation market of goods many of which were destined for sale in other markets. Those goods needed to move from a place of manufacture to a place of consumption and, insofar as this involved moving between non-contiguous states (such as Hong Kong and Australia) this was likely to involve the use of air cargo services. But the carriage of goods from one state to another is more complex than mere transportation. Involved also are activities such as customs clearing, cargo preparation and transportation to the airport from the place of pickup. Ancillary to services of that kind are other services such as warehousing and bond storage.
3. Whilst integrators provide all of these services and air transport as well, many airlines have found it convenient to allow others to provide these kinds of ancillary services and to limit themselves to the essential transportation aspect of the business. It is attractive to think in familiar terms of a supply chain but perhaps a little misleading as well. The freight forwarders at origin are frequently not the same as the freight forwarders at destination (although they may be). The vertical structure of the industry was thus likely to look like this**:**



1. 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.
2. Quite apart from those matters there is the fact that the nature of the consignors and consignees may vary significantly. At one end, there will be those involved in single instances of exportation or importation involving often enough individual chattels. For these people, their encounter with the international system of air cargo transport is likely to be transitory. At the other end of the spectrum there will be significant exporters and importers of chattels whose very size and the volume of whose cargo signify the presence of substantial economic actors. Although the young man importing into Australia via air a single item of electronics purchased on eBay is a shipper it would, I think, invite serious conceptual confusion to place him in the same category as a large importer of computer equipment bringing in 200 pallets of machines per week.
3. The debate between the parties in relation to the functional dimension of the market was, as I have said, directed towards the issue of whether the ‘shippers’ were market participants. As I have endeavoured to show, the class of shippers is very disparate.
4. The Commission’s documentary and testimonial evidence on this issue strongly suggested that airlines, in general, regarded significant importers and exporters both as targets for their marketing activities and also as the ultimate source of business. Many of the airlines produced cargo magazines for the cargo trade and a cursory examination of these makes clear that the larger shippers were regarded by airlines, in general, as objects to be pursued. Further, the internal reporting documents for a number of airlines show that the cargo moving activities of particular shippers were the subject of intense scrutiny. These observations accord with common sense. That the airlines would compete for volumes of cargo directly from large shippers is, with respect, obvious.
5. Air NZ contested this conclusion. It accepted that the Commission’s evidence did suggest that some shippers were market participants but it denied that the Commission’s evidence related to the relevant markets, that is, to routes out of Hong Kong and Singapore to Australia. To make evidence relating to other ports and other routes relevant the Commission would need to prove, so the argument ran, that the competitive conditions in all of the markets upon which the Commission’s evidence touched were the same.
6. The Commission began its submissions by noting that the marketing reports of Air NZ and other airlines showed that they considered themselves to be carrying loads or volumes for particular shippers. The Commission pointed to Singapore Airlines’ (‘SQ’) cargo marketing report for Japan for January 2003. This report contains the statement ‘the bulk of the loads come from Sanyo Ex OSA and, to a lesser extent, Yamaha and Toyota Ex NGO’. This certainly shows that SQ was focussed upon shipper traffic in the business conducted by it out of Japan. I do not think however, that I can reason directly from the state of the Japanese market to the position in the Hong Kong market.
7. The Commission relied upon Air NZ’s cargo monthly report for May 2004 for the Asia Japan region. Interestingly, this report dealt with traffic both out of Hong Kong and Japan. Under the heading ‘Market Demand’ it refers to ‘Sony/Panasonic/Xerox traffic volume increased after golden week holiday (29 Apr to '05 May 04)’. This report does not make clear where this cargo was going. But I can see no reason not to infer from it that Air NZ, at least, was focussed on large shippers in markets including Hong Kong.
8. An internal Cathay Pacific email dated 30 July 2004 has a section headed ‘major shippers activity’ under which it was said ‘Sharp has been shipping over 300 sets of PDP with volume around 330MC to SYD this week’. Under the heading ‘market information’ it goes on to say ‘Toyota has just modified their sales & production plan for 2004 to upward’. The balance of this email shows, however, that it is a report of the Japan station for Cathay and whilst I accept that it shows that that station was closely following the activities of some large shippers I do not think that I can simply translate that state of affairs to Hong Kong, Singapore or Indonesia.
9. On the other hand, the marketing magazines of the airlines – which were directed to multiple markets – do proceed on the basis that regardless of origin port the airlines were focussed on shipper activity. Thus, in the January to June 2005 edition of the SQ Air Cargo Magazine (entitled ‘the Megabeat’) there was an article relating to the combined efforts of ‘Lee Fish Europe’ (a significant importer of fresh fish into the European market) and SQ’s cargo line.
10. The article is illuminating. Having set out the significant needs of Lee Fish Europe for fresh seafood of high quality sourced from the Pacific rim (as well as the blue waters of the Maldives and Sri Lanka) and the speed with which this catch must be transported to the tables of Europe it goes on to say:

Working in such a challenging market, Lee Fish recognizes the need to partner an airline which could ensure capacity is available on a regular basis and which would have total visibility of the product that is being carried out of its overseas markets. In this respect, SIA Cargo is proud to be Lee Fish’s partner.

1. Now it is true that this article does not speak directly to the various markets out of Hong Kong and into Australia. But it does suggest that SQ regarded itself as partnering with at least one shipper and further that this partnership was worth publicising in a marketing magazine. A subpoena issued to SQ elicited documents which showed that the Megabeat Magazine had been distributed worldwide to its managers. I am not sure that this necessarily means that it was distributed to shippers themselves. But it does show that partnering with shippers was not at all unheard of throughout SQs worldwide network.
2. The Commission relied upon a document entitled ‘South East Asia 1st Quarter 2006 Sales Plan Report’. It is not clear whose document this is. It bears a ‘KAL’ discovery number which suggests that it may have originated from Korean Airlines. The Commission relied upon a section under the hearing ‘KULSF’. I do not know what this means, although it may refer to Kuala Lumpur. Whichever airline generated the report it certainly shows that airline to be interested in shipper activities:

Major shippers namely Flextronics, Western Digital, Freescale and Canon have projected stable traffic during Jan and Feb.

1. There are many similar references throughout the document.
2. Again, whilst I accept that this shows an interest on the relevant airline’s part in the activities of shippers, I am not persuaded I should simply assume equivalent interest in different markets.
3. Oral testimony given the 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.
4. I was taken to many marketing reports from a number of airlines. These are not written in a way which confines their contents to individual routes but instead they are based on area wide analysis. For example, in Air NZ’s report for July 2002 there is a reference to ‘good demand of Sony SYD and ‘Xerox new products for AKL’. I am not going to set all of these out although a list of them appears in footnotes 246 to 251 of the Commission’s closing submissions. To my mind these show that the marketing operations of airlines in the Asian market were focussed in large part on the activities of large shippers who were perceived to be the ultimate source of demand.
5. Ms Goh and Mr Gregg were anxious in their oral evidence to deny any direct contact with the shippers. When pressed on how the marketing reports came, therefore, to include such detailed information about the shippers Ms Goh intimated that the information had come from a freight forwarder. This does not seem to be very likely and Ms Goh could not recall how she came to be able to report the figures to head office.
6. In any event, whether the airlines had direct contact with shippers is really beside the point. The real question is whether airlines perceived shippers to make decisions about which airline they would use or whether that decision making process was confined in its entirety to freight forwarders. I do not accept that all large shippers were content to leave the decision about which airline to use to the freight forwarders. I can see no reason why a firm with a lot of cargo to carry would not use the volume of its business to extract a better deal from an airline.
7. In those circumstances, I conclude that across 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 foundation of the market.
8. The Commission also submitted that the evidence showed that particular consignees had demand for the airlines’ services. A very large quantity of documentary evidence was referred to at footnotes 262 to 273 of the Commission’s submissions in chief. This material showed that in the Asia Pacific region there were consignees who were actively considered as a revenue source by the airlines. I did not apprehend that this was really denied as a regional proposition by either of the airlines. Their point, to which I return below, was that one could not reason from that general position to particular statements about the markets out of Hong Kong or Singapore into ports in Australia.
9. Next the Commission submitted that the airlines designed their products according to the demand for particular scheduling, handling and storage requirements of specified shippers. The evidence, on an Asia wide basis, supported this proposition (and it was not submitted to the contrary). So much was apparent, for example, in the marketing reports of the airlines and there were instances of airlines (specifically, British Airways) responding to such requirements.
10. The Commission submitted that certain shippers had particular preferences and were able to influence the choice of airline and flight. It relied upon a very substantial body of documentary evidence located in footnotes 270 to 274 to make good that proposition. It appears to me to do so. Neither Air NZ nor Garuda submitted that this material did not establish what the Commission suggested. Their point was that it was not possible to draw conclusions about the qualities of the Hong Kong to Australia markets or Singapore to Australia markets from this material. I deal with that contention below.
11. Next the Commission submitted that airlines had direct contact and negotiations with shippers regarding price and service. Leaving aside the position of Air NZ this proposition appears straight forward among other airlines such as SQ, Cathay, Qantas and Emirates.
12. A report was prepared for Air NZ by a firm of business consultants, AJ Kearney, on how the airline might improve its position in the cargo market. It is replete with references to Air NZ having direct contact with customers (an expression which the report uses in contradistinction to freight forwarders) and it emphasises in more than one place the three way nature of the relationship between Air NZ, the freight forwarders and the customers. It proceeds on an assumption that Air NZ dealt with customers and suggests ways that this might be better done. In light of this report, the proposition that Air NZ had no contact with customers is quite untenable and I reject it. Ms Goh and Mr Gregg gave oral testimony to the contrary. I reject that evidence as inconsistent with the available contemporaneous documentary material.
13. The Commission submitted that airlines adopted sales and marketing strategies directed to shippers promoting the airfreight services which they offered. The evidence for this was located in footnotes 290 to 304 of the Commission’s submissions in chief. I accept that this proposition is established at the level of the Asian market in general. The contrary was not submitted by either airline.
14. The Commission submitted that airlines entered into tripartite arrangements with freight forwarders and shippers. I accept this. Typically such arrangements referred to specific products and would identify the carrier, the shipper and the freight forwarder. They also often provided for meetings between the airline and shipper and for the shipper to provide to the airline projected tonnages and frequencies. An internal email received by Mr Gregg on 13 May 2003 gives the correct flavour:

The two key exporters have been pushing for price relief for the past month or so … We are confident that the pressure is genuine and both exporters are making serious noises about pulling the product out of the market. This would be extremely serious as once an exporter leaves a market it is difficult for them to re-establish their position at a later date.

1. An internal memorandum from Mr Gregg to a Mr Jellie of 11 March 2003 stated:

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

1. There is a letter from SQ to WDM International dated 28 September 2000 which states:

… we are more than happy to sit down and discuss set contracts/rate with you and your shippers. We are able to lock in said contracts for a 6 or 12 month period however this must be agreed and signed by all parties (including your respective shipper/shippers …

1. I therefore accept the proposition that in the general Asian market tripartite arrangements were entered into between carriers, shippers and freight forwarders.
2. The Commission then submitted that airlines competed with each other for the custom of particular shippers. Thus several internal reports of various airlines referring to losing custom from one shipper to another airline were in the evidence. The Commission referred to extensive documentary evidence in relation to this at footnotes 313 to 315 of its submissions in chief. Apart from disputing that this material was capable of showing anything about the markets which existed between Hong Kong, Singapore, Indonesia and Australia I did not apprehend there to be a dispute about the contention put forward by the submission.
3. The Commission next submitted that it was relevant to a functional analysis that the freight forwarders included terms in their contractual documentation that permitted them to pass through charges such as fuel surcharges. This appears to have been so. It also relied on the fact that freight forwarders were contractually the agents of the shippers. This is a controversial proposition contested by Garuda. I do not think that I need to resolve it as the market issues are to be determined as a matter of economic substance rather than legal form. It is appropriate to describe the freight forwarders as intermediaries having fluctuating control over the cargo whose carriage they arranged.
4. The Commission submitted that the airlines regarded the goods they carried as belonging to the shippers. This is an inevitable consequence of the freight forwarders being intermediaries and, in many ways, is obvious. Air NZ argued that references to the volumes of particular kinds of cargo being carried by it in its monthly report were to be understood as statements about what the freight forwarders were doing. I reject this proposition which, for reasons I have already given, makes no sense.
5. The Commission then submitted that the airlines marketed themselves as dealing directly with the shippers. A large amount of promotional material was put before the Court in footnote 337 to make good that proposition. I accept it.
6. Largely, the airlines did not dispute any of the propositions above which were established by the very large volume of documentation upon which the Commission relied. Rather they submitted that:
7. the competitive forces in the various markets were different;
8. it should not be assumed that functional factors in one market were applicable in others; and
9. accordingly, the Commission had not proved by the above matters that the markets in suit had the qualities which it submitted.
10. Thus Air NZ drew attention to the fact that of the Commission’s five lay market witnesses only one, Mr Cleary of Qantas, had any experience on routes to Australia from Hong Kong or Singapore. Each of the others was involved on other routes. So too a large part of the Commission’s documentary tender related to routes other than the ones whose functional aspects were under consideration.
11. This was of significance because evidence was elicited from Mr Cleary that the competitive conditions faced by Qantas varied between routes. Mr Gregg and Mr Nelson gave similar evidence.
12. I reject this submission. I do so because it is contrary to common sense and to Air NZ’s own documents. 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.
13. I accept that the competitive conditions in the Singapore to Sydney market and the Hong Kong to Taipei market were not necessarily the same. Obvious differences which exist include the different mix of substantial importers in Sydney and Taipei not to mention the difference in what is being exported from Hong Kong and Singapore. Further, because the most significant driver in routing decisions is passenger flow the competitive dynamics of the two legs are likely to be influenced by the different passenger volumes on them.
14. But does this mean that I should assume that the air cargo market on those two different routes does not include airlines and freight forwarders? I think not. There is no reason to think that the structural features of the 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.
15. Further, routes out of Hong Kong, regardless of whether they are bound for ports in Australia or elsewhere, are constrained by the basic hardware and operations of the airport. For that reason I have no difficulty in concluding that despite the different competitive conditions on various routes, airlines generally deliver their services using planes. For similar reasons it is obvious, in my opinion, that on any given route (of sufficient size) there would be substantial importers and exporters for whom it would be natural for the airlines to compete. The management consultant’s report obtained by Air NZ shows that the contrary position is not one seriously entertained by Air NZ internally, even if it was put forward in this litigation.
16. Accordingly, I draw the following conclusions about the functional dimensions of the market:
17. 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;
18. 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;
19. 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;
20. 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
21. 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.

## 4.4 Market in Australia?

1. Was the market in Australia? The Commission argued that the market was in Australia for three reasons which it is convenient to deal with separately.
2. Despite the great length of the parties’ submissions the actual debates between them turned out to be narrow. The economic issues for determination were:
3. 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;

1. 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;
2. 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
3. whether, in light of the foregoing, the market was in Australia.
4. I deal with these separately.

### 4.4.1 Source of demand in Australia

1. 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 air space, 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.
2. 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.
3. The Commission submitted that a market was an ‘area of close competition between firms’ or ‘the field of rivalry between them’ citing decisions such as *QCMA* at 190. So viewed, the field of rivalry between the airlines extended to Australia where the three destination services described above were provided in a competitive environment. On the other hand, the airlines emphasised that what took place inside a market was substitution and they pointed to the statement of Spender J in *QIW Retailers Limited v Davids Holdings Pty Limited (No 3)* (1993) 42 FCR 255 at 267 adopting a quotation from the *Second Annual Report* of the Trade Practices Commission (1975) that the geographical market is an area ‘in which sellers of the particular product operate and to which purchasers can practicably turn for such goods or services’.
4. The airlines focussed on the concept of the place where customers might turn but the Commission took comfort from the statement that the market was located where the sellers operated (submitting that they operated, *inter alia*, in Australia where ground handling services and the like took place). The conundrum that these may well be different places is a feature of transportation markets in general.
5. There is textual support for the position of both sides in *QCMA* but that decision is not to be construed as if it were a statute. This is particularly so where *QCMA* was not concerned with transportation markets. The central thrust of *QCMA* nevertheless concerns substitution. It is through that prism that the present problem is most usefully analysed.
6. As I have said I reject the existence of any supply side substitutes because there was no evidence that other airlines could enter the various Hong Kong to Australian airport markets if the carriers in those markets executed a SSNIP. To assess that I would either need evidence that other carriers would have been able enter the markets or, if that direct evidence was lacking, some kind of analysis about barriers to entry and the feasibility of entering the markets. There was no such evidence.
7. 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.
8. It is easy, therefore, to follow the airlines’ submission that the place where customers turn to choose between various providers of the service is strictly limited to Hong Kong. The Commission, however, submits that the service is provided not only at Hong Kong but also along all points on the route between Hong Kong and the relevant Australian airport. A repeat customer, the Commission submits, might well find itself growing weary of one airline’s ground handling efforts at Sydney and decide to switch instead to a different carrier specifically to obtain superior ground handling services at that airport in relation to flights from Hong Kong. Here there can be seen, so the argument ran, switching behaviour between airlines and in respect of a service not delivered in Hong Kong. Mr Gregg gave evidence that ground handling services were a key measure of performance and Mr Cleary (previously of Qantas) said that it was easier to sell capacity where Qantas had well managed cargo terminal operations. I accept 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.
9. However, the relevant enquiry is not about switching in some loose sense but rather, as the text of s 4E requires, substitution. The correct question is where are the relevant substitutable services provided to consumers of those services. 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. If there were true substitutes available in Sydney (because the ground handling services are provided in Sydney) this would entail 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. The absurdity of that statement signals the presence of conceptual error. The presence of that error is confirmed if one accepts, as on the Commission’s case one must, that the market for carrying air freight from Hong Kong to Sydney includes airports in Australia.
10. If it was sufficient in the case of an international transportation market that it was located wherever rivalrous 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. It was no doubt for that reason that the Commission was careful to include in its analysis the additional fact that there were shippers (that is, importers) in Australia who were participants in the market (as I have held there to be).
11. One may ask then, and the airlines did, what the analytical significance of having a market participant in Australia was and here the answer, it seems, was that it showed that the switching decisions could not themselves be located in Hong Kong where the airplanes were. 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 and the Commission’s position is indistinguishable from the example given above of the package tour of Europe.
12. I do not accept, therefore, the Commission’s first variant of its argument on market in Australia.
13. I am also unpersuaded by the suggestion that the fact that the *ultimate* source for some of the demand was in Australia affects the analysis, at least in this case. At paragraph 66(ii) of his report in reply Professor Church said:

The relevant product markets consist of paths that terminate in Australia because of derived demand by Australians to consume imports or otherwise have cargo transported to Australia. The demand for air cargo to Australia by freight forwarders is derived from this demand and is not independent. Hence 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.

1. I did not apprehend this evidence to go so far as to say that this had the consequence that the market was located in Australia. The last sentence contains two ideas: that the demand may be situated in Australia and that a price increase may have economic impacts in Australia. I am prepared to accept that some of the demand for the services was, in the case of some large importers, probably located in Australia and I have no doubt that increases in freight rates might have the effect of increasing the cost of imported goods in Australia. I do not think that Professor Church was saying that the markets were, however, in Australia. At best his opinion was that the functional aspects of the markets might have, as he put it at [66] in his reply, an ‘Australian dimension’. I am certainly prepared to accept that for some purposes, such as examining whether a merger decreases competition in various markets, knowing that one market has an ‘Australian dimension’ might be useful but I do not think it assists in answering the question of where the market is located. As Professor Church agreed under cross-examination, the consequence of his approach was that the markets for components added to Mercedes-Benz cars in Stuttgart had an Australian dimension when those cars were sold in Australia to satisfy Australian demand. Whilst it might be useful to know that for some purposes, it is too broad to be a useful identifier of market location.

### 4.4.2 Downstream substitution in Australia

1. The next argument depended upon a proposition explored by Dr Williams and Professor Church and accepted, I think, by Professor Gilbert. It depended on the idea that in an input market which was vertically arranged, the behaviour of participants in a downstream market might operate to limit the ability of participants in an upstream market to exercise market power: cf. *Australian Competition and Consumer Commission v Metcash Trading Ltd* (2011) 198 FCR 297 at 346 [252]. Professor Gilbert gave the example of the ability of consumers of electricity to switch to new sources of supply such as solar or wind and thereby to hinder the ability of a coal monopolist selling to power generators to exercise market power in its dealing with the generators. Professor Church gave a similar example involving the provision of internet services where a monopolistic provider of network arrangements to wholesalers might be constrained by decisions of consumers to switch to internet delivered by altogether different means.
2. This is, no doubt, an interesting phenomenon. If the purpose of the process is to assess market power one can readily understand how incomplete a picture one would get if such effects were to be left out of consideration.
3. There were some nice questions about how the effects of downstream substitution away (as it is called) is dealt with in the process of market definition. However, none of those questions arise because there is simply no evidence that any such effect would have occurred in this case.
4. It is easy enough to understand the effect when considering an input market with a single input such as in the examples above concerning coal or internet services. But the facts of this case are much more complicated for there are multiple downstream markets. So, as set out above at [239], the top five exports from Hong Kong to Australia in the period 2004 to 2006 were:

|  |  |
| --- | --- |
| Motors, appliances, radio, televisions | 22.98% |
| Engines and machines | 13.32% |
| Clothes and others | 9.35% |
| Clothes – knitted | 7.71% |
| Books, paper, art | 6.51% |

1. When one comes to ask what the effect of a SSNIP would be in, say, the Hong Kong to Sydney market, one would need to know something about the markets which are encompassed in the figures above. One would also need to know something about alternate sources of supply (such as Singapore, China and so on). Let it be assumed for the sake of argument that televisions made up 10% of imports coming from Hong Kong into Australia. If the Sydney market for televisions was highly competitive importers might be inclined to absorb any SSNIP which was imposed by air carriers out of Hong Kong.
2. Whether they did so or sought instead to locate televisions in places other than Hong Kong would rather depend on those other places and the transport costs which would be involved. It might be feasible, but difficult, to assess the behaviour of one downstream market (such as televisions) in the face of a SSNIP in the Hong Kong to Sydney air cargo market. The difficulty however, is that one must assess not one such market but very many markets, being the downstream markets, and one must aggregate their behaviour to work out if there would be enough downstream substitution away in those multiple markets to operate as a constraint in the upstream market.

### 4.4.3 Conclusion

1. No such attempt was made in this case and I am left with what was described by the parties as a thought experiment. A thought experiment clarifies concepts but it cannot provide a substitution for some empirical evidence be it qualitative or quantitative. There is simply no basis upon which I could find this effect did, or was likely to, take place.
2. I do not therefore need to enter the debate as to whether a market which operates as a downstream restraint should be included in the upstream market. If it is to be, it does have the consequence, which Professor Gilbert noted, that the market for air cargo services includes all the markets into which the cargo carried by them is then subsequently sold. That appears to be a somewhat odd outcome. Of course, in merger cases under s 50 of the TPA the phenomenon of downstream substitution away is an important factor, but the terms of s 50 focus upon a substantial lessening of competition in *a* market. By contrast, s 45 requires the substantial lessening of competition to occur in the market in which the firms are competing. This is a significant difference. In any event, the complete absence of anyevidence about the occurrence of this phenomenon means these questions do not arise. I am conscious that the High Court of New Zealand reached the opposite conclusion in *Commerce Commission v Air New Zealand* *Ltd* (2011) 9 NZBLC 103, 318 (24 August 2011). That case was tried on agreed facts. The Court was willing to infer a number of matters concerning downstream effects which I cannot embrace having had the benefit of a trial.
3. I conclude that the relevant markets for the transport of cargo to ports in Australia from Hong Kong were not markets in Australia.

## 4.5 The market for flights ex Singapore and Indonesia

1. The above analysis is confined to Hong Kong. I would reach the same conclusions, however, in relation to the markets from Singapore and Indonesia into Australia. That is, that there were individual markets on the individual routes into Australia; that the product was the carriage of cargo together with the ancillary services discussed above; and that the market participants were the airlines, freight forwarders and some large shippers. I am unclear about the position of integrators. Assuming in the Commission’s favour that there were integrators operating out of Indonesia and Singapore, I do not think this would alter the analysis above. The relevant consumer choices are still very much at the origin airport.
2. Whilst I am satisfied that there could be demand side substitution in those markets, that demand side substitution occurred at the ports of origin. There was no evidence of supply side substitution.
3. Each of the markets in Hong Kong, Indonesia and Singapore was consequently not a market in Australia.

# 5 THE EXTRA-TERRITORIAL OPERATION OF THE *TRADE PRACTICES ACT*

1. The conclusion that there was no market in Australia renders irrelevant a series of complex arguments raised by the airlines as to why the TPA should not be construed to apply to regulate offshore aviation markets. Had I concluded that there had been a market in Australia I would not have been disposed to accept any of those arguments. Put another way, if I am wrong in my conclusions on the location of the markets, I do not accept that there are any good reasons why the TPA did not apply to the conduct in question. In this section, I consider and reject the airlines’ arguments on extra-territoriality.

## 5.1 The need for actual conduct

1. Although I have not yet come to an examination of the conduct alleged by the Commission against the two airlines it is nevertheless useful to note for the purposes of the present debate an aspect of the alleged conduct which is not in dispute. The Commission’s case is that the various arrangements or understandings were reached at meetings or through courses of conduct between the airlines, all of which unquestionably occurred outside Australia. Further, the arrangements or understandings which the Commission alleges the airlines arrived at were, with one minor exception in Indonesia, arrangements or understandings about the imposition of surcharges or fees which were to be imposed on freight forwarders at the origin ports where the cargo was to be uploaded, i.e. Hong Kong, Singapore, Denpasar or Jakarta. Perhaps to bring the point into clearer focus, what is alleged in each case is that the arrangements or understandings were reached in those places about charges which were to be imposed in those places. All of these events, even on the Commission’s case, happened outside Australia. The single minor exception to this concerned the Commission’s case against Garuda in Indonesia where a customs fee was imposed on flights from Australia to Indonesia. As will be seen, however, I am not satisfied that the Commission proved that any understanding had been reached by Garuda about that fee. It may, therefore, be disregarded for present purposes.
2. To understand the submissions made against the Commission it is necessary to focus on the internal mechanics of the Commission’s case.
3. The actionable wrong pointed to by the Commission is a breach of s 45(2) of the TPA which at the relevant time provided that:

**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. The Commission moves both under ss 45(2)(a) and 45(2)(b), that is, it seeks to prove that the two airlines entered into the arrangements or understandings (s 45(2)(a)) and that (in most cases) they gave effect to them (s 45(2)(b)). Regardless of which limb the Commission proceeds under, however, it must nevertheless prove that the provision of the contract, arrangement or understanding must have had ‘the purpose, or would have or be likely to have the effect, of substantially lessening competition’ in the case of s 45(2)(a)(ii) or ‘has the purpose, or has or is likely to have the effect, of substantially lessening competition’ in the case of s 45(2)(b)(ii). I did not apprehend that anything turned on the subtle difference in the terms of these two provisions which appear substantially the same.
2. Looked at in isolation, therefore, s 45(2) would impose upon the Commission an obligation to show that the contract, arrangement or understanding to impose each surcharge (or the giving effect to a provision in the contract, arrangement or understanding) had the purpose or the likely effect of substantially lessening competition.
3. To do so the Commission generally called in aid of s 45A which deemed such an arrangement or understanding to have that effect in certain circumstances including those where the contract, arrangement or understanding had the purpose or was likely to have the effect of fixing, controlling or maintaining the price for services (I disregard for present purposes the Commission’s arguments based on exchanges of pricing information which did not rely on s 45A). At the relevant time, s 45A(1) provided:

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

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 important feature for present purposes, which was especially emphasised by Garuda, was that the conduct which was alleged to contravene s 45 was conduct which was deemed by s 45A(1) to have a particular quality. It was not legally necessary under s 45 that the airlines had engaged in conduct which had the purpose, effect, or likely effect of substantially lessening competition, and it was potentiality thrown up by the interaction between ss 45(2)(a) and 45(2)(b) as well as s 45A(1) that there might be no actual substantial lessening of competition.
2. This may seem difficult to follow but it became critical in Garuda’s submission when one came to consider the extraterritorial operation of the TPA. Three provisions were relevant to that enquiry. First, s 45(3) made clear that the competition to which s 45(2) referred was competition in a market in which the airlines provided services in competition with each other in the following terms:

(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. Secondly, the expression ‘market’ was defined in s 4E to mean a market in Australia. Its full text is:

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. These two provisions provide a limitation on the geographical reach of Pt IV of the TPA. Their effect is the subject of discussion above. By itself, however, s 4E would not be sufficient to give Pt IV of the TPA an extraterritorial operation even if the relevant ‘market in Australia’ was a subset of some larger market, extending beyond the geographical confines of the Commonwealth. The wording of s 4E does not disclose an intention in itself to operate extraterritorially.
2. That work is done instead by s 5(1) which, thirdly, extends the operation of Pt IV (and other Parts too) to conduct which occurs outside Australia so long as it is engaged in by a body corporate incorporated in or carrying on business within Australia. Section 5(1) provides:

Part IV, Part IVA, Part V (other than Division 1AA), Part VB **and Part VC** extend to the engaging in conduct outside Australia by bodies corporate incorporated or carrying on business within Australia or by Australian citizens or persons ordinarily resident within Australia.

[portion in bold effective from 15 December 2001]

1. It has been held that the TPA applies extraterritorially only insofar as the conditions of s 5 have been met:  *Bray v F Hoffmann-La Roche Ltd* (2002) 118 FCR 1 at 16 [52] per Merkel J. Garuda pointed to the conclusion in *Bray* that the provisions of the TPA that imposed accessorial liability on persons who have, broadly speaking, assisted in the contravention of Pt IV (s 75B), was itself contained in Pt VI which is concerned with ‘Enforcement and Remedies’, so that s 5 was not engaged (Pt VI not being mentioned in s 5(1)).
2. Why did this matter? It was material because one of the limitations in s 5(1) was that it extended the operation of Pt IV only to ‘conduct outside Australia’. Section 5(1) was sufficient, Garuda accepted, to engage with and apply to the conduct referred to in s 45(2) (that is, the conduct in reaching a contract, arrangement or understanding or in giving effect to such a contract, arrangement or understanding) but it could not engage with the superadded necessity that the purpose or likely effect of the relevant provision of such a contract arrangement or understanding had the quality of substantially lessening competition. The legal characterisation of that purpose or likely effect was not conduct to which s 5(1) could apply.
3. I do not accept this argument. It rests upon a false dichotomy between the conduct proscribed by s 45(2) – that is, the conduct of entry into a contract, arrangement or understanding – and the characterisation of the competitive effect of the provisions of the contract, arrangement or understanding arrived at.
4. The conduct to which s 45(2) refers is not just the conduct of entry into, or giving effect to, a disembodied contract, arrangement or understanding; rather, and to the contrary, it is the conduct of entry into or giving effect to a particular kind of contract, arrangement or understanding, specifically, a contract, arrangement or understanding containing a provision or provisions with a particular quality, *viz*, having the purpose, effect or likely effect of substantially lessening competition.
5. To draw an analogy, if s 45(2) instead prohibited the conduct of entering into a contract whose performance would be criminal, Garuda’s submissions would necessarily entail the conclusion that a separate enquiry was needed into the conduct of entering into the contract and, thereafter, the legal characterisation of what the performance of its terms would require. But in that case it is clear that the conduct and the contract are not separate from each other. The conduct which is proscribed is entry into a contract with the given qualities.
6. In this circumstance, I do not accept that the requirement that a provision of a contract, arrangement or understanding have the purpose, effect or likely effect of substantially lessening competition is separate from or distinct to the conduct to which s 45(2) itself refers. What is prohibited by s 45(2) is entry into or giving effect to a contract arrangement or understanding having a particular quality. That being so, s 5(1) extends the operation of s 45(2) to extraterritorial conduct having that quality. I reject the argument.
7. Garuda pursued a variant of this argument which focussed instead on the quality of s 45A as a provision which deemed there to be a substantial lessening of competition where the purpose or likely effect of a provision of a contract, arrangement or understanding was, put shortly, price fixing. As a matter of definition, upon s 45A’s enlivenment there need not have been any conduct at all for, so Garuda submitted, it provided for the activation of s 45(2) purely through a process of deeming. Section 5(1), by contrast, was to be seen as requiring actual conduct rather than deemed conduct.
8. The flaw in this otherwise diverting argument is, in essence, the same difficulty which afflicts its first variant. Section 45A(1) is intimately connected with conduct – the conduct in s 45(2). It provides a specific answer to the question of how the conduct in s 45(2) is to be characterised for the purposes of that provision. Just as it is unsound to seek to winnow the forbidden contract, arrangement or understanding in s 45(2) from the characterisation of its provisions, so too it is impermissible to treat a deeming provision about that characterisation as not being concerned with the conduct to be characterised and hence beyond s 5(1). Furthermore, s 45A does deal with conduct, namely, the conduct of price fixing. The price fixing conduct which enlivens the deemed substantial lessening of competition by s 45A is conduct to which s 5 applies.

## 5.2 Interference with sovereign rights of other States

1. Air NZ and Garuda joined in a submission that Pt IV of the TPA should be construed so as to avoid unreasonable interferences with the sovereign authority of other nations. In this case, so the argument ran, to permit the terms of Pt IV to apply to conduct in Hong Kong, Singapore and Indonesia in circumstances where that conduct was either required or permitted by the laws of those places involved an interpretation of the TPA which displayed a lack of legislative deference to the sovereign authority of other nations. Such a construction was to be avoided, if at all possible.
2. There are two issues here; first, did the law of the foreign places involved permit or require the alleged conduct; secondly, does the principle exist? As to the first issue, I conclude below in Chapter 6 that neither the law of Hong Kong nor the directions of its government required airlines to collude on the setting of fuel or insurance surcharges. I reach the same conclusion in Chapter 7 about the law and administrative requirements of Indonesia. It was not suggested that the law or administrative practices of Singapore required the airlines to agree surcharges amongst themselves.
3. On the other hand, the law of Hong Kong did not at any of the relevant times forbid price fixing arrangements and the law of Singapore did not do so until 1 January 2006 when the relevant parts of the *Competition Act* (Singapore, cap 50B, 2004) came into force. Although there was a competition law in force in Indonesia at all relevant times, it was not proved in this case that the conduct alleged against Garuda contravened that law. In those circumstances, I proceed on the basis that the law of all three jurisdictions neither required nor forbade the alleged conduct.
4. As to the second issue (does the principle exist?), it therefore arises in a context in which the alleged interference with sovereign rights consists of an Australian law operating extraterritorially to render unlawful conduct within a foreign state which is not required by the local law of that state but not forbidden by it either. The airlines’ submission about this involves a different principle of statutory interpretation to the presumption that legislation does not operate extraterritorially. Indeed, it takes as its point of departure in almost all cases the fact that the impugned domestic legislation does operate extraterritorially. The airlines’ focus instead is on what that extraterritorially operative domestic legislation requires in foreign places and how what it so requires intersects with the local legal systems into which it has intruded.
5. In *Hartford Fire Insurance Co v California* 509 US 764 (1993) the Supreme Court considered, *inter alia*, whether the *Sherman Act* applied to conduct by re-insurers in the London market in allegedly conspiring to force primary insurers to change the terms of their standard domestic commercial general liabilities policies in the United States. The proceedings were summarily dismissed by the District Court of the Northern District of California (‘the District Court’) and this was partially reversed by the Court of Appeals for the Ninth Circuit. One of the questions before the Supreme Court was whether notions of international comity required the District Court to decline the exercise of jurisdiction. There were two forms of the argument. One was that the *Sherman Act* would not be interpreted so as to extend to the regulation of the London reinsurance market; the other, that even though the *Sherman Act* might extend that far, the Court should nevertheless decline to exercise the jurisdiction it otherwise had.
6. The majority concluded that no question of comity arose because there was no conflict between the *Sherman Act* and British law. Souter J delivered the Court’s opinion on this issue (with whom Rehnquist CJ, White, Blackmun and Stevens JJ joined). Citing (at 799) the *Restatement (Third) of Foreign Relations Law* (‘the *Restatement (Third)*’) § 403 Comment *e*, his Honour concluded ‘[n]o conflict exists, for these purposes “where a person subject to regulation by two states can comply with the laws of both.” (footnote omitted)’. Since the London reinsurers did not argue that British law required them to act in some fashion prohibited by the *Sherman Act* his Honour was unable to discern any conflict to which the principle invoked could attach.
7. On this issue, however, Scalia J (with whom O’Connor, Kennedy and Thomas JJ relevantly agreed) dissented. Having identified that statutes are not generally construed as applying extraterritorially his Honour went on to say at 814 - 815:

But if the presumption against extraterritoriality has been overcome or is otherwise inapplicable, a second cannon of statutory construction becomes relevant: “[A]n act of congress ought never to be construed to violate the law of nations if any other possible construction remains.” *Murray v. Schooner Charming Betsy,* 2 Cranch 64, 118 (1804) (Marshall, C.J.). This cannon is “wholly independent” of the presumption against extraterritoriality. [*EEOC v. Arabian American Oil Co.,* 499 U.S. 244, 264 (1991) (Marshall, J., dissenting)] It is relevant to determining the substantive reach of a statute because “the law of nations,” or customary international law, includes limitations on a nation’s exercise of its jurisdiction to prescribe. See Restatement (Third) §§ 401-416. Though it clearly has constitutional authority to do so, Congress is generally presumed not to have exceeded those customary international-law limits on jurisdiction to prescribe.

Consistent with that presumption, this and other courts have frequently recognized that, even where the presumption against extraterritoriality does not apply, statutes should not be interpreted to regulate foreign persons or conduct if that regulation would conflict with principles of international law…

[full citation added]

1. His Honour identified the principle as being illustrated in several cases concerned with conflict of laws but also on the broader basis which had been explained by Learned Hand J in *United States v Aluminium Co. of America*, 148 F.2d 416, 443 (CA2 1945) that ‘we are not to read general words, such as those in *[the Sherman] Act* without regard to the limitations customarily observed by nations upon the exercise of their powers; limitations which generally correspond to those fixed by the “Conflict of Laws.”’ (square brackets in original).
2. Having then referred to a subsequent line of cases dealing with international comity and the *Sherman Act*, Scalia J then continued (at 817):

The “comity” they refer to is not the comity of courts, whereby judges decline to exercise jurisdiction over matters more appropriately adjudged elsewhere, but rather what might be termed “prescriptive comity”: the respect sovereign nations afford each other by limiting the reach of their laws. That comity is exercised by legislatures when they enact laws, and courts assume it has been exercised when they come to interpreting the scope of laws their legislatures have enacted. It is a traditional component of choice-of-law theory. See J. Story, Commentaries on the Conflict of Laws§ 38 (1834) (distinguishing between the “comity of the courts” and the “comity of nations,” and defining the latter as “the true foundation and extent of the obligation of the laws of one nation within the territories of another”). Comity in this sense includes the choice-of-law principles that, “in the absence of contrary congressional direction,” are assumed to be incorporated into our substantive laws having extraterritorial reach.

1. This required a consideration of what it was precisely that comity necessitated. Relying again on the *Restatement (Third)* his Honour concluded (at 818):

… a nation having some “basis” for jurisdiction to prescribe law should nonetheless refrain from exercising that jurisdiction “with respect to a person or activity having connections with another state when the exercise of such jurisdiction is unreasonable.”

1. What then did reasonableness require? Scalia J continued (at 818-819):

The “reasonableness” inquiry turns on a number of factors including, but not limited to: “the extent to which the activity takes place within the territory [of the regulating state],” *id.*, § 403(2)(a); “the connections, such as nationality, residence, or economic activity, between the regulating state and the person principally responsible for the activity to be regulated,” *id.*, § 403(2)(b); “the character of the activity to be regulated, the importance of regulation to the regulating state, the extent to which other states regulate such activities, and the degree to which desirability of such regulation is generally accepted,” *id.*, § 403(2)(c); “the extent to which another state may have an interest in regulating the activity,” *id.*, § 403(2)(g); and “the likelihood of conflict with regulation by another state,” *id.*, § 403(2)(h). Rarely would these factors point more clearly against application of United States law.

1. Having referred to the extensive British legislative regulation of the London re-insurance market his Honour then concluded (at 819):

Considering these factors, I think it unimaginable that an assertion of legislative jurisdiction by the United States would be considered reasonable, and therefore it is inappropriate to assume, in the absence of statutory indication to the contrary, that Congress has made such an assertion.

1. Despite being in dissent in *Hartford* Scalia J’s exposition of the relevant principle of statutory interpretation was endorsed by the entire Court in *F Hoffman-La Roche Limited v Empagran S.A.* 542 US 155 (2004). In that case Breyer J (in whose judgment Rehnquist CJ, Stevens, Kennedy, Souter and Ginsburg JJ joined and with whose judgment Scalia and Thomas JJ concurred) said this (at 164):

… this Court ordinarily construes ambiguous statutes to avoid unreasonable interference with the sovereign authority of other nations. See, e.g., *McCulloch v Sociedad Nacional de Marineros de Honunduras,* 372 U.S. 10, 20-22 (1963) (application of National Labor Relations Act to foreign-flag vessels); *Romero v. International Terminal Operating Co*.,358 U.S. 354, 382-383 (1959) (application of Jones Actin maritime case); *Lauritzen v. Larsen*, 345 U.S. 571, 578 (1953) (same). This rule of construction reflects principles of customary international law––law that (we must assume) Congress ordinarily seeks to follow. See Restatement (Third) of Foreign Relations Law of the United States §§ 403(1), 403(2) (1986) (hereinafter Restatement) (limiting the unreasonable exercise of prescriptive jurisdiction with respect to a person or activity having connections with another State); *Murray v. Schooner Charming Betsy,* 2 Cranch 64, 118 (1804) (“[A]n Act of congress ought never to be construed to violate the law of nations if any other possible construction remains”); *Hartford Fire Ins. Co. v. California*,509 U.S. 764, 817 (1993) (SCALIA, J., dissenting) (identifying rule of construction as derived from the principle of “ ‘prescriptive comity’ ” ).

1. The terms of Scalia J’s concurrence are also relevant (at 176):

I concur in the judgment of the Court because the language of the statute is readily susceptible of the interpretation the Court provides and because only that interpretation is consistent with the principle that statutes should be read in accord with the customary deference to the application of foreign countries’ laws within their own territories.

1. Air NZ submitted that these two decisions established the principle of statutory interpretation upon which it relied. The Commission in answer submitted that it was doubtful the principle existed in Australian law. The Commission did not submit (as to me appears to be the case) that the majority judgment in *Hartford* requires the rejection of the airlines’ argument on the basis that there was no conflict between the Australian and the local laws: see 799 (supra, [364]).
2. Leaving that to one side, the situation in the United States is not perhaps as clear as Air NZ’s submissions suggest: see, for example, *Spector v Norwegian Cruise Ship Line Ltd* 545 U.S. 119, 158 (2005) where Scalia J appears to have altered his approach in *Hartford; Pasquantino v United States* 544 U.S. 394 (2005) (where the Court seemingly had no difficulty applying a US wire-fraud statute to persons smuggling liquor into Canada); *Morrison v National Australia Bank Ltd* 561 U.S. 247 (2010). Since none of these materials were the subject of submission I shall say no more of them.
3. Instead, I will confine my attention to *Hartford* and *Empagran*. An analysis of these two decisions reveals that the suggested United States principle is an outcrop or corollary of the principle that statutes are interpreted, where possible, in a way which is consistent with customary international law or relevant treaty obligations.
4. The interesting aspect of the two decisions is, I think, the invocation of a principle of customary international law that one State should refrain from exercising jurisdiction extraterritorially over persons subject to regulation in another State unless that exercise is in some way reasonable. The source of this principle is, perhaps, obscure. Indeed, only Scalia J discussed the issue in any detail in *Hartford* (at 818):

In sum, the practice of using international law to limit the extraterritorial reach of statutes is firmly established in our jurisprudence. In proceeding to apply that practice to the present cases, I shall rely on the Restatement (Third) for the relevant principles of international law. Its standards appear fairly supported in the decisions of this Court construing international choice-of-law principles (*Lauritzen*, *Romero*,and *McCulloch*) and in the decisions of other federal courts, especially *Timberlane.* Whether the Restatement precisely reflects international law in every detail matters little here, as I believe this litigation would be resolved the same way under virtually any conceivable test that takes account of foreign regulatory interests.

1. The parts of the *Restatement (Third)* referred to by Scalia J are in the section entitled ‘Jurisdiction and Judgments’ and the parts of that section referred to are in Chapter One which deals with the jurisdiction of States to make laws. Section 402 says:

§ 402. Bases of Jurisdiction to Prescribe

Subject to § 403, a state has jurisdiction to prescribe law with respect to:

(1) (a) conduct that, wholly or in substantial part, takes place within its territory;

(b) the status of persons, or interests in things, present within its territory;

(c) conduct outside its territory that has or is intended to have substantial effect within its territory;

(2) the activities, interests, status, or relations of its nationals outside as well as within its territory; and

(3) certain conduct outside its territory by persons not its nationals that is directed against the security of the state or against the limited class of other state interests.

1. This is a statement about the content of public international law. Broadly it is consistent with the views expressed by Professor Crawford in Chapter 21 of *Brownlie’s Principles of Public International Law*; that is, jurisdiction is generally territorial or by nationality. Pausing there, it is plain that the TPA relies on a territorial nexus. Section 4E limits the markets to which Pt IV applies to those which are ‘in Australia’ and s 5(1) makes plain that only the extraterritorial conduct of bodies corporate incorporated in or conducting business in Australia is covered by the legislation.
2. More interesting is the limitation which is said by the *Restatement (Third)* to exist on this principle. Section 403(1) provides:

§ 403. Limitations on Jurisdiction to Prescribe

1. Even when one of the bases for jurisdiction under § 402 is present, a state may not exercise jurisdiction to prescribe law with respect to a person or activity having connections with another state when the exercise of such jurisdiction is unreasonable.
2. I am far from certain that this is a correct restatement of the content of customary international law, and, despite the robustness with which Scalia J expressed the view that it was, I am not sure that his Honour’s statement is, with respect, correct either. However, for now I am content to assume that the statement is correct. If so, there is no reason that the similar principle of statutory interpretation in Australian law that one should construe legislation, if possible, so as to avoid putting Australia in breach of its international obligations, does not lead to the same result. Every statute is ‘to be so interpreted and applied as far as its language admits as not to be inconsistent with the comity of nations or with established rules of international law’: see *Jumbunna Coal Mine NL v Victorian Coal Miners’ Association* (1908) 6 CLR 309, 363; *Chu Kheng Lim v Minister of State for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1, 38; *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273, 287. If there is a principle of international law that proscribes the exercise by a State of extraterritorial legislative competence in circumstances where, although there is present a territorial or nationality based nexus, nevertheless the extent of the legislative interference with the affairs of another State is unreasonable, then that principle would lead to conclusions largely in line with the dissent in *Hartford*.
3. *Brownlie’s* suggests that there are at least five ways extraterritorial jurisdiction is attracted (or can be, – the difference is sometimes elusive): a territorial connexion, nationality, passive personality, the protection principle and the effects doctrine. Without lingering on this excessively, there is nothing in this which resembles § 403 of the *Restatement (Third)*.
4. The difficulty, so it seems to me, is that the principle of international law identified by § 403 of the *Restatement (Third)* (that only *reasonable* interferences in the affairs of other States are justified) appears to be contrary to the leading authorities in public international law. In *SS ‘Lotus’ (France v Turkey) (Judgment)* [1927] PCIJ (ser A) No 10the Permanent Court accepted that once a nexus to the relevant State was established the power of regulation was untrammelled. Although that case has been much discussed over the years none of those discussions have suggested the limitation referred to by Scalia J: see, for example, *The Fisheries Case (United Kingdom v Norway) (Judgment)* [1951] ICJ Rep 116; *Case Concerning the Arrest Warrant of 11 April 2000* (*Democratic Republic of Congo v Belgium*) *(Judgment)* [2002] ICJ Rep 3.
5. There is no trace in *Brownlie’s* of such a reasonableness requirement for the exercise of legislative jurisdiction once a legislative nexus such as territory or nationality, is established. If such a principle, in fact, existed there might well be difficulties created in otherwise mundane areas. States frequently expose their nationals to taxation obligations arising out of events in foreign jurisdictions. If the principle referred to by Scalia J actually existed then the whole problem of double taxation would be unlikely to exist. The fact that there exists such a widespread range of double taxation treaties based on the OECD Model is quite inconsistent with the proposition inherent in Scalia J’s statement that such acts of extraterritorial taxation could only be lawful in international law where they were reasonable. Further, the application of a reasonableness standard in such a context would most likely be unworkable. What metric could be used to determine whether an extraterritorially imposed tax was unreasonably imposed?
6. So too, the very existence of the United States’ ‘effects doctrine’ in antitrust litigation and the extensive way it has been used by United States courts themselves to interfere directly in the affairs of other States (see, for example, in relation to Australia the Ranger Uranium Litigation: *Re Uranium Antitrust Litigation*, 480 F Supp 1138, 1149 (9th Cir, 1979) and *Re Uranium Antitrust Litigation* 617 F 2d 1248 (7th Cir, 1980)) strongly shows that there is absent the kind of widespread acceptance of the supposed norm which would be necessary in order to identify a rule of customary international law. The decision in *Hartford* in a sense makes the point. In that case, the United States exercised legislative jurisdiction over the London re-insurance market (despite Scalia J’s dissent). Whatever else *Hartford* shows it must show that the rule of customary international law invoked by Scalia J does not exist as a matter of states practice. Others have reached the same conclusion: see Deborah Senz and Hilary Charlesworth, ‘Building Blocks: Australia’s response to foreign extraterritorial legislation’ (2001) 2 *Melbourne Journal of International Law* 69. (‘Since the interest-balancing approach has been rejected by a significant proportion of US trading partners in the antitrust context, the reasonableness doctrine is unlikely to evolve into a generally accepted rule of international law’ (at 83)).
7. It follows that the domestic principle of statutory interpretation which suggests that laws should be interpreted so as to avoid putting the Commonwealth in breach of customary international law cannot have the effect that Pt IV of the TPA should not be interpreted so as to authorise unreasonable interferences with the sovereign rights of other nations where a territorial nexus is established with the Commonwealth. No such principle of customary international law exists. To the extent that Scalia J’s dissent in *Hartford* suggests to the contrary it is, with great respect to that eminent jurist, plainly wrong.
8. To summarise: two principles of statutory interpretation are involved. The first is that legislation is not to be interpreted as having extraterritorial effect unless this is made clear. In this case, s 5(1) of the TPA makes clear that Pt IV does apply extraterritorially to Australian companies or companies conducting business in Australia. A second principle of statutory interpretation requires legislation to be read, if possible, so as not to put the Commonwealth in breach of customary international law or some treaty obligation. At the level of customary international law, Australia is fully entitled to regulate extraterritorial affairs so long as there is a proper nexus. The fact that the TPA only applies to extraterritorial conduct of corporations carrying on business or incorporated in Australia and only with respect to markets in Australia more than satisfies the territorial nexus requirements of customary international law. There is no principle of customary international law which makes unlawful the regulation of extraterritorial affairs involving persons with a proper nexus to a State just because that regulation is superimposed on another State’s domestic legislation. Insofar as treaty obligations are concerned, even assuming that the imposition of Pt IV liability on Garuda involves Australia in a breach of Art 6(2) of the Australia-Indonesia ASA (which for reasons given later it does not) there is no textual mechanism by which s 51(1) of the TPA can be read down to exclude that outcome.
9. Had I concluded that the markets in question were markets in Australia within the meaning of s 4E, I would not have felt constrained by the fact that the conduct alleged was not unlawful in Hong Kong, Singapore or Indonesia to seek to narrow the construction I gave that expression. In any event, as in *Hartford,* I have concluded that none of the legal systems involved required the airlines to collude on surcharges so no inconsistency with foreign law arises.

## 5.3 Whether Parliament intended the TPA to interfere with the sovereign affairs of other States

1. Garuda submitted that the passage in 1976 and then again in 1981 of Commonwealth legislation designed to outflank the excessive operation of the United States *Sherman Act*’s effects doctrine showed that the TPA could not apply in the extraterritorial way for which the Commission contended. The legislation in question is the *Foreign Proceedings (Prohibition of Certain Evidence) Act 1976* (Cth), the *Foreign Antitrust Judgments (Restriction of Enforcement) Act 1979* (Cth) and the *Foreign Proceedings (Excess of Jurisdiction) Act 1984* (Cth). I do not accept that these throw any light on the matter. They are different legislation passed *after* the TPA.
2. I turn then to the law of Hong Kong.

# 6 HONG KONG LAW AND DOMESTIC PRACTICE

1. For the purposes of several defences the airlines submitted that they were bound by the law of Hong Kong to obtain the approval of the HK CAD before imposing a fuel or insurance surcharge; that in the event that they wished to calculate the surcharge by reference to an index mechanism they were required to do so collectively through an application made on each of their behalves through the HK BAR CSC; and that if such approval was obtained they were permitted to charge only that amount and not some lesser amount.
2. Each of these is a necessary element in the airlines’ various defences in so far as they related to the domestic law of Hong Kong. Unless the obligation was to charge the amount approved, and not some lesser amount, there would be no conflict with a law which proscribed price fixing. So too, the requirement that the airlines obtain approval for tariffs, in general, could not justify the conclusion that they were therefore obliged to act jointly to formulate an index mechanism.
3. 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].
4. Success under either of these approaches would be sufficient for the airlines.
5. I deal first with what the law of Hong Kong required and then with what was required by the HK CAD as a matter of administrative discretion.

## 6.1 The requirements of the law of Hong Kong

1. Regulation 3(1) of the *Air Transport (Licencing of Air Services) Regulations* (Hong Kong) cap 448A prohibits a person using an aircraft for the carriage of cargo between Hong Kong and other places ‘except under and in accordance with’ the provisions of an operating permit (at least in so far as non-Hong Kong registered carriers are concerned). Regulation 5(2) permits the licencing authority to attach such conditions to a licence as it sees fit. Air NZ’s Hong Kong operating permit relevantly provided:

This permit is granted subject to the following conditions:

…

(j) For carriage between New Zealand and the HKSAR on any service operated under this permit ANZ shall charge only those tariffs which have been approved by the DGCA and the aeronautical authorities of New Zealand. For carriage between the HKSAR and a State other than New Zealand on any service operated under this permit ANZ shall charge only those tariffs which have been approved by the DGCA and, where appropriate, to the aeronautical authorities of the other State;

(k) Tariffs shall be filed with the DGCA in such form as the DGCA may specify;

(l) For the purposes of conditions (j) and (k) above, the term “tariff” has the meaning assigned to it in the relevant bilateral arrangements;

1. Garuda’s Hong Kong operating permit was not materially different. There is no question that both required approval to be obtained for the imposition of a ‘tariff’; the question is whether a fuel or insurance surcharge is a ‘tariff’. Both operating permits refer to the meaning of tariff as being governed by ‘the relevant bilateral arrangements’. It is therefore necessary to examine the treaties not because their provisions had any legal impact on either airline but because the language of their operating permits gave the word ‘tariff’ the same meaning as it had in those treaties. Because the Commission denies that fuel surcharges, insurance surcharges or customs fees are tariffs it is necessary to ascertain the meaning of that term in each relevant treaty. That question is a question of public international law.
2. What then are ‘the relevant bilateral arrangements’ which are to be construed? Here, unfortunately, matters are less than clear. It is not difficult to assume that carriage of cargo by Air NZ from Hong Kong to New Zealand is governed by the Hong Kong-New Zealand ASA. Things become less clear, at least to me, when Garuda is flying from Hong Kong to Australia. Garuda submitted, and no-one seemed to be inclined to disagree, that it only flew to Australia from Hong Kong via Indonesia. I was not taken to evidence about this so the issue remains obscure.
3. Of course, it is far from obvious that this assumption would be correct. The evidence before the Court suggested that cargo which was not time critical often proceeded by surprisingly circuitous routes. It is by no means clear that cargo flown from Hong Kong to Australia by Garuda would necessarily fly via Indonesia. To know the answer to this question it would be necessary to know the routes Garuda flew and the existence and extent of any interlining arrangements to which it was a party.
4. The parties did not attempt, so far as I could see, to resolve these issues. Instead, Air NZ and the Commission approached the matter on the basis that the relevant ASA was the Hong Kong-New Zealand ASA and Garuda on the basis that it was the Hong Kong-Indonesia ASA and the Australia-Indonesia ASA. I can do little else although I stress that this may well be less than a complete picture. Fortunately, as will become apparent, the distinction does not matter.
5. The question then becomes the meaning of the word ‘tariff’ in these three ASAs and whether it includes a fuel or insurance surcharge or a customs fee. I deal first and principally with the Hong Kong-New Zealand ASA.

### 6.1.1 The Hong Kong-New Zealand ASA

1. Article 7 of the Hong Kong-New Zealand ASA defines ‘tariff’ in the following terms:

ARTICLE 7

**Tariffs**

(1) The term ‘tariff’ means:

(a) the fare charged by an airline for the carriage of passengers and their baggage on scheduled air services and the charges and conditions for services ancillary to such carriage;

(b) the freight rate charged by an airline for the carriage of cargo (excluding mail) on scheduled air services;

(c) the conditions governing the availability or applicability of any such fare or freight rate including any benefits attaching to it; and

(d) the rate of commission paid by an airline to an agent in respect of tickets sold or air waybills completed by that agent for carriage on scheduled air services.

(2) The tariffs to be charged by the designated airlines of the Contracting Parties for carriage between Hong Kong and New Zealand shall be those approved by both aeronautical authorities and shall be established at reasonable levels, due regard being had to all relevant factors, including the cost of operating the agreed services, the interests of users, reasonable profit and the tariffs of other airlines operating over the whole or part of the same route.

(3) Any of the designated airlines may consult together about tariff proposals, but shall not be required to do so before filing a proposed tariff. The aeronautical authorities of each Contracting Party shall not accept a filing unless the designated airline making such filing gives an assurance that it has informed the other designated airlines of the proposed tariffs.

(4) Any proposed tariff for carriage between Hong Kong and New Zealand shall be filed with the aeronautical authorities of both Contracting Parties in such form as the aeronautical authorities may separately require to disclose the particulars referred to in paragraph (1) of this Article. It shall be filed not less than 60 days (or such shorter period as the aeronautical authorities may allow) before the proposed effective date. The proposed tariff shall be treated as having been filed with a Contracting Party on the date on which it is received by the aeronautical authorities of that Contracting Party. Each designated airline shall not be responsible to any aeronautical authorities other than its own for the justification of the tariffs so proposed except where a tariff has been unilaterally filed.

(5) Any proposed tariff may be approved by the aeronautical authorities of either Contracting Party at any time and, provided it has been filed in accordance with paragraph (4) of this Article, shall be deemed to have been approved by the aeronautical authorities unless, within 30 days (or such shorter period as the aeronautical authorities of both Contracting Parties may allow) after the date of filing, the aeronautical authorities of either Contracting Party have served on the aeronautical authorities of the other Contracting Party written notice of disapproval of the proposed tariff. Such notice of disapproval shall be given not less than 15 days prior to the effective date of the proposed tariff.

(6) If a notice of disapproval is given in accordance with the provisions of paragraph (5) of this Article, the aeronautical authorities of the two Contracting Parties may determine the tariff by mutual agreement. Either Contracting Party may, within 30 days of the service of the notice of disapproval, request consultations which shall be held within 30 days of the request.

(7) If a tariff has been disapproved by one of the aeronautical authorities in accordance with paragraph (5) of this Article, the aeronautical authorities have been unable to determine the tariff by agreement in accordance with paragraph (6) of the Article, the dispute may be settled in accordance with the provisions of Article 15 of this Agreement.

(8) Subject to paragraph (9) of this Article, a tariff established in accordance with the provisions of this Article shall remain in force until a replacement tariff has been established.

(9) Except with the agreement of the aeronautical authorities of both Contracting Parties, and for such period as they may agree, a tariff shall not be prolonged by virtue of paragraph (8) of this Article:

(a) where a tariff has a terminal date, for more than 90 days after that date;

(b) where a tariff has no terminal date, for more than 90 days after the date on which a replacement tariff is filed with both aeronautical authorities by the designated airline or airlines of one or both Contracting Parties.

(10) The tariffs charged by the designated airlines of one Contracting Party for carriage between the area of the other Contracting Party and the territory of a State which is not a Contracting Party shall be subject to the approval of the other Contracting Party and such non-contracting State: provided, however, that a Contracting Party shall not require a different tariff from the tariff of its own airlines for comparable services between the same points. The designated airlines of each Contracting Party shall file such tariffs with the other Contracting Party, in accordance with its requirements. Approval of such tariffs may be withdrawn on no less than 15 days’ notice provided however that a Contracting Party withdrawing such approval shall permit the designated airline concerned to apply the same tariffs as its own airlines for comparable services between the same points.

1. The question therefore is whether a fuel or insurance surcharge is a ‘freight rate’ under Art 7(1)(b) or a condition governing the availability or applicability of a fare under Art s 7(1)(c). The parties agreed that as a treaty its interpretation was to be approached in accordance with Art 31 of the *Vienna Convention on the Law of Treaties*, opened for signature 23 May 1969, 1155 UNTS 331 (entered into force 27 January 1980) (‘the Vienna Convention’).
2. Article 31(1) of the Vienna Convention provides that a treaty ‘shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose’. The context includes its text and preamble (as Art 31(2) assumes). Article 31(3)(b) ensures that the context includes any subsequent practice that establishes the agreement of the parties regarding its interpretation. In the case of the ASA under consideration this would open the way to an argument that the States party was accustomed to treating fuel surcharges as ‘tariffs’ under Art 7(1) as was the New Zealand government. No attempt was made to rely upon this matter. I put Art 31(3)(b) to one side.
3. A number of textual considerations suggest that ‘freight rate’ should be interpreted to include a component of an overall rate such as a fuel surcharge. First, the combined operation of Arts 7(2), 7(5) and 7(6) is to create a régime in which the aeronautical authorities of Hong Kong, i.e. the HK CAD and those of New Zealand maintain, if necessary through agreement or arbitration, control over ‘freight rates’ on flights governed by the Hong Kong-New Zealand ASA. Whilst one can be tolerably clear about the purpose underlying rate fixing in Bermuda I style ASA’s, Art 7 is a somewhat less demanding provision. Strict supervision is, however, maintained. The airlines do not have to consult with each other about tariffs but may do so: Art 7(3). I do not think I can speculate on why Hong Kong and New Zealand decided that they should maintain ultimate control over tariffs even if the ultimate approval within 30 days of lodgement of a tariff provided by for by Art 7(5) rather suggests that interference was expected to be light. What one can take from the control contemplated by Art 7 for the two States is that it served some potential economic purpose.
4. Secondly*,* if one admits of the possibility that an airline might charge a ‘tariff’ within Art 7(2) but then be able to charge another impost in addition to the ‘tariff’ which was not itself a tariff, then it would follow that the regulatory scheme would not apply to and would not regulate this second class of impost.
5. Thirdly*,* this would mean that approval under Art 7(2) was not required to levy such an impost and that no power existed under Art 7(5) to disapprove its imposition. Effectively, in relation to this impost the ASA would operate for completely ‘open skies’.
6. Fourthly*,* there is no limit to the size of this effect. Any component of a freight rate, if components of a rate be themselves not a rate, will lie outside the regulation of Art 7. In particular, every freight rate can be reduced to two equal or nearly equal halves. If components of a rate lie outside Art 7 one obvious lacuna in the operation of Art 7 is the device of converting all ‘freight rates’ into two or more ‘components’ lying beyond its reach.
7. Fifthly*,* reading ‘freight rate’ so that for any act of carriage there can be only one such rate and thereby excluding any components of such a rate, is supported by the singular form of the expression ‘the freight rate’. In the interpretation of written instruments it is generally accepted as a matter of domestic law that references to the singular include the plural unless the context indicates to the contrary: see, for example, *Acts Interpretation Act 1901* (Cth), s 23(b). The Vienna Convention does not include amongst its provisions any express rule concerning the approach to the interpretation of singular expressions. This reflects a conscious decision taken during its drafting not to include canons or maxims of interpretation. It is likely that ordinary rules of language apply. Thus the World Trade Organisation’s Appellate Body considered that ‘duty’ included ‘duties’ so that an investigating authority looking into anti-dumping allegations was not prohibited from considering more than one at a time: Appellate Body Decision, *United States – Sunset Reviews of Anti-Dumping Measures on Oil Country Tubular Goods from Argentina* [2004] WTO Doc WT/DS268/AB/R, AB-2004-4 at [102]. Probably the safer course is to seek to ascertain from the terms of the treaty involved whether the States party intended a reference to the singular to include the plural. In the case of Art 7 it should be inferred that they did because to read it otherwise would render the article open to obvious circumvention of a kind which could not have been in contemplation.
8. Sixthly*,* I have difficulty in identifying what end it would serve to construe ‘freight rate’ so as not to include components of a rate. It would certainly undermine the ability of the two States to control the prices being charged on the routes between them.
9. Those matters lead me to conclude that the expression ‘freight rate’ where used in Art 7(1) includes a component of a freight rate, such as a surcharge or a customs fee, as a matter of ordinary meaning.
10. Professor Dempsey expressed the view in his evidence that a tariff included a surcharge. Since I have reached that conclusion independently I do not need to call in aid of his opinion. Accordingly, I may skirt the rather complex questions attending the receipt of his opinion: cf. Art 32, Vienna Convention.
11. For these reasons I conclude that a ‘freight rate’ in Art 7 of the Hong Kong-New Zealand ASA includes a component of a freight rate such as a surcharge or a customs fee. Consequently, the fuel surcharges the subject of this litigation were tariffs under the Hong Kong-New Zealand ASA.

### 6.1.2 The Hong Kong-Indonesia ASA

1. The relevant provision of the Hong Kong-Indonesia ASA was Art 8. It provided:

ARTICLE 8

**Tariffs**

1. The term “tariff” means one or more of the following:

(a) the fare charged by an airline for the carriage of passengers and their baggage on scheduled air services and the charges and conditions for services ancillary to such carriage;

(b) the rate charged by an airline for the carriage of cargo (excluding mail) on scheduled air services;

(c) the conditions governing the availability or applicability of any such fare or rate including any benefits attaching to it; and

(d) the rate of commission paid by an airline to an agent in respect of tickets sold or air waybills completed by that agent for carriage on scheduled air services.

(2) The tariffs to be charged by the designated airlines of the Contracting Parties for carriage between Hong Kong and Indonesia shall be those approved by the aeronautical authorities of both Contracting Parties and shall be established at reasonable levels, due regard being had to all relevant factors, including the cost of operating the agreed services, the interests of users, reasonable profit and the tariffs of other airlines operating over the whole or part of the same route.

(3) The tariffs referred to in paragraph (2) of this Article may be agreed by the designated airlines of the Contracting Parties seeking approval of the tariffs, which may consult other airlines operating over the whole or part of the same route, before proposing such tariffs. However, a designated airline shall not be precluded from proposing, nor the aeronautical authorities of the Contracting Parties from approving, any tariff, if that airline shall have failed to obtain the agreement of the other designated airlines to such tariff, or because no other designated airline is operating on the same route. References in this and the preceding paragraph to “the same route” are to the route operated, not the specified route.

(4) Any proposed tariff for carriage between Hong Kong and Indonesia shall be filed with the aeronautical authorities of the Contracting Parties by the designated airline or airlines seeking its approval in such form as the aeronautical authorities may separately require to disclose the particulars referred to in paragraph (1) of this Article. It shall be filed not less than 60 days (or such shorter period as the aeronautical authorities of the Contracting Parties may agree) before the proposed effective date. The proposed tariff shall be treated as having been filed with the aeronautical authorities of a Contracting Party on the date on which it is received by those aeronautical authorities

(5) Any proposed tariff may be approved by the aeronautical authorities of a Contracting Party at any time and, provided it has been filed in accordance with paragraph (4) of this Article, shall be deemed to have been approved by the aeronautical authorities of that Contracting Party unless, within 30 days (or such shorter period as the aeronautical authorities of the Contracting Parties may agree) after the date of filing, the aeronautical authorities of one Contracting Party have served on the aeronautical authorities of the other Contracting Party written notice of disapproval of the proposed tariff.

(6) If a notice of disapproval is given in accordance with the provisions of paragraph (5) of this Article, the aeronautical authorities of the Contracting Parties may jointly determine the tariff. For this purpose, one Contracting Party may, within 30 days of the service of the notice of disapproval, request consultations between the aeronautical authorities of the Contracting Parties which shall be held within 30 days from the date the other Contracting Party receives such request in writing.

(7) If a tariff has been disapproved by the aeronautical authorities of a Contracting Party in accordance with paragraph (5) of this Article, and if the aeronautical authorities of the Contracting Parties have been unable jointly to determine the tariff in accordance with paragraph (6) of this Article, the dispute may be settled in accordance with the provisions of Article 15 of this Agreement.

(8) Subject to paragraph (9) of this Article, a tariff established in accordance with the provisions of this Article shall remain valid until a replacement tariff has been established.

(9) Except with the agreement of the aeronautical authorities of both Contracting Parties, and for such period as they may agree, the validity of a tariff shall not be prolonged by virtue of paragraph (8) of this Article:

(a) where a tariff has a terminal date, for more than 12 months after that date;

(b) where a tariff has no terminal date, for more than 12 months after the date on which a replacement tariff is filed with the aeronautical authorities of the Contracting Parties by a designated airline of a Contracting Party.

(10) (a) The tariffs to be charged by the designated airlines of Hong Kong for carriage between Indonesia and another State shall be subject to approval by the aeronautical authorities of Indonesia and, where appropriate, of the other State. The tariffs to be charged by the designated airlines of Indonesia for carriage between Hong Kong and a State other than Indonesia shall be subject to approval by the aeronautical authorities of Hong Kong and, where appropriate, of the other State.

(b) Any proposed tariff for such carriage shall be filed by the designated airline of one Contracting Party seeking approval of such tariff with the aeronautical authorities of the other Contracting Party. It shall be filed in such form as those aeronautical authorities may require to disclose the particulars referred to in paragraph (1) of this Article and not less than 90 days (or such shorter period as they may decide) prior to the proposed effective date. The proposed tariff shall be treated as having been filed on the date on which it is received by those aeronautical authorities.

(c) Such tariff may be approved at any time by the aeronautical authorities of the Contracting Party with whom it has been filed and shall be deemed to have been approved by them unless, within 30 days after the date of filing, they have served on the designated airline seeking approval of such tariff written notice of disapproval.

(d) The aeronautical authorities of a Contracting Party may withdraw approval of any such tariff approved or deemed to be approved by them on giving 90 days' notice to the designated airline charging such tariff. That airline shall cease to charge such tariff at the end of that period.

(11) Notwithstanding the provisions of paragraphs (5) and (l0)(c) of this Article, the aeronautical authorities of a Contracting Party shall not disapprove any proposed tariff filed with them by a designated airline which corresponds (e.g. in price level, conditions and date of expiry but not necessarily the routeing being used) to the tariff charged by an airline of that Contracting Party for comparable services between the same points or is more restrictive or higher than that tariff.

1. On the issue of whether a tariff includes a surcharge or a customs fee, the construction questions are largely the same. It is true, because Indonesia has not acceded the Vienna Convention, that it does not directly apply but it is likely, in any event, that the Vienna Convention merely reflects the contents of customary international law: see *Thiel v Commissioner of Taxation* (1990) 171 CLR 338 at 356. I see no material difference between the definition of ‘tariff’ under Art 8 and its definition in Art 7 of the Hong Kong-New Zealand ASA in relation to this issue. Consequently, I conclude that it includes surcharges and customs fees as well.

### 6.1.3 The Australia-Indonesia ASA

1. The Australia-Indonesia ASA does not contain a definition of ‘tariff’. The most relevant provision is Article 6 which is set out above at [163].
2. The same reasoning, however, applies. If ‘tariff’ is construed not to include a component of an overall freight rate then the entire purpose of the article can be thwarted by breaking overall freight rates into component elements to which Article 6 will not apply. This cannot be what the States party intended. Accordingly, I conclude that a tariff includes a surcharge and a customs fee.
3. For that reason, I conclude that the surcharges and customs fee are tariffs within the meaning of all three agreements.

### 6.1.4 Obligations with respect to approved tariffs

1. It follows therefore that I accept the first of the requirements contended for by the airlines. If they were going to impose a fuel or insurance surcharge or a customs fee they needed to obtain approval from the HK CAD as a matter of Hong Kong domestic law.
2. I also accept that the only surcharge which could be imposed would be the approved one. This flows not from the meaning of the word ‘tariff’ in any of the ASAs which is, at least on this topic, obscure but from the language of the operating permit (‘shall charge only those tariffs which have been approved’). The word ‘only’ means ‘only’. The charging of a non-approved surcharge would be the charging of a different tariff.
3. I do not, however, accept that Hong Kong domestic law required anything in relation to collective applications for fuel surcharges. Indeed, the airlines did not submit that it did. Their case was that this requirement was to be seen as emerging from the administrative directions given to them by the HK CAD.
4. The Commission called an expert in the law of Hong Kong, Dr McCoy QC, to prove that a tariff was a maximum amount. The airlines called Mr Wingfield, Hong Kong’s former solicitor-general, to prove that it was a minimum amount. There is no doubt that in the case of Bermuda I the expression ‘tariff’ referred to a minimum. The entire point of Bermuda I was to prevent the forces of ‘destructive competition’ from leading to the elimination of the European aviation industry at the hands of the United States industry. This is the very point made by Haanappel to which I have referred to above in Section 3.1. I can see no reason why one would have an ASA to regulate air transport between two nations containing price fixing machinery if the price fixed was a maximum. Nothing in the literature about ASAs supports the Commission’s position; nor does it correspond with what happened.
5. Despite this, Dr McCoy held the contrary view. There were three reasons for this. First, a Court would take judicial notice of discounting of tariffs by airlines. I cannot take judicial notice of such a matter. Section 144 of the *Evidence Act 1995* (Cth) constrains the matters of which I can take judicial notice to matters of common knowledge where the proceeding is held, (i.e. Sydney) or matters capable of verification by reference to documents the authority of which cannot be reasonably be questioned. The tariff discounting practices of airlines flying out of Hong Kong are not the legitimate subject of judicial notice. Even if the obstacles of s 144 could somehow be surmounted, the practices of airlines would be irrelevant to the meaning afforded the word ‘tariff’ in the ASAs. Later shared States’ practice may throw light on what a treaty provision may mean (cf. Vienna Convention Art 32) but that is not what the practice of airlines would reveal.
6. Secondly, Dr McCoy thought that the ASAs were part of what he termed a ‘Russian Doll’ consisting on the outside of the Vienna Convention, the ASAs, the domestic ordinances in Hong Kong and the terms of the operating permit. Viewed in that context, one could see that they were maxima from which discounting could occur because this was the natural English meaning of the word ‘tariff’. I do not agree that this is so. Even if the ordinary meaning of the word ‘tariff’ connoted a minimum I do not think in the context of the ASAs it could mean that because of an inability on my part, despite some effort, to understand what the point of rate fixing machinery is if those subject to it are permitted to discount from it. In any event, I doubt whether ‘tariff’ has such meaning. The Oxford English Dictionary defines a tariff as ‘an official list or schedule setting forth the several customs duties to be imposed on imports and exports; a table or book of rates; any item of such a list, the impost (on any article); also the whole body or system of such duties as established in any country.’ This does not support Dr McCoy’s view.
7. Thirdly, Dr McCoy argued that the Art 44(e) of the Chicago Convention provided for ‘no unreasonable competition’ and this was something a Hong Kong decision maker would have to take into account. I take from this the idea that the Chicago Convention is somehow to be seen as imposing an obligation to encourage competition (albeit not of an unreasonable kind); that competition would require the ability on the part of airlines to discount; and, therefore, that one ought to read the word ‘tariff’ in the ASA consistently with that obligation. I do not accept this. Assuming that the ASAs should be interpreted in light of the Chicago Convention one would require a great deal more than these three words to qualify the operation of these bilateral arrangements. The argument is tenuous.
8. I conclude that Dr McCoy is, with respect, wrong about this and that Mr Wingfield is correct. As it happens, the issue is also one of public international law about which I can form my own views: *Australian Competition and Consumer Commission v PT Garuda Indonesia (No 9)* (2013) 212 FCR 406 at [32]-[48]. My own view is that it is quite plain that tariffs are minima and that the point of rate fixing machinery in ASAs is to prevent ‘the destructive forces of competition’ from harming (originally) flag carriers.
9. The Commission also alleged that there was a further issue about the meaning of ‘tariff’ which was whether once a tariff was approved it had to be imposed by an airline. I did not read the airlines’ submissions as contending that this was a requirement. In any event, it is plain that there was no such obligation.
10. The Commission also cited *Browne v Dunn* (1893) 6 R 97 for the proposition that since Dr McCoy was not cross-examined to suggest that his view about tariffs being minima was wrong the airlines could not submit to that effect. I reject this submission. The issue was plainly in contest; both sides knew their respective positions; opinions had been exchanged. The rule in *Browne v Dunn* does not require the obvious to be put to a witness. In any event, quite apart from the airlines’ position I am satisfied that Dr McCoy is certainly incorrect in light of my own understanding of how the ASA should be interpreted as a matter of public international law. I do not propose to decide this case on a basis of which I know to be wrong.

## 6.2 The requirements of the HK CAD

1. There is no direct evidence that the HK CAD ever issued a written requirement that airlines wishing to impose a fuel surcharge calculated by reference to an index mechanism do so by a collective application through the HK BAR CSC. No witness was called from the HK CAD to say that it had done so. There was indirect evidence, however, to that effect. Air NZ pointed to the testimony of Ms Liu (who was cross-examined) and the affidavit of Mr Tan (who was not). There was also correspondence to the President of the European Commission from the HK CAD.
2. Before turning to the controversial aspects of that evidence it is useful to refer to some matters by way of background. The airlines which operated out of Hong Kong international airport established amongst themselves a body called the Hong Kong Board of Airline Representatives (‘the HK BAR’) to represent their interests in matters of concern to them. It consisted of representatives from each of the airlines and a member of the Hong Kong Legislative Council. It had a number of subcommittees including the cargo subcommittee (the HK BAR CSC) whose purpose was to represent the interests of airlines in discussions with the HK CAD about air cargo. At the relevant time the HK BAR CSC had around 50 to 60 members.
3. During the period 2000 to 2008 the HK BAR CSC was chaired by a representative of Cathay Pacific, the home carrier. The relevant chairpersons were:
4. Mr Chung Mak (until January 2000);
5. Mr KK Leung (from February 2000 to September 2003);
6. Mr Tom Wong (from September 2003 to August 2005); and
7. Ms Christine Liu (from July 2005 to June 2007).
8. Ms Liu was called as a witness by Air NZ. She is presently an employee of Cathay Pacific but is on extended unpaid leave. Messrs Mak and Wong are no longer employed by Cathay Pacific and Mr Leung passed away in 2011.
9. The HK BAR CSC also had an executive subcommittee which met, as Ms Liu put it, in a more efficient manner and had a smaller membership. These committees kept minutes of their meetings. There was also a surcharge working group which was established in 2003 as a subcommittee of the HK BAR CSC. It was part of the role of the chair of the HK BAR CSC to deal with the HK CAD on the issue of tariffs.
10. As I have said, the written correspondence between the HK BAR CSC and the HK CAD does not reveal the existence of a written requirement that airlines wishing to impose a fuel surcharge using an index mechanism do so by way of joint application. The HK CAD’s written correspondence does indicate, however, that it regarded fuel surcharges as tariffs within the meaning of the relevant ASAs: see, for example, its letters to the HK BAR CSC of 12 April 2002 and 18 June 2002 which both clearly stated the HK CAD’s view that fuel surcharges were tariffs which required its approval. For reasons already given above, this view was correct.
11. Over the period 2000 to 2007 it is clear that the HK CAD gave approval for the imposition of fuel surcharges based on three indices. The first index was the IATA fuel index which was used for the period 2000 to 2002; the second was the Lufthansa fuel index which was used between 2002 and 2006; and, the third was a fuel index proposed by the HK BAR CSC itself which was used after 2006 until 2007. The HK CAD also approved changes to the lists of airlines who were using the index through the HK BAR CSC’s joint application. None of this very extensive correspondence refers to the need for the HK BAR CSC to apply jointly on behalf of all airlines wishing to use a fuel price index although in practice this is what occurred.
12. At the time that the index being used switched from the Lufthansa Index to the HK BAR CSC index (in September 2006) a meeting took place between Ms Liu and four representatives of the HK CAD being a Ms Poon, a Mr Kwok, Mr To and a person called Erin. Ms Liu gave evidence about this meeting. Paragraphs six to twelve of her affidavit of 22 February 2013 are as follows:

6. After I completed my presentation, one of the CAD representatives (I cannot now recall which one), said words in Chinese to the following effect:

We would like to provide you clarification of our stance on how we assess applications for fuel surcharges. We would like to give you clarification because we have learned recently that there was some confusion about our policy.

7. …

8. The CAD representative said words to the effect:

If you want an approval to charge an FSC in accordance with an FSC mechanism, all airlines must agree to a single mechanism, not multiple mechanisms. But if an individual airline wants to apply for approval to charge a static FSC, it can apply individually.

9. I recall that Stephen Kwok said words to the effect:

You can imagine that it’s not possible to implement and monitor more than one FSC mechanism in Hong Kong, not just for the CAD but because it would be confusing for shippers as well.

10. Ms Poon said words to the effect:

If you want to apply to CAD for a static surcharge in Hong Kong, individual airlines can do so. But according to the Air Services Agreements, the CAD requires 60-90 days to review the application before it will grant approval. If approved, the approval would last two months and the FSC could not change in those two months.

11. I then said words to the effect:

That is a very clear statement, thank you. Would you mind putting that in black and white so that I can pass that information on to the airlines?

12. A CAD representative responded in words to the following effect:

If you need the details in black and white, we would have to obtain the Bureau’s approval and that would be a prolonged and complicated process. As chairman of the BAR-CSC, you can pass this on the airlines.

1. It will be noted that on Ms Liu’s account the HK CAD did not prevent airlines lodging their own static applications although it did indicate that such applications would take between 60-90 days to process and would be in force for only two months. This is quite different to the airlines’ submission that they were obliged by a direction from the HK CAD only to lodge a joint application. Ms Liu’s affidavit directly contradicts that proposition. It suggests instead that the airlines were free to lodge individual applications albeit there may have been commercial reasons why they did not wish to utilise that freedom. These included the delay which would be involved in obtaining approval, the inability to change the surcharge during the approval’s currency and its relatively short duration. None of these, however, was a legal impediment to making an application for an individual approval. Further, an airline which wished to use an index mechanism to determine its surcharges was perfectly free to do so. Instead of getting approval for the entire index structure it could keep the index in-house and seek approval for the individual surcharges its index suggested. There were commercial disincentives against doing so, but there was never a direction from the Hong Kong authorities that airlines who decided to impose surcharges using an index must agree on a single index with their competitors.
2. The Commission was nevertheless critical of Ms Liu’s evidence (I return to this below) but it is corroborated by contemporaneous documentation. For example, in her letter to the HK CAD of 26 September 2006, Ms Liu set out the circumstances in which the Lufthansa Index came to an end but went on to say:

In accordance with your prior direction to collectively apply for review and approval for the Ex-Hong Kong air cargo fuel surcharge, BAR-CSC has endeavoured to create an index that is consistent, transparent and predictable, in line with the requirements of the shipper and freight forwarder community in HK. Accordingly, we will be grateful for your consideration and approval of BAR-CSC’s proposed new air cargo fuel surcharge mechanism.

1. Further, in an email of 20 September 2006 Ms Liu said:

… as CAD indicated verbally to me that airlines should submit one scheme iso [instead of] leaving CAD to choose.

1. The Commission submitted that I should reject Ms Liu’s evidence for the following reasons. First, the final account of the conversation of 26 or 29 September was given by Ms Liu only in her third affidavit and was thus to be seen as her third ‘go’ at getting the account correct. Secondly, it was unlikely she could have had such precise recall of the conversation which had happened seven years earlier. In the same vein, it was said that her confident assertion she could recall certain events in 2006 was inherently implausible. Thirdly, in relation to the events of September 2006 it was pointed out that Ms Liu was by then aware of the antitrust implications of what had been occurring and indeed it was Ms Liu who was striving to obtain a clear statement from the HK CAD that it would require a joint application for the use of a fuel price index mechanism. Further, her evidence of whether she took a file note of the conversation was said to be unsatisfactory. She testified that she had taken a note of it but acknowledged under cross-examination that no such note had ever been found. Fourthly, she was criticised for her account of the meeting which was said to have certain chronological difficulties. Fifthly, it was said that she had reconstructed her evidence from the email of 19 September 2006. Finally, it was said that she was argumentative in the manner in which she gave her evidence.
2. I accept that Ms Liu was perhaps sometimes a little over confident in her ability to recall the events of 2006 with such clarity. But none of the criticisms which have been made of her evidence dispose me to consider that her account of the conversation of 26 September 2006 is incorrect. In significant ways it is corroborated by the emails of 20 and 26 September 2006. For me to reject her evidence I would need to conclude that these emails were generated with some ulterior and essentially dishonest motive. I acknowledge that it is possible that Ms Liu, being by then aware that antitrust questions had arisen, was seeking to obtain in writing something which might serve as a defence in subsequent antitrust proceedings. But I do not really think this is likely. The legal mechanics by which the statement sought to be elicited from the HK CAD as to its fuel surcharge index requirements operated at a very high level. The Commissioner’s case on this aspect attributes to Ms Liu a degree of forensic foresight well in excess of that I would expect her to have.
3. This conclusion also accords with what common sense might suggest HK CAD’s position would be – it would be ungainly to have to deal with more than one fuel index and it would perhaps promote confusion amongst the shippers.
4. Accordingly, I accept Ms Liu’s evidence about events in Hong Kong and, in particular, I accept her evidence about what was said by representatives of the HK CAD to her at the meeting held in September 2006. No doubt there were deficiencies in her evidence but I did not think that these bespoke a lack of honesty on her part.
5. Of course that establishes a ‘direction’ only in September 2006. It does not establish that the HK CAD always proceeded on this basis. On the other hand, I do know that, in fact, there was only one fuel index approved at a time and that in each case it was the result of a joint application made on behalf of airlines by the HK BAR CSC. I am prepared to infer that the position announced in September 2006 was not new but reflected the practice of the HK CAD over the entire relevant period. It is difficult to see why there would have been a sudden change of practice in September 2006.
6. Air NZ placed considerable reliance upon a letter written by the HK CAD to the European Commission on 3 September 2009 (see: *Australian Competition and Consumer Commission v Air New Zealand (No 7)* (2013) 209 FCR 361). In this letter the HK CAD set out its views of what it had required of airlines in the relevant period. In part it said:

The Commission should be absolutely clear that, in respect of the cargo fuel surcharge index-based mechanism, we require that the BAR-CSC and the participating carriers agree on the details of the collective applications, including the amount of the surcharge for which approval was sought, the evidence to be provided to CAD supporting the applications and the single mechanism to be used for determining the surcharge. The CAD also mandated and required the participating carriers to levy specifically the surcharge approved. Moreover, we mandated and required BAR-CSC to submit for approval to CAD any change of the list of carriers participating in the collective applications and we made it clear that such carriers should not levy any fuel surcharge without CAD’s express approval to the BAR-CSC.

1. Where this letter varies from it I prefer Ms Liu’s account of what the HK CAD in fact required to the account set out in its letter. Her account is based upon contemporaneous experiences with nominated HK CAD officials actually involved in the process of preparing the fuel surcharge. Further, Ms Liu’s account is supported by the contemporaneous documents discussed above. The letter, on the other hand, postdates by a number of years the events in question and is written by a person who appears to have no direct contemporaneous involvement in the surcharge approval process.
2. I do not, however, accept that Ms Liu’s evidence establishes the direction for which the airlines contend. Her account of the meeting in September 2006 does not show that the airlines were told that they could only submit a joint application in respect of a fuel index mechanism. Instead the airlines were told that they could each apply for a static surcharge but that the HK CAD would most likely take 60-90 days to process any such application and any approval would, in any event, last for only two months. As I have said above, an airline which wished to use its own fuel index could do so by providing the HK CAD with a series of static surcharges calculated by that airline internally using its own index. No doubt the information by the HK CAD that it would take at least two months to process any such application provided something of a commercial disincentive for an airline to go down that path and perhaps the same may be said of the fact that any such approval would only last for two months, but this was a commercial or practical concern and not a legal one. The sluggishness of the HK CAD’s approach to such applications, and their disinclination to entertain them, was no doubt inconvenient but it was not an administrative prohibition. I therefore reject the key proposition the airlines advance that the HK CAD required a joint application for any fuel index mechanism. It encouraged such an approach, but it did not require it. At all times they were both legally and administratively able to lodge single applications on each of their own behalves. The HK CAD never directed that the airlines could not do this and it never directed them to collude. The correct position is most accurately captured in a telex of 10 January 2000 sent by the Chair of the HK BAR CSC about an alteration to a surcharge. It concluded:

F.Y.I, if any individual airlines would still like to file to HKCAD for a fuel surcharge, they are of course free to do so.

1. I therefore accept that:
2. a fuel or insurance surcharge is a tariff within the meaning of the relevant operating permits;
3. airlines were required to obtain approval from the HK CAD for the imposition of any fuel or insurance surcharge;
4. once that approval was obtained each airline was permitted to charge only that surcharge and no other; but
5. although airlines were encouraged to lodge a joint application through the HK BAR CSC for the approval of any fuel index mechanism, they were not directed to do so and each could have, subject to some commercial inconvenience, applied its own fuel index mechanism.
6. I have considered the affidavit evidence of Mr Tan who was not made available for cross-examination and whose affidavit was received over objection as a documentary tender under an exception to the hearsay rule. He had no direct evidence on this topic to give but only that of his understanding of what the HK CAD required. I prefer Ms Liu’s evidence to Mr Tan’s.
7. The upshot of that factual conclusion is that the question of whether there is a foreign state compulsion defence does not arise.

# 7 INDONESIAN LAW AND DOMESTIC PRACTICE

1. Garuda submitted that it had been required to engage in collective agreement in fixing surcharges because of *Undang-Undang Republik Indonesia Nomor 15 Tahun 1992 Tentang Penerbangan* [Law No 15 of 1992 on Aviation] (Indonesia) (‘the Indonesian Aviation Law’) Art 13(2) a translation of which provided:

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.

[emphasis added]

1. There was a dispute as to whether ‘on the basis of’ was an adequate translation of the Indonesian word ‘berdasarkan’ but this presently is of no moment. This is because Art 13(2) applies to foreign aircraft which Garuda’s aircraft are not. Two experts on Indonesian law, Professor Lindsay and Dr Butt, were called and both agreed that Art 13(2) did not apply to Garuda which would appear to be the end of this argument.
2. In its written submissions, however, Garuda submitted that it came under an obligation to agree surcharges collectively by reason of Art 38 of *Peraturan Pemerintah Republik Indonesia Nomor 40 Tahun 1995 Tentang Angkutan Udara* [Government Regulation No 40 of 1995 on Aviation] (Indonesia) (‘the Indonesian Aviation Regulations’). A translation of Art 38(2) provided:

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 Lindsay was of the view, with which Dr Butt agreed, that Art 38 of the Indonesian Aviation Regulations had to be interpreted in light of the statute which implemented it which was Art 40 of the Indonesian Aviation Law*.* It provided:

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

1. This is fatal to Garuda’s submissions because it is clear that Art 40 is directed, not to Garuda, but to the Government of Indonesia. What Art 38(2), therefore, requires is for the Government to determine the tariffs guided by the relevant bilateral arrangement. It says nothing about Garuda’s obligations.
2. Garuda also submitted in writing that it was ‘tolerably plain that Article 38(2) corresponds to an implementation of a Bermuda style tariff-fixing obligation. The reference to multilateral treaties is apt to include IATA rate-fixing where that is available’. When the relevant treaty uses IATA rate fixing it is true that the effect of Art 38(2) and Art 40 will be that the Government of Indonesia will be obliged to set tariffs by reference to any IATA rate fixing which has occurred. But this is not a legal obligation which rested on any of the airlines. It rested only upon the Government of Indonesia. Accordingly, Art 38(2) did not require Garuda to engage in IATA rate fixing as a matter of Indonesian domestic law.
3. The Commission also submitted that its construction of these provisions was assisted by the subsequent passage of the *Undang-Undang Republik Indonesia Nomor 5 Tahun 1999 Tentang Larangan Pratek Monopoli Dan Persaingan Usaha Tidak Sehat* [Law No 5 of 1999 Regarding the Ban on Monopolistic Practices and Unfair Business Competition] (Indonesia). Because I have rejected Garuda’s claims about Indonesian law I do not need to decide this issue.
4. I therefore reject Garuda's submissions about Indonesian law, which were tenuous. As to Indonesian State practice Garuda submitted that it was clear that the government of Indonesia was involved in the determination of tariffs including surcharges. To make good this point it relied upon four matters:
5. *The minutes of a meeting of the ACRB held on 4 October 2001*. These contain the statement 'GA will report to Indonesian Government' in respect of the fuel and security surcharges. This does not prove that the Indonesian government required lodgement of tariffs. The absence of any such statement for all of the other understandings suggests there was not.
6. *The minutes of a meeting of the ACRB held on 13 September 2002.* These minutes record that 'GA advised Indonesian Authority unable to accept the new formula for Low Density Cargo as stipulated in the IATA Memorandum CTC COMP 0396…'. An earlier meeting held on 30 July 2002 shows that the airlines had decided not to implement this IATA rule and were informing the government. This was not the determination of a tariff or surcharge as suggested by Garuda nor is there any evidence of any reply from the government.
7. *The minutes of a meeting of the ACRB held on 9 April 2002*. This meeting concerned the AWB fee discussed later. The Indonesian government is not referred to in this minute.
8. *The minutes of a BARINDO meeting held on 28 May 2004*. This in fact concerned a letter written to the government asking it not to introduce a new tax.
9. These four matters do not remotely persuade me that, in fact, the Indonesian government required lodgement of tariffs or surcharges.
10. Finally, Garuda relied upon a submission made by the Commission to the Department of Foreign Affairs and Trade in October 2007. This submission refers to the obligation under the ASA to lodge tariffs but says nothing about whether Indonesia actually required this to be done.
11. I find there was no such practice. Neither Indonesian law nor practice required Garuda to collude on surcharges. The issues of its foreign state compulsion defences do not arise.
12. Before turning to the facts it is first useful to make some observations about the requirements for proof in cases such as the present.

# 8 PROOF IN SECTION 45 CASES

1. Four issues arise here. First, what needs to be proved in order to show that a contract or arrangement has been made or an understanding reached within the meaning of s 45? Secondly, how does one go about proving such a matter? Third, who bears the onus of proof? Fourth, what is the level of proof required?

## 8.1 What needs to be proved?

1. As to the first issue the following propositions are orthodox in the jurisprudence of this Court (although not free from controversy in academic circles):
2. Section 45 uses the expression ‘contract, arrangement or understanding’. Obviously enough a contract involves a degree of formality. Arrangements and understandings, on the other hand, are different concepts but at the heart of both is the need for there to be a meeting of the minds or, if you will, a consensus: *Australian Competition and Consumer Commission v Leahy Petroleum Pty Ltd* (2007) 160 FCR 321; [2007] FCA 794 at 331-332 [26]-[28]. It seems that an arrangement will generally require some form of express negotiation or at the very least communication between the parties: *ACCC v Leahy* at 331-332 [26] and the authorities there collected. On the other hand, an understanding can be tacit and may arise without communication so long as there is a meeting of the minds: *ACCC v Leahy* at 332 [27]-[28]. Whatever else is involved it seems this means that at least one party assumes an obligation to another or gives an assurance or undertaking that it will act in a certain way: *Apco Service Stations Pty Ltd v Australian Competition and Consumer Commission* (2005) 159 FCR 452 at 464 [45] applying the remarks of Lindgren J in *Australian Competition and Consumer Commission v CC (NSW) Pty Ltd* *(No 8)* (1999) 92 FCR 375 at 408 [141].
3. Ordinarily, the concept of a meeting of the minds or a consensus will involve some element of reciprocity between the parties to the understanding. A number of obiter dicta suggest that reciprocity or mutuality is not inevitably a necessary element whilst conceding that, in practice, it will frequently be present. The debate was usefully summarised by Lockhart J in *Trade Practices Commission v Service Station Association Ltd* (1993) 44 FCR 206 at 230-231. Although many later authorities in this Court have referred to this judgment as authority for the proposition that mutuality is not a necessary element, it is worth noting Lockhart J’s own observation that it is difficult to imagine such a case in practice. This view was also shared by Spender and Lee JJ in their concurring judgment at 238. In a similar vein, I am aware of no case in which an understanding has been established in which there was not mutuality between the alleged parties to the understanding. Nevertheless, the authorities in this Court require one to proceed on the basis that it is possible, at least in theory, to establish an understanding without mutuality being present.
4. An understanding need not be overt. In most cases, there will be overt or express action of some kind or another because in practical terms it is quite difficult to reach a consensus without some form of communication. It is not, however, impossible.
5. On the other hand, there will be no understanding where one party decides unilaterally to act in a particular way in response to a pricing manoeuvre by a competitor. A deliberate decision to follow the pricing of a competitor does not give rise, by itself, to an arrangement or understanding to which s 45 applies. In a sense, this is a corollary of the need for a consensus.
6. Consequently, there can be no understanding because one party hopes or expects (in a non-normative sense) that another party will act in a particular way: *Apco Service Stations v ACCC* at 464 [45]; *ACCC v CC (NSW) Pty Ltd* at 408 [141].

## 8.2 How is an understanding to be proved?

1. Turning then to the second question of how an arrangement or understanding might, in practice, be proved the following points deserve repetition:
2. It will be rare, particularly in price fixing cases, for the parties openly to have committed themselves to each other in some fashion which is easily detected, still less proved. Exceptions to this will, however, include those cases where one member of a price fixing cartel or bid rigging enterprise betrays the other members by giving direct testimony of the understanding. There will also be cases where written agreements are present as, for example, sometimes happens with vertical distribution arrangements or, as in the case of IATA, when the price fixing procedure takes place in the open as part of a formal conference pricing structure.
3. In cases where direct evidence is not available, the proof of a collusive understanding needs must be circumstantial. Pausing there, it is important to note that there is nothing inherently weak about cases based on circumstantial evidence. In truth, the strength of any particular circumstantial case will be a function of the number of elements of which it consists and the corresponding unlikelihood of those elements happening for reasons other than as a result of the posited collusive behaviour. Just as with any case of circumstantial evidence, it is forlorn to seek to work out the significance of the individual elements. The circumstantial case’s nature and its strength emerge organically from a consideration of it as a whole. Thus, the onus of proof is to be applied only at the end: *Palmer v Dolman* [2005] NSWCA 361 at [41]. As subparagraph (c) of [41] shows, however, this does not mean that the court is prevented in the ordinary way from finding particular circumstances proved or not proved. Rather, what is meant is that the question of whether the inference, which it is said should be drawn, is to be asked holistically at the end of the process rather than it being asked whether the inference should be drawn from any individual circumstances.
4. The range of circumstances which may, in a particular case, form part of such a circumstantial case are without limit. In the competition area there are, however, some recurrent themes. As circumstances, none of these themes prove anything in general: some meetings between competitors are collusive, some are not; sometimes parallel pricing arises from conspiracy, sometimes it does not; so too, not every market anomaly signals the presence of a cartel – sometimes they just happen. To produce a list of potential circumstantial matters may run the risk, therefore, of giving rise to a ‘check list’ mentality in which, rather than asking whether a circumstantial case has been proved, one sees how many items on the list are present. Such reasoning is erroneous. Lists of matters which have been found in past cases sometimes to indicate the presence of collusive behaviour can never be more than just aids to understanding given sets of facts. At the end of the day, the question will always remain: has the circumstantial case been proved?
5. With that important limitation in mind the following circumstances have been found to be present in some cases of collusive behaviour.
6. ***Parallel Conduct.***  One would expect cartel behaviour to produce parallel, or at least approximately parallel, pricing behaviour. However, it is equally clear that other circumstances can produce the same effect quite innocently. In markets for high volume, homogenous goods in which the market participants are protected by significant barriers to entry, it is quite possible for parallel pricing to occur without collusion. Sawtooth patterns in the movement of petrol prices have been held, in more than one jurisdiction, not to prove the presence of price fixing: see, for example, in Australia, the discussion by Gray J in *ACCC v Leahy* [2007] FCA 794 at [927]-[930]; and in the United States *In re Coordinated Pretrial Proceedings in Petroleum Products Antitrust Litigation*,906 F 2d 432, 445 (9th Cir, 1990). More generally, the same phenomenon can occur in any market which exhibits oligopolistic interdependence, that is, a market in which there are relatively few firms and where those firms use their awareness of each other’s activities in setting prices. It is thus accepted that a circumstantial case consisting only of parallel pricing will never suffice to establish a contravention of s 45: *Trade Practices Commission v Email Ltd* (1980) 31 ALR 53 at 56. In that case, Lockhart J referred to a number of well-known US decisions to that effect including the Supreme Court’s decision *Theatre Enterprises Inc v Paramount Film Distributing Corp*,346 US 537 (1954). Away from markets which exhibit features of oligopolistic interdependence it may be that parallel price movements are more difficult to explain or, to put it another way, that collusion may be more probable. This case does not, however, present a suitable vehicle for the testing of that proposition.
7. In the language of the law of circumstantial evidence, in a case of bare parallel pricing there will usually be a hypothesis consistent with innocence. Certainly this will be so in a market which exhibits oligopolistic interdependence. On the other hand, the absence of parallel pricing may (but need not) tend to prove the absence of collusion. Again, this cannot be an ironclad rule. Even where there is a price fixing cartel there may be circumstances in which non-parallel pricing may yet emerge. For example, there may be a breakdown in discipline in the cartel leading to an outbreak of cheating by one or more of the carteliers. The facts in this case afford an example of this by Garuda in its operations out of Indonesia in the case of the May 2003 Fuel Surcharge Understanding (below at [1180]) when it unilaterally stopped charging the agreed FSC. There may be other cases too where the members of a price fixing cartel deliberately engage in non-parallel pricing from time to time to reduce the appearance of parallel behaviour; or the ability successfully to collude may only occur during certain intermittent market conditions.
8. It follows from these observations that the presence (or absence) of parallel behaviour is only the beginning of the inquiry and will rarely, if ever, be sufficient on its own to reach a conclusion one way or the other. Air NZ relied upon a passage in SG Corones, *Competition Law in Australia* (Lawbook, 5th ed, 2010) at 276-277 which was in these terms:

Circumstantial evidence, such as prices moving in unison is not sufficient; there must be witnesses who are prepared to give direct evidence of a consensus and a commitment being reached as to the prices they will charge in the future.

1. This is followed immediately by a paragraph which begins, ‘[t]here may be no direct evidence of the parties meeting or communicating directly with each other’. In any event, the first the statement is wrong. Whilst it is true that a circumstantial case consisting solely of parallel pricing cannot succeed (although note the possible exception in markets not exhibiting features of oligopolistic interdependence discussed above at [466]), this is an entirely different proposition to the notion that circumstantial cases are not permitted in Part IV cases at all. There is no support for that idea in the authorities. Further, it is incorrect to say that the necessary consensus can be proved only by direct testimony. In most cases it will, in fact, be proved circumstantially: cf. *Apco Service Stations v ACCC* at 465 [52].
2. ***Meetings and opportunities to exchange confidential information.*** There can be legitimate reasons for competitors to meet. The cargo sub-committees in this case afford examples of this. The cargo carrying airlines, as a class at each airport, did have rational and legitimate reasons to meet. For example, they had common interests in seeking to lobby governments on the imposition of taxes. The customs charge levied by the Indonesian government on air waybills affords an example of an issue upon which the airlines had a joint legitimate interest in lobbying (see below at [1190]). So too, there were common issues such as the airlines’ satisfaction with the performance of individual terminal operators. In each of these cases there were innocent reasons for the airlines to consult with each other. Meetings of that kind may nevertheless provide the opportunity for collusive behaviour to take place. What may commence as a legitimate meeting procedure may ultimately result in collusion. This will be particularly so where the meetings are scheduled on a regular or semi-regular basis, as was largely the case in these proceedings. On the other hand, where competitors meet without any apparent legitimate purpose then this will assist in proving, although not determining, the existence of a price fixing understanding. Again, it is possible that there may be innocent explanations such as that the meeting was fortuitous or unintended. The status of evidence that competitors met is, therefore, somewhat nuanced and in this way resembles the status of evidence of parallel pricing.
3. ***Economically irrational behaviour.*** I discuss the approach of the United States’ federal courts to proof of cartel matters in more detail below, but it is worth noting that it is recognized, again with some caution, that economically irrational behaviour can be indicative of the presence of a cartel. For example in *In re Flat Glass Antitrust Litigation*,385 F 3d 350, 360-361 (3rd Cir, 2004) the United States Court of Appeals for the 3rd Circuit observed that:

Evidence that the defendant acted contrary to its interests means evidence of conduct that would be irrational assuming that the defendant operated in a competitive market. In a competitive industry, for example, a firm would cut its price with the hope of increasing its market share if its competitors were setting prices above marginal costs.

1. Caution needs to be exercised when going down this path. As the United States Court of Appeals for the 11th Circuit pointed out in *Williamson Oil Co Inc v Phillip Morris USA*, 346 F 3d 1287 (11th Cir, 2003) at 1310 a court should not be ‘too quick to second-guess well-intentioned business judgments of all kinds’. And indeed it has been pointed out that conscious parallelism may generate precisely the kind of ‘irrational behaviour’ under discussion in *In re Flat Glass: Co-ordinated Pretrial Proceedings in Petroleum Products Antitrust Litigation* at 445.
2. ***Motive.*** There is no doubt that the existence of a motive to fix prices is a legitimate matter to take into account in assessing whether the collusive behaviour took place. As in other fields of law, there is an acceptance that the objective likelihood that a person committed an act is increased if the person had a motive to commit the act. The decision in *Trade Practices Commission v David Jones (Australia) Pty Ltd* (1986) 13 FCR 446 at 448-449 (upon which the Commission relied) is an example where motive formed an essential part of the reasoning. However, some care is necessary in identifying what the relevant motive is. The motive cannot be one of simply making profits because all firms are exercised ultimately by that motive and the pursuit of profit for profit’s sake is evidence of robust capitalism rather than anti-competitive behaviour. Authority in the United States has suggested that motive in the present sense requires an inquiry into the conscious likelihood that the collusive behaviour would succeed: see, for example, *In re Flat Glass* at 360. This will likely be the case in any concentrated industry. This has led the Court of Appeals for the 7th Circuit to observe that ‘[t]he mere existence of mutual economic advantage, by itself, does not tend to exclude the possibility of independent, legitimate action and supplies no basis for inferring a conspiracy’: *Serfecz v Jewel Food Stores*,67 F 3d 591, 600-601 (7th Cir, 1995). It is true that this is not how the Court analysed the question of motive in *TPC v David Jones* but recourse to the facts of that case show the evidence of motive did relate directly to oligopolistic interdependence. The market involved in that case was the market in Adelaide for Sheridan manchester and the number of firms was small enough to meet at Kappy’s Coffee Lounge (still in business in 2014 at Compton St, Adelaide). The evidence before Fisher J certainly showed an awareness on the respondents’ parts that the market could, with some efforts, be fixed: see 449 ff.
3. ***Joint action, collusion and similar pricing structures.*** The Commission submitted that each of these matters could support a circumstantial case of collusive behaviour. The authorities cited for this were *Australian Competition and Consumer Commission v Mobil Oil Australia Ltd* [1997] ATPR ¶ 41-568 and *TPC v Email Ltd*. For reasons I will give shortly, I do not accept that either of those decisions is authority for those propositions. Putting that observation to one side, these matters are couched at such a level of generality that they may, in practice, be meaningless. For example, if ‘collusion’ can be demonstrated then this is hardly to be thought of as an element in a circumstantial case. Collusion is not *how* a s 45 case is proved; it is *what* is proved in a s 45 case. Likewise, the concept of joint action is so nebulous that without knowing more the concept is unlikely to assist. If the alleged ‘joint action’ has involved meetings or other occasions upon which pricing or other confidential information might be exchanged then one can readily see its relevance to the proof of collusion by circumstantial means. If, on the other hand, what is involved is something else not involving such occasions it is difficult to see what the concept might add to the overall analysis. For example, it is difficult to see how joint sponsorship by a number of firms of some public spectacle would support a price fixing case. So too, the fact that firms have similar pricing structures is really just another way of pointing to price parallelism. Accepting that price parallelism can assist in, but not generally establish by itself, a circumstantial case of collusion, I do not think it is useful to concatenate similarity in pricing structures to the list of matters which may assist in proving a circumstantial case.
4. In any event, neither of the authorities relied upon by the Commission to establish these propositions does so. The page references given by the Commission to *TPC v Email* are to passages in which the Court rejected the Commission’s case on the facts. The reasons of Heerey J in *ACCC v Mobil Oil* were concerned with a pleading debate and seem to establish only that parallel pricing is not sufficient.
5. In a case, therefore, in which it is sought to prove collusion in breach of s 45 by circumstantial means, the following non-exhaustive matters may be useful aids in analysis:
6. Has there been parallel pricing?
7. Have the parties accused of collusion had occasion to meet or otherwise exchanged pricing information? Are there legitimate reasons for why these meetings might have occurred?
8. Have the firms accused of the collusive conduct acted in a way which is economically irrational?
9. Do the firms have a motive to engage in price fixing conduct, that is to say, do they have an understanding of their own ability to control prices by collusion?
10. Because the situations involving collusion which may arise are in effect limitless in their variety, this list cannot be exhaustive. There may always be other circumstances available. For example, where there is a substantial drop in the price of a good in an upstream input market and there are no corresponding price consequences in the downstream markets this may – but need not – indicate the presence of one or more collusive arrangements.
11. What is important to grasp is that lists of this kind are not substitutes for analysis. What is required is proof of a circumstantial case and the matters set out above are merely circumstances worth examining. In this regard it is to be emphasised that the domain of discourse here involved is really an aspect of the law of evidence and, in particular, the law pertaining to circumstantial proof. What will be involved are competing hypotheses and there will follow, at least in a competition case, a comparison between the likelihood of the various circumstances being explained by the thesis conclusion of collusion and the likelihood of the circumstances being explained by some other, innocent, explanation.
12. In the criminal law, with which this case is not concerned, the question will be whether the Crown has proved the guilt of the accused beyond a reasonable doubt. This has the strong procedural consequence, insofar as a circumstantial case is concerned, that if there is any reasonable hypothesis consistent with the innocence of the accused the prosecution will fail.
13. In civil proceedings such as the present, a different approach will result from the lower civil standard of proof. The question will be whether the party alleging collusion has proven it on the balance of probabilities: *Bradshaw v McEwans* (1951) 217 ALR 1 at 5. That party will need to show that its hypothesis of collusion is more probable than not. A party accused of collusion will be able to resist proof of such a case in two ways. The first will be to attack the adequacy with which the various circumstances have been proved, that is to say, the alleged colluder may attack the very existence of the alleged circumstances. This situation is not relevant to the current analysis and may be put to one side. Secondly, the alleged colluder may seek to prove that there is an alternative hypothesis which explains the circumstances. The legal burden of proof will remain on the party alleging collusion but within that framework it will be forensically useful for the respondent to seek to show that there is an alternative innocent hypothesis which is more likely than the one relied upon by the applicant. In that context, and unlike the criminal law, it will not suffice to point only to the fact of a reasonable hypothesis consistent with innocence. The endeavour will be forensically useful only if the hypothesis is more likely than not. Even so, one needs to keep steadily in mind that it is the applicant who ultimately bears the onus of proof.
14. Finally, when it comes to assessing the circumstantial case the question is not whether each of the circumstances individually proves the existence of the alleged arrangement or understanding. Rather, the issue is whether all of the circumstances taken together do so. To approach the matter on any other basis destroys the integrity of the circumstantial case.
15. There is a considerable body of jurisprudence in the United States concerned with what needs to be proved by way of circumstantial evidence to make good a claim of collusion under the *Sherman Act.* These cases identify what have been referred to as ‘plus factors’, that is, circumstantial matters tending to prove conspiracy. Professor Kovacic sets out a list of these plus factors in William E Kovacic‘The Identification and Proof of Horizontal Agreements under the Antitrust Laws’ (1993) 38 *The Antitrust Bulletin* 5 at 37-54. They include:
16. the existence of a rational motive for defendants to behave collectively (p 37);
17. actions contrary to the defendant’s self-interest unless pursued as part of a collective plan (p 38);
18. market phenomena that cannot be explained rationally except as the product of concerted action (p 42);
19. the defendant’s record of past collusion-related antitrust violations (p 44);
20. evidence of interfirm meetings and other forms of direct communications among alleged conspirators (p 45);
21. the defendant’s use of facilitating practices (p 48);
22. industry structure characteristics that complicate or facilitate the avoidance of competition (p 53); and
23. industry performance factors that suggest or rebut an inference of horizontal collaboration (p 54).
24. I am indebted to Professors Beaton-Wells and Fisse for both this list and the reference to the article: see Caron Beaton-Wells and Brent Fisse, *Australian Cartel Regulation: Law policy and practice in an international context* (Cambridge University Press, 2011) at 60.
25. However, the authorities (and there are many) which discuss or apply the plus factors are all cases involving applications for summary judgment. Why is this? The answer is that in the United States cases under the *Sherman Act* are tried by juries. The jurisprudence in the United States federal courts has therefore been focussed on the circumstances in which defendants’ attempts to take the matter away from a jury are entitled to succeed. Largely these have involved summary judgment applications. The Supreme Court in *Monsanto Co v Spray-Rite Service Corp*,465 US 752, 768 (1984) explained the forensic task confronting a plaintiff met with a summary judgment application this way:

[T]here must be evidence that tends to exclude the possibility of independent action by the [defendants]. That is, there must be direct or circumstantial evidence that reasonably tends to prove that [the defendants] had a conscious commitment to a common scheme designed to achieve an unlawful objective.

1. The ‘plus factors’ have come to be matters pointed to on summary judgment applications to support the availability of reasonable inferences that collusion must have been involved.
2. One needs to approach the plus factors in the Australian context, therefore, with care. It is one thing to say that there are several ‘plus factors’ present so that a matter should be permitted to go to a jury. It is altogether another to use them to conclude that collusion has actually occurred. Beyond pointing out the existence of various matters which *can* (but need not) tend to prove a conspiracy it seems the plus factors do not provide much guidance beyond being examples of the kinds of circumstantial material which may be useful.
3. Finally, as with any circumstantial case, the ultimate question is whether the plaintiff has established the existence of the arrangement or understanding on the balance of probabilities. Because of the way circumstantial evidence operates, the case is to be looked at as a whole and not piece by piece as I have already indicated above. Ultimately this is likely to lead to reasoning which consists of a careful weighing of all of the material but whose final steps are ultimately impressionistic. This is an inherent aspect of the nature of circumstantial evidence. There is no one size fits all approach to assessing evidence in cases of this kind.

## 8.3 Who bears the onus of proof?

1. Plainly the Commission bears the burden of proving its case. Both airlines contended that the Commission bore the onus of disproving what were called their ‘affirmative defences’. These defences included arguments such as that they were compelled to act by reason of foreign law. I reject this argument. The existence of a liability in the airlines under s 45 does not have as one of its constituent elements the non-existence of the facts constituting these defences. For example, had the airlines not raised the operation of foreign law as a defence it would be absurd to suggest that the Commission was obliged as part of its case under s 45 to prove that foreign law did *not* compel the defendant’s behaviour. I am unable to see that the situation changes when the defences are pleaded. In some cases a defence will operate by denying factual matters which are necessary ingredients in the moving party’s case. In those cases, the onus will lie upon that party to prove that matter and not on the defendant to disprove it. But where a defence consists of a matter of exculpation or excuse which inherently or otherwise assumes the existence of liability, then the onus will lie on the party asserting the exculpation or excuse to prove the facts said to justify it: see *Currie v Dempsey* [1967] 2 NSWR 532 at 539-540 per Walsh JA; applied *Maricic v Dalma Formwork (Australia) Pty Ltd* [2006] NSWCA 174 at [70] per Basten JA (Beazley and Ipp JJA agreeing). These defences were of that nature and it was for the airlines to prove them.

## 8.4 A *Jones v Dunkel* inference against the Commission?

1. Both airlines joined in a submission that an inference should be drawn against the Commission for failing to call witnesses from the airlines that it had cooperation agreements with. I have not found it necessary to invoke this principle in reaching my conclusions.

## 8.5 Standard of proof

1. The airlines submitted that I should take into account the gravity of the allegations made against them in considering whether the Commission has proved that they contravened s 45. Section 140(2)(c) of the *Evidence Act* requires this outcome and I so proceed. Further, I propose to assume in the airlines’ favour that right thinking people would regard the price-fixing conduct of which these airlines are accused as disgraceful.
2. I turn then to the facts.

# 9 BACKGROUND TO THE UNDERSTANDINGS ALLEGED BY THE COMMISSION

1. The story of the fuel surcharges the subject of this litigation is a complex one having its antecedent roots in the 1990s and the internal mechanics of IATA. Before turning to the positions in each of Hong Kong, Singapore and Indonesia it is useful to be equipped with some general background about how they came to exist.
2. The working committees of IATA included the Cargo Tariff Co-ordinating Conferences and the Cargo Committee. Beginning in 1990 the IATA Secretariat had been monitoring the price of aviation fuel using the average spot price available in five world markets – Singapore, US Gulf, US West Coast, Rotterdam, and Italy. The Secretariat created an index expressed in US cents per US gallon from July 1990. It showed that in the 18 months leading up to January 1997 the average price of fuel had increased substantially.
3. In December 1996 the Cargo Tariff Conferences Steering Group met and decided that there was sufficient justification to hold a worldwide conference of Cargo Tariff   
   Co-ordinating Conferences. Such a conference was held in Geneva between 14 and 16 January 1997. This meeting resulted in a proposed resolution known as ‘116ss’. It contemplated that a fuel surcharge of USD0.10/kg (or its equivalent in local currency) would be imposed from 1 March 1997 provided fuel prices calculated using the average referred to above remained above 130% of the price which obtained in June 1996 (which was used as a baseline). This would be removed if fuel prices fell below 110% of the baseline for more than three weeks. If fuel prices rose again and exceeded 130% of the baseline then IATA would convene a meeting to consider whether the fuel surcharge should be reintroduced which it would also do if the price exceeded 150% for the purposes of reviewing the amount of the surcharge (the USD0.10/kg or equivalent). These percentages came to be referred to as index levels. So, for example, an index level of 130 connotes a fuel price of 130% of the baseline price (in this case, the price in June 1996).
4. In this form proposed resolution 116ss was defeated because Lufthansa voted against it. However, during the course of 1997 refinements were made to the resolution and it was recirculated to the Cargo Tariff Co-ordinating Conferences in the period June to August 1997 in the form of Mail Vote 875. On 7 August 1997 IATA declared that Mail Vote 875 had been passed.
5. In consequence of that mail vote, resolution 116ss as adopted was as follows:

WHEREAS aviation fuel prices represent a significant portion of TC Members’ operating costs

WHEREAS minor fluctuations in fuel prices may be reasonably absorbed

WHEREAS the need exists to react to significant changes in fuel costs in a rapid and orderly manner

IT IS RESOLVED that,

1. the Secretary shall monitor average weekly spot prices of aviation fuel from published oil industry sources against the average prices of June 1996 of USD0.535 per US Gallon (Index 100)
2. provided that the index equals or exceeds 130 on or after 1 October 1997 the charges contained in Attachment ‘A’ shall apply
3. a) in the event that the index subsequently is lower than 110 for a period of 2 consecutive weeks the Secretary shall advise TC Members that application of the charges in Attachment ‘A’ shall be suspended

b) in the event that the index subsequently exceeds 130 for a period of 2 consecutive weeks the charges contained in Attachment ‘A’ are reintroduced

4 in the event that, at any time, the index exceeds 150 for a period of 2 consecutive weeks, the Secretary shall convene a special meeting of the Cargo Tariff Coordinating Conferences to review the amounts contained in Attachment ‘A’

5 any TC Member may file to amend the charge(s) or to introduce new charge(s) in Attachment ‘A’ subject to the following conditions:

a) the filing shall be submitted to the Secretary providing reasons for the amendment or new charge and the intended effective date

b) upon receipt of such filing, the Secretary shall circulate the information to all TC Members

c) any voting TC Member of the Tariff Conference(s) concerned may protest the filing within 10 days, and shall provide reasons and compromise proposals

d) filings not protested shall become effective on the date proposed and shall be incorporated into the agreement from such date, subject to applicable government approval(s)

1. At a further meeting of Cargo Tariff Co-ordinating Conferences held in Geneva between 4 and 8 May 1998 it was noted that resolution 116ss could not be declared effective because the United States Department of Transport had not yet approved, and other countries had disapproved, Mail Vote 875. Despite this, IATA published the resolution in its publication of tariffs known as the TACT Rule Book (i.e ***T***he ***A***ir ***C***argo***T***ariff Rule Book). IATA also began to publish the fuel index generated by resolution 116ss.
2. In early December 1999, the IATA fuel index had exceeded 130 for two consecutive weeks which would have been a trigger under resolution 116ss had it been in force.
3. A number of airlines contacted IATA about fuel surcharges at this point, but each was advised, correctly, that resolution 116ss was not effective. On 10 January 2000, IATA’s Manager of Industry Affairs sent members a telex listing the recent fuel price index movements. Air NZ was one of the recipients.
4. Between December 1999 and February 2000 a number of international airlines introduced a fuel surcharge of USD0.10/kg, €0.10/kg or local currency equivalent with effect from early February or March 2000. These airlines included Air NZ as well as Alitalia, KLM, Air France, American Airlines, Lufthansa, United Airlines, SAS, Korean Air, Cathay Pacific, Emirates, Qantas, Thai Airways and Cargo Lux.
5. On 28 January 2000, IATA applied to the US Department of Transport for two year approval and antitrust immunity for resolution 116ss (as to the significance of which, see above [144]). On 14 March 2000, this was refused on the basis that the index was ‘fundamentally flawed’. Difficulties with it included its failure to readjust as quickly when prices moved down and its failure to take into account the airlines fuel hedging programmes.
6. IATA promptly notified its members that resolution 116ss was not effective. By then, however, Lufthansa had begun publishing the IATA index on its own website. Once notified that resolution 116ss was no longer effective Lufthansa began to publish its own index called the ‘Lufthansa Index’ which was, however, identical to the now abandoned IATA index.
7. Further attempts at a composite meeting of Cargo Tariff Co-Ordinating Conferences held in Geneva between 15 and 17 May 2000 to revive resolution 116ss or render it more likely to be accepted by the US Department of Transport failed.
8. Lufthansa subsequently added a further level to its index which when increased to 170 for two consecutive weeks set the surcharge at USD0.15/kg/€0.17/kg and when decreased (for two consecutive weeks) to 150 set the surcharge at USD0.10/kg/€0.10/kg. On 29 September 2000, the 170 trigger point was reached but throughout 2001 the index dropped and the surcharge was itself removed in December 2001/January 2002. Being copied from the original IATA Index (and hence resolution 116ss) the Lufthansa Index was not triggered unless it reached 130. The fact that the index remained below 130 through the second half of 2001 meant that the Lufthansa Index was not triggered and no fuel surcharge was indicated. In January 2002, Lufthansa announced it had revised its methodology across its entire network. Whereas the previous index was first triggered at 130 the new one was now triggered at 115. The index in the full form was as follows:

|  |  |  |  |
| --- | --- | --- | --- |
| **Level** | **Fuel Surcharge** | **Imposition- Index** | **Removal** |
| 1 | EUR/USD 0.05/kg | 115 | 100 |
| 2 | EUR/USD 0.10/kg | 135 | 120 |
| 3 | EUR/USD 0.15/kg | 165 | 145 |
| 4 | EUR/USD 0.20/kg | 190 | 170 |

1. An internal Lufthansa email suggests that Lufthansa contacted Air France and KLM to suggest that they should adopt this index and proposed that they ‘take a similar path after a small delay’. Emirates and SAS introduced largely similar indices. Subsequently in 2004 and 2005 when the index went much higher than 190 Lufthansa added additional levels. Lufthansa continued to publish its index until May 2009.
2. A consideration of the understandings requires a consideration of a number of emails and other primary materials. In many cases these documents were authored by people for whom English was not their first language. The errors in the quoted documents appear in the original.
3. I deal first then with the Commission’s case in Hong Kong.

# 10 THE UNDERSTANDINGS ALLEGED BY THE COMMISSION IN HONG KONG

## 10.1 Introduction

1. The Commission’s case in Hong Kong centred largely around the activities of the HK BAR CSC and the local aeronautical regulator, the HK CAD. For reasons given above at [390]ff it was necessary for any airline wishing to impose a surcharge of any kind to obtain HK CAD’s approval to do so. As I have explained above in Chapter 6.2 the HK CAD provided commercial incentives to airlines who wished to use an index methodology to determine surcharges (such as the Lufthansa Methodology) to apply jointly for approval. This attitude of the HK CAD provided fertile soil in which price fixing was likely to be facilitated.
2. By 2000 the airlines operating out of Hong Kong who were members of the HK BAR CSC were meeting on a regular basis to agree upon the surcharge mechanisms they would collectively ask the HK CAD to approve. Following these meetings the chair of the HK Bar CSC (which was provided by local national carrier, Cathay Pacific) would write to the HK CAD seeking approval for the surcharge mechanism which had been agreed. Often a process of surveying the airlines on an appropriate surcharge was adopted by the HK BAR CSC in lieu of or in advance of physical meetings. Later sub-committees were established with a similar function. These were the HK BAR CSC Executive Committee (‘HK BAR CSC Ex Com’) and the Surcharge Working Group (‘SWG’).
3. The Commission’s case centred around four sets of alleged understandings reached through these structures. These were:
4. an arrangement or understanding entered into by the airlines at a meeting of the HK BAR CSC held on 23 July 2002 and by which the airlines were said to have decided to fix prices in accordance with the ‘modified Lufthansa Methodology’;
5. an alternative allegation that the airlines arrived at an arrangement or understanding to alter their fuel surcharges in response to circularised letters sent to the HK CAD informing it of changes to the surcharge as index points were passed and the date the charge would come into effect. In effect this allegation is that the airlines used the procedure by which the HK BAR CSC communicated with the HK CAD as a means of co-ordinating movements in the level of the fuel surcharge (‘the Hong Kong Imposition Understanding’);
6. a series of eight understandings by which the original approved modified Lufthansa Methodology was extended for further periods of time or with additional levels; and
7. an arrangement or understanding to impose an insurance surcharge in October 2001 and another in December 2002.
8. The workings of the HK BAR CSC were heavily documented in contemporaneous records. Throughout the period in question there was no competition law in Hong Kong and much of the material which is available shows plainly that, as a group, the airlines were agreeing the surcharge they wished to see approved. This was not seriously contestable to my mind.
9. Both airlines did, however, deny reaching the various alleged understandings. At a high level of generality these arguments were that:
10. they were not at some of the meetings where price fixing is alleged to have occurred;
11. they were bound by Hong Kong law to implement the surcharges once they had been approved by the HK CAD;
12. in the case of Air NZ, its policy was simply to follow whatever the national carrier, Cathay, was doing; and
13. where the price-fixing occurred at the level of the SWG or the HK BAR CSC Ex Com, those subcommittees did not have the authority to engage in price fixing on behalf of Air NZ or Garuda.
14. In the main, I have rejected (b) and (c) but accepted, in some cases, (a) and (d).

## 10.2 Witnesses

1. Air NZ called three witnesses involved in the events in Hong Kong: Mr Gregg, Ms Goh and Ms Liu. It did not call Mr Martin Ngai, Regional Cargo Manager for North Asia, based in Hong Kong, who was, I conclude, the person who made the actual decisions for Air NZ about the imposition of surcharges out of Hong Kong.
2. Mr Gregg held the position of Manager of Global Cargo Sales for Air NZ between 2000-2008. His evidence was relevant both to the events in Hong Kong and Singapore. For reasons I give in relation to Singapore (below, Chapter 11) I do not regard Mr Gregg's evidence as being of much significance to the Commission's price fixing case. The decision maker was Mr Gregg's subordinate in Hong Kong, Mr Ngai. Mr Gregg was not present at the relevant meetings and his role was largely to approve what Mr Ngai had already done.
3. Ms Goh was the Regional Manager for Asia/Japan Cargo. Mr Ngai reported to her in Hong Kong and she reported to Mr Gregg. Her role was more significant in Singapore. Insofar as Hong Kong was concerned, her affidavit evidence was that Mr Ngai made the decisions and he reported to her. She told him that he needed to obtain approval from headquarters in New Zealand. She denied under cross-examination that she herself had reported the fuel surcharges to headquarters. When confronted by documentary evidence to the contrary, she explained it on the basis that it was just part of the many forms she had to provide to headquarters. The Commission submitted that I should disbelieve her on this basis. I do not agree. Mr Ngai was the real decision maker and Ms Goh’s role was peripheral. In my opinion, she was merely mistaken.
4. She also gave evidence that Air NZ usually formed its own view on surcharges. Subsequently, when challenged she said that Air NZ followed the national carrier. This was her evidence in Singapore, too. I accept her evidence but think it of little relevance when the person making the decisions was Mr Ngai.
5. Air NZ also called Ms Liu. She commenced working at Cathay Pacific in 1997 and from July 2005 was the Manager of Cargo Sales for Hong Kong and China. As an aspect of that position it was Ms Liu who chaired the HK BAR CSC. She was also a member of the HK BAR CSC Ex-Com. The Commission’s case extends over the period 2000-2006. Ms Liu’s evidence is, therefore, relevant strictly to 2005-2006. The relevance of Ms Liu’s evidence related to the directions said to have been given by the HK CAD to the airlines. In Chapter 6, above, I have concluded that Ms Liu’s evidence should be accepted but that the effect of her evidence is that the HK CAD did not require airlines to lodge joint applications for surcharge mechanisms and that they remained free to apply for approval for their own surcharges which they could, if they chose, generate using their own index. The HK CAD provided commercial incentives to lodge joint applications but they were not legal requirements.
6. I turn then to the first understanding alleged by the Commission, the 2002 Hong Kong Lufthansa Methodology Understanding.

## 10.3 The 2002 Hong Kong Lufthansa Methodology Understanding

1. As explained above, the use of the IATA index by various airlines was underway by at least December 1999. An inquiry made by Cathay Pacific of IATA on 7 January 2000 revealed that resolution 116ss had not yet been declared effective. Cathay, which was the home carrier in Hong Kong, initially reacted by deciding that it would not file an application with the HK CAD for an official fuel surcharge but would instead adjust its market rates for ‘better flexibility’ and to ‘better cater for the needs of the airlines’. This it proposed to do on 1 February 2000. Cathay was, of course, the chair of the HK BAR CSC (more accurately, its employees were). It conveyed its view that it would not be using a fuel surcharge index itself to other airlines and indicated that it would be content to discuss the matter at the next HK BAR CSC meeting which was to be held on 12 January 2000.
2. At some time prior to that meeting Cathay’s position appears to have changed to one where it would abide the outcome of the meeting’s decision on whether a surcharge should be imposed. Internal email correspondence of Cathay and Qantas supports this view.
3. The meeting took place on 12 January 2000. There are no minutes of this meeting available. However, a number of emails sent shortly after it allow some picture to be painted of what occurred. All of the airlines present at the meeting, except Canadian Airlines and Garuda, expressed no objection to the imposition of a fuel surcharge filed with the HK CAD via the Chair of the HK BAR CSC (that is, Cathay). The effective date would be 1 February 2000; Cathay would inform the industry; it would represent all carriers in the application to the HK CAD; and would inform the Hong Kong Association of Freight Forwarders Agents Limited (‘HAFFA’) of the intention to apply to the HK CAD for approval from 1 February 2000.
4. As anticipated at that meeting, on 14 January 2000 Cathay applied to the HK CAD for approval to introduce a fuel surcharge in Hong Kong. It was expressed to be ‘as per IATA resolution 116ss’ although it omitted any reference to that resolution not being effective. The suggested fuel surcharge would be imposed when the IATA index hit 130 and would be HK0.50/kg in Asia (TC 3) and HK1.00kg in all other areas. An email from Cathay Pacific to the United Parcel Service enclosed Cathay’s application to the HK CAD and I infer, as the Commission submitted I should, that it was sent to all other members of the HK BAR CSC. I do this because it is addressed to ‘BAR-CSC members’ and because it is natural that this would occur.
5. Subsequently, the proposed implementation date was changed to 16 February 2000. Meanwhile the HK CAD was provided with a copy of resolution 116ss by Cathay on 25 January 2000. There was no indication to the HK CAD that resolution 116ss was not in force.
6. Following various enquiries and exchanges between Cathay and HK CAD, the latter approved the introduction of a fuel surcharge with effect from 16 February 2000 on 14 February 2000 ‘in accordance with the IATA Resolution 116ss’. It was valid for one year or until the index dropped below 110 for two consecutive weeks. Cathay promptly conveyed this information to the airlines. The airlines, including Air NZ, then announced the surcharge to their customers and imposed it.
7. In the months which followed there were two developments. First, as already noted above, the US Department of Transport refused to approve resolution 116ss leading to its abandonment by IATA. IATA wrote to its member airlines on 14 April 2000 and counselled them against approaching another entity to publish the IATA index or calculating it themselves. It was not long after this that Lufthansa began to publish its own index on 29 September 2000.
8. The second development was a sharp rise in the price of fuel towards the end of the year. Following various discussions the airlines met on 10 October 2000 and resolved that a second round of fuel surcharges at HK0.40/kg long haul and HK0.20/kg intra-Asia be the subject of an application to the HK CAD for tariff approval. The index, of course, did not contemplate this being triggered at 130, having no provision for higher levels. Nevertheless, the suggestion was that this surcharge would be imposed when the index reached 150.
9. The application was made on 12 October 2000. The application referred to the fact that the IATA mechanism had provided for a review of the mechanism if the fuel price index exceeded 150 for two consecutive weeks. The proposed commencement date was 1 November 2000. Air NZ, amongst others, announced that it would impose a second round fuel surcharge from 1 November 2000 subject to government approval.
10. This was not what the index provided for. Resolution 116ss, had it been effective, would have required a special meeting of the Cargo Tariff Co-ordinating Conferences to be convened when the index reached 150 to decide what to do. Having been supplied with a copy of resolution 116ss which omitted any reference to the fact that it was not in force, it is perhaps easy to understand why, on 16 October 2000, the HK CAD asked the HK BAR CSC whether such a meeting had been held.
11. This was a challenging question to answer given that the HK BAR CSC had not informed the HK CAD that resolution 116ss was not in force and the HK CAD’s letter of 16 October 2000 evidently assumed that it was.
12. The Chairman of the HK BAR CSC replied to the HK CAD on 17 October 2000 that IATA had not convened a special meeting at ‘this time,’ but instead, had asked ‘individual airlines to use their own discretion to tackle the matter’. This was not correct. No meeting could be convened under resolution 116ss because it was not effective. IATA had not told the airlines to use their discretion if the index reached 150. It had told them not to use the index and indeed, had discontinued the publication of the index and any related activities.
13. The application was approved on 27 October 2000. It was valid for one year or until the index dropped below 110 for two consecutive weeks and on the condition that it would drop back to the earlier level if the index fell below 110 for two consecutive weeks. The airlines were informed of this on 30 October 2000 and it was implemented from 1 November 2000.
14. Subsequently, in December, the price of fuel began to drop. Over the course of 2001 various fluctuations in the index were implemented. There is no need to set the detail of them out. The final position, reached on 11 December 2001, was that the fuel surcharge was withdrawn as the price had fallen below 110 for two consecutive weeks.
15. The Commission makes no direct complaint about these initial events in Hong Kong. It does submit, however, that they provide valuable context in understanding subsequent events about which it does complain. I accept this submission.
16. On 23 January 2002, Lufthansa unilaterally altered its worldwide fuel index from its original version which had just been a copy of the IATA index. The critical feature of this new ‘methodology’ (a rather grand word for what is simply a table) was that it could go down as well as up and had multiple trigger points. The new Lufthansa Methodology was as follows:

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
| **Implementation/Increase** | | | **Reduction/Suspension** | |
| 115 | EUR0.05/kg | 100 | | EUR0.15/kg |
| 135 | EUR0.10/kg | 120 | | EUR0.10/kg |
| 165 | EUR0.15/kg | 145 | | EUR0.05/kg |
| 190 | EUR0.20/kg | 170 | | Suspension |

1. Because the surcharge was a ‘tariff’ under the relevant ASAs, Lufthansa needed, and believed it needed, the approval of the HK CAD. Since the existing HK CAD approval of resolution 116ss had been achieved collectively by the HK BAR CSC this suggested, and Lufthansa appears to have accepted, that it should obtain HK CAD approval for its revised methodology. When it made the worldwide announcement of its revised methodology it had made clear that the position in Hong Kong was subject to approval. Subsequently Lufthansa produced a version of the modified index it would like to see imposed in Hong Kong. This was as follows:

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
| **Fuel Price Index Above** | **Applicable surcharge per kilo actual weight** | **Fuel Price Index Below** | | **Applicable surcharge per kilo actual weight** |
| 115 | HKD0.40 | | 170 | HKD1.10 |
| 135 | HKD0.70 | | 145 | HKD0.70 |
| 165 | HKD1.10 | | 120 | HKD0.40 |
| 190 | HKD1.40 | | 100 | Fuel surcharge suspended |

1. Not all of the airlines shared Lufthansa’s enthusiasm to reduce the trigger point to 115 from 130 and to impose the new higher trigger levels. Initially the proposal met with considerable resistance from within the HK BAR CSC. This was driven by two factors. The first was a perception strongly held by Cathay that the HK CAD would not approve the proposed index because it was activated at a lower trigger point and more often than the existing index. Cathay’s view was that the fuel surcharge was not popular with the HK CAD and such a generous arrangement was unlikely to be approved. The second matter was that during the first half of 2002 the fuel price hovered just under 130 which created an anticipation in many quarters that a surcharge would shortly become levyable anyway under the current approval. Those of that view could see no need to force the issue with the HK CAD.
2. On 10 May 2002 the HK BAR CSC wrote to each of the airlines noting that the price of fuel had not passed through the 130 barrier and seeking their input into what should be done. The letter enclosed a questionnaire asking airlines whether they were collecting a fuel surcharge in their home countries. The responses showed that European and US carriers were charging fuel surcharges consistently with the Lufthansa Index. The airlines were also asked whether they wished to depart from the methodology used at that time. In their answers, in excess of 30 indicated they did not wish to change from the current index whilst six indicated that they did.
3. On 16 May 2002 a meeting of the HK BAR CSC was held and, contrary to the outcome suggested by the questionnaire, it was decided to adopt the revised Lufthansa Methodology. Contemporaneous emails sent by persons in attendance at the meeting suggest that the reason this occurred was because of a general sense that the price of fuel was not going to pass through 130 and thereby activate the surcharge. By contrast, the new Lufthansa Index would be enlivened at 115. This gave its adoption a commercial attractiveness.
4. There are no minutes available for this meeting but what occurred can be reconstructed from four reports sent in its wake. First, Mr Johnny Ho of Qantas reported to his superiors by email on the outcome of the meeting in the following terms:

Attended BAR-SCS meeting today (16May02) for discussion of fuel surcharge.

Chairman requested members to vote for two options:

1) Waiting for fuel index to reach 130, or

2) Use current mechanism of European Carriers with lower trigger points.

About 15 members (including CX) voted for option 2 with lower trigger point and remaining members (except SQ) had no objection for this option.

After discussion, members agreed to go with following actions:

1. Mechanism

It is agreed (including BA) to use LH’s current mechanism as the benchmark with the benefits of lower trigger point for fuel index at 1.15 and higher amount at HKD0.40/kg.

(BA’s trigger point at 125 and the amount at HKD0.30/kg)

2. Fuel surcharge amount

Fuel Index Long Haul Asia

+115 HKD0.40/kg HKD0.20/kg

+135 HKD0.80/kg HKD0.40/kg

+165 HKD1.20/kg HKD0.60/kg

+190 HKD1.60/kg HKD0.80/kg

-170 HKD1.20/kg HKD0.60/kg

-145 HKD0.80/kg HKD0.40/kg

-120 HKD0.40/kg HKD0.20/kg

-100 Suspend

Long Haul includes Australia, New Zealand and S.W. Pacific

3. Fuel surcharge will be based on “Chargeable weight”.

4. Tentative date: 01JUN2002

Chairman and some of the memebrs will arrange to meet CAD to express our planning before filing formal application.

1. Secondly, Mr Chan reported to his superiors at Martinair on the meeting in these terms:

In todays carriers’ meeting on the above, all agreed that the current fuel price movement is not likely to reach the 130 index level to warrant the implementation of the FSC. This puts the carriers in HKG at a distinct disadvantage.

Consequently through unanimous consent all carriers agreed to adopt the LH system to replace the existing one. BAR-CSC will make a collective application to CAD for approval targeting 15th June as the implementation date. Fyg, the LH scheme is based on the following trigger levels:

index surcharge amount index surcharge amount

exceed 115 hkd0.40/k below 170 hkd1.20/k

exceed 135 hkd0.78/k below 145 hkd0.78/k

exceed 165 hkd1.20/k below 120 hkd0.40/k

exceed 190 hkd1.56/k below 100 surcharge suspended

Explanation:

For example: When index reaches 135 the FSC amnt is hkd0.78/k and only when index falls below 120 then surcharge revert to hkd0.40/k. This helps to maintain the FSC @ hkd0.78/k even if the index falls to anyway between 134 - 121.

Above surcharge amount applicable to long-haul and 50pct applies to short-haul, surcharge on chargable basis.

CX/LH/BA start lobbying CAD next week before officially submit application. Will post-keep on development.

1. Thirdly*,* Mr Ngai of Air NZ reported to his superior Mr Gregg in terms which included this statement:

Today I attend the interline meeting and good news is that we are proposing HKG CAD for a HKD0.40 F/S from 01Jun.

1. Finally, five days after the meeting on 21 May 2002 the Chair of the HK BAR CSC, Mr Leung, reported to the members the following:

Dear Member Airlines,

BAR-CSC held a meeting last Thursday (May 16) to discuss the fuel surcharge and decided the following:

1. many overseas markets are imposing cargo fuel surcharge while Hong Kong market is not. It is because the current mechanism that BAR-CSC agreed with CAD about 1.5 years ago has not reached the trigger point (fuel index level 130) to levy the surcharge. It appears the current fuel surcharge mechanism does not reflect the actual development of fuel prices this year.

2. as such, the majority of BAR-CSC members decided to change to a new fuel surcharge mechanism which allows members in HK to levy the surcharge earlier but at a smaller amount. The objective is to make it aligned with that of the other major cargo markets outside of Hong Kong. The current mechanism reflects the upwards/downward trend of fuel prices in only two steps. The new mechanism is much more closely linked to the actual movement of fuel prices. This is achieved by doubling the number of steps in the fuel price index, which allows BAR-CSC members to more promptly respond to any changes, whether upward or downwards, in fuel prices.

3. BAR-CSC will see civil Aviation Department this Thursday (May 23) to explain the new mechanism and lobby for their support, before we submit a formal application for the new mechanism and surcharge.

1. There are thus available contemporaneous written accounts from four people actually at the meeting: Mr Ho, Mr Chan, Mr Ngai and Mr Leung. The following inferences may be drawn from their reports:
2. there were more than 16 airlines represented at the meeting. Mr Ho recorded that 15 voted for the option that was adopted and the remaining, except SQ, had no objection;
3. only one airline, SQ, was against switching to a modified Lufthansa Index. This is recorded in Mr Ho’s email. Mr Chan’s email does not mention this but I am satisfied that Mr Ho’s account is more detailed and reliable;
4. all of the airlines present agreed to implement the index subject to its approval by the HK CAD. If consent was not forthcoming they would not impose it but if it was they would; and
5. it would be imposed, if possible, on 1 June 2002.
6. On 5 June 2002, following a number of informal meetings with the HK CAD, the HK BAR CSC lodged an application for approval of the new index. The suggested commencement date was 19 June 2002.
7. This application was then distributed to the airlines along with a suggestion that they circulate information to their agents in Hong Kong about the surcharge. Various airlines, including Air NZ on 18 June 2002, did this. On the same day, the HK CAD advised the HK BAR CSC that in the meantime no airline should impose a surcharge without its written approval. Various negotiations then continued between the HK CAD and the HK BAR CSC. On 19 July 2002 the HK CAD finally approved the modified index. The terms of the approval were as follows:

Dear Sir,

I refer to your tariff filing to levy fuel surcharge at levels according to a set of predetermined fuel price indices.

Having considered the information you provided, I am pleased to inform you that your application as described in your letter ref SO/CAD-06/002 dated 5 June 2002 is approved for a period of one year with effect from 19 July 2002. Please note that it is a condition of this approval that you inform this Department with every adjustment, whether upward or downward, of the level of surcharge levied and the corresponding fuel price index. You are also required to inform us of the fuel price index on a regular basis or at request. This approval will be invalid if there is any change to the method of calculation of the index without our prior agreement.

Please note that this approval is given on a one-off basis and without prejudice to any future or similar applications of tariff filing for fuel surcharge.

1. 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. The application of 5 June 2002 was in the following terms:

Dear Alan

On behalf of BAR-CSC, I write to seek CAD approval on a new fuel surcharge mechanism to replace the existing one which has been used for close to two years.

The major reasons for proposing the new mechanism are as follows:

(i) the existing fuel surcharge mechanism (Attachment A) reflects the upward/downward trends of fuel prices in only two steps. The new fuel surcharge mechanism (Attachment B) is much more closely linked to the actual developments of fuel prices. This is achieved by doubling the steps in the fuel price index; which allows the BAR-CSC airlines to more promptly respond to any changes, whether upward or downward, in fuel prices. Due to the introduction of the new levels in fuel price index, the limits are slightly modified. The fuel surcharge process will be left unchanged. If the fuel price index passes the fixed limits for two subsequent weeks, the corresponding fuel surcharge will be implemented with one week notice.

(ii) in the proposed new mechanism, the key advantage for shippers/cargo agents is that in the long run it is very likely they will pay less than that of the current mechanism. Attachment D provides a comparison of the surcharge amount using the existing and new mechanisms if they were applied to fuel index movement in 2001, 2000 and 1999. As you can see, in most weeks, in this 3-year period, the new mechanism would benefit shippers/cargo agents because they would have paid less.

(iii) it is now a worldwide practice for other major cargo markets outside of HK to use new fuel surcharge mechanisms and surcharges for their air cargo exports. Attachment C gives details of the various surcharges being imposed by markets in Europe, USA and Asia.

The latest fuel index as at May 24, 2002 went up to the level of 130 (Attachment E) and it looks it may be edging up above 130 soon. At this level, the surcharge under the new mechanism will be HK$0.40/kg, less $0.60/kg than under the existing mechanism.

BAR-CSC would like to apply the new fuel surcharge mechanism effective from June 19, 2002, as follows:

|  |  |
| --- | --- |
|  | Proposed new surcharge  effective June 19, 2002  if index exceed 115 for 2 consecutive weeks |
| Area 1  North & South America | HK$0.40/kg |
| Area 2  Europe, Middle East & Africa | HK$0.40/kg |
| Area 3  South and Southwest Pacific | HK$0.40/kg |
| Area 3  Asia (other than South & Southwest Pacific) | HK$0.20/kg |

We hope the above meets with your approval and if further information is needed please contact me …

1. I do not accept that the approval required any airline to levy the surcharge. It did require, however, that if a surcharge was levied it had to be in accordance with the index.
2. Further, other than providing that there be no fuel surcharge before 19 July 2002, it also said nothing about the timing of the surcharge’s imposition.
3. Shortly after the approval of 19 July 2002 the HK BAR CSC called a meeting to determine the next step. Again there are no minutes available of this meeting but it was followed by various email reports from which what occurred may be reconstructed.
4. Mr Ho of Qantas reported:

With approval from CAD on our recent application under new mechanism of lower trigger points, Carriers in HKG are allowed to start fuel surcharge with validity for one year with effect from 19JUL2002.

KK stated HAFFA requested Carriers to impose fuel surcharge with two weeks notification as they need time to inform all their members. However, the floor came to the conclusion as followings :

1. Effective date: 01th August 2002

2. On chargable weight

3. One week notice to agents for next change (increase or decrease)

KK requested each individual members to send notice to all related agents/shippers about the introduction and mechansim of the new fuel surcharge.

1. Mr Yip of SQ reported:

HKG CAD has just given the approval of local BAR’s application for fuel surcharge. The surcharge of HK$0.40/kg and HK$0.20/kg for long and shorthaul destinations respectively will be effective from 01 AUG 2002. The shortfall surcharge covers Area 3 except S and SW Pacific regions.

The surcharge rate will be adjusted according to the movement of Fuel Index as published by LH Cargo. The attached table shows the details of the scheme.

The surcharge will be based on chargeable weight and reflected in AWB as MYC due carrier.

All airlines in BAR have agreed to implement the surcharge as from 01 AUG 02.

1. Mr Leung advised Northwest Airlines in these terms:

It is good news that CAD eventually approved BAR-CSC’s new fuel surcharge scheme after almost 2 months of negotiation with CAD, HAFFA and HK Shippers Council. Attached pls find a copy of the approval letter and the new fuel surcharge scheme.

Members of the BAR-CSC has decided to start collecting the new fuel surcharge from Aug 01, 2002 at HK$0.40/kg for longhaul destination and $0.20/kg for shorthaul destinations.

Please note the surcharge amount varies according to the movement of the fuel index levels. For example, the surcharge can go up to a maximum of HK$1.60/kg for longhaul and $0.80/kg for shorthaul.

1. Mr Leung informed the Hong Kong Shippers’ Council as follows:

This is to inform that CAD has approved BAR-CSC’s application for the new fuel surcharge mechanism. A copy of the approval letter and the new fuel surcharge scheme is attached.

Subsequently BAR-CSC held a meeting this afternoon (July 23) which decided to implement the fuel surcharge effective from August 01, 2002. The surcharge will be HK$0.4/kg for long-haul destinations and HK$0.2/kg for short-haul destinations. The latest fuel index as at July 12, 2002 is 125 a copy of which is attached.

Please take note there are four trigger points of the fuel index that will trigger a change of the surcharge amount. If the index level exceeds above or drops below a trigger point for two consecutive weeks, the surcharge amount will change correspondingly.

If you have any queries, please do not hesitate to contact me …

1. A similar letter was written to HAFFA. On the basis of this material the following inferences may be drawn:
2. all the airlines at the meeting decided to impose the surcharge with effect from 1 August 2002;
3. this agreement was reached by a collaborative decision-making process, hence Mr Ho’s expression ‘the floor came to the conclusion’. They were agreeing inter se to be bound by the outcome of that process; and
4. the nature of that decision was that all the airlines present regarded themselves as bound to give effect to the decision (‘All airlines in BAR have agreed to implement’).
5. Having decided that they would impose the surcharge on 1 August 2002 the question then arises whether the airlines were motivated in so doing to use the modified Lufthansa Index by the HK CAD’s approval, by their own earlier decision on 16 May 2002 to do so, or by both? It seems to me that they must have been actuated in a sense by both. Unless they had desired to impose the surcharge in accordance with the modified Lufthansa Index, they would not have done so. Nor did the approval require them to charge a surcharge. On the other hand, without the approval they could not have done so. In that sense, neither was a sufficient condition to bring about the decision to impose the surcharge and both were necessary; that is to say, there needed to be both a desire to introduce a surcharge and a permission to do so.
6. A number of airlines, including Air NZ, announced the implementation of the new surcharge effective from 1 August 2002.
7. It was on this basis that the revised Lufthansa Methodology came to be adopted.

### 10.3.1 Air NZ

1. The Commission’s primary case on this was pleaded at paragraph 124 of the Further Amended Statement of Claim (‘Air New Zealand FASOC’) (which was in terms the same as paragraph 112 of the Commission’s claim against Garuda):

**2002 Hong Kong Lufthansa Methodology Understanding**

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, El Al, 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 | HKD0.80/kg  (HKD0.40/kg for Asia, except South and South West Pacific) |
| Exceeds 165 for 2 consecutive weeks | HKD1.20/kg  (HKD0.60/kg for Asia, except South and South West Pacific) | Below 120 for 2 consecutive weeks | HKD0.40/kg  (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 | Suspend 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 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.

[emphasis in original]

1. There is thus pleaded an arrangement or understanding having two elements. The first is an agreement to replace the pre-2002 resolution 116ss methodology with Lufthansa’s revised methodology; the second is an agreement that the airlines would impose surcharges in accordance with that methodology.
2. The fact that the airlines were openly co-operating to have the fuel surcharge approved might be thought to make it quite obvious that the understanding alleged by the Commission was made good. It appeared that way to me during the trial and, despite the vigorous submissions made on Air NZ’s behalf, I am unable to throw off the sense that the obvious is indeed the case. Air NZ nevertheless submitted that this was not so. It made the following submissions as to why it did not reach the understanding alleged by the Commission. These were:
3. *the alibi issue.* Air NZ submits that there is no evidence that it was represented at the critical meeting of 23 July 2002;
4. *the chronology issue.* Air NZ submitted that the pleaded case was that the arrangement on understanding was reached on 23 July 2002 when the approval had already been granted on 19 July 2002;
5. *the multiple level issue.* Air NZ submitted that the Commission could not succeed where higher levels were later added to the index;
6. *the implementation issue.* Air NZ submitted that all that had been agreed at the meeting of 23 July 2002 was the date upon which the surcharge would be imposed. The evidence did not show that at the meeting a decision to impose the surcharge had been made;
7. *the 16 May 2002 meeting issue.* Air NZ submitted that the events at the meeting of 16 May 2002 became irrelevant after approval was given on 19 July 2002;
8. *the irrelevance of implementation issue.* Air NZ submitted that little could be drawn from the fact that the airlines had all implemented a surcharge in accordance with what had happened at the meeting of 23 July 2002;
9. *the consensus issue.* Air NZ submitted that it could not have reached an arrangement or understanding because it was bound to act as it did in accordance with the law of Hong Kong;
10. *the absence of agreement issue*. Air NZ submitted that there was no evidence that there had been a meeting of the minds or that it had undertaken to do anything or that any airline had undertaken to do anything for it. Nor was there any express communications between the parties.
11. I reject each of these submissions.
12. *As to (a) (whether Mr Ngai was present at the meeting)*: Air NZ submitted that it was not represented at the meeting of 23 July 2002. There is no doubt that Air NZ was invited to attend the meeting. A telex inviting Air NZ to the meeting was sent on 22 July 2002. Its terms indicated that recipients were asked to confirm their attendance ‘by email’ or by telephone. Air NZ pointed to the fact that there was no evidence of any such email being sent. That, of course, leaves out the possibility that Air NZ responded by phone or did not respond but attended in any event.
13. To meet that eventuality Air NZ relied upon the terms of the telex itself. On the telex the airlines are identified by codes. The code for Air NZ is ‘HKGSFNZ’. On the copy of the telex in evidence there are a series of ticks next to various airline codes but there is no tick next to ‘HKGSFNZ’.
14. Air NZ submits that I should infer from this that these ticks served as signs that the airline had attended the meeting. The absence of a tick next to Air NZ’s code meant that it was not there. It buttresses that submission by noting that the same document has a handwritten list of persons on a different page together with an identifier for each person’s airline. It says that this list substantially corresponds with the ticked codes on the telex. To that I would add that the document was produced by Cathay who was, of course, in charge of organising the meeting.
15. The Commission submits that the telex and attached list are simply evidence of the identity of the airlines who responded to the invitation *prior* to the meeting. It submits that Qantas and SQ were both at the meeting but do not appear on the list which is true. It also says that the list appears to show only nine airlines which is an implausibly low number for such an important meeting.
16. I have no particular view about the latter but I do accept that the absence of Qantas and SQ from the list when they were both represented at the meeting shows that the telex is unlikely to be an attendance list for the meeting. I do not think therefore that I should infer from the telex that Air NZ did not attend.
17. Of course, it is not for Air NZ to prove that it was *not* at the meeting but instead for the Commission to prove that it was. I am prepared to infer, however, that Air NZ was represented at the meeting by Mr Ngai. This is for several reasons. To begin with, Mr Gregg of Air NZ had authorised Mr Ngai to attend meetings of the HK BAR CSC on Air NZ’s behalf. It is clear also from contemporaneous emails that Mr Ngai had attended the meetings of the HK BAR CSC on 3 April 2002 and 16 May 2002. Furthermore, Mr Ngai prepared a circular informing customers of the implementation of the surcharge on 23 July 2002, i.e., the same day. This suggests either that he became aware very quickly of what had occurred at the meeting or that he was present at it. The former is rendered less likely, although not impossible, by the absence of any correspondence from the HK BAR CSC on that day informing the airlines of the surcharge outcome. It is not impossible because Mr Ngai may have been informed orally by someone from another airline who was at the meeting (or who had spoken to someone at the meeting). It may also be that a document was sent on that day but that all copies of it have been lost. Of course one needs to keep in mind, and I do, that the absence of evidence is not the same as evidence of absence.
18. There is therefore material from which, taken altogether, one could draw the inference that Mr Ngai was present at the meeting. By itself, it is possible that Mr Ngai did not go to the meeting of 23 July 2002 even though he went to the meetings of 3 April 2002 and 16 May 2002. By itself, it is possible that the HK BAR CSC did circularise its members on 23 July 2002 (including Mr Ngai) but that no one has been able to find a copy of the circular since. By itself, it is possible that Mr Ngai found out what happened at the meeting on 23 July 2002 through some other unexplained means. By itself, it is possible that he was not at the meeting even though he had been authorised by Mr Gregg to attend the meetings of the HK BAR CSC and even though Mr Gregg was not at it.
19. Although all of these matters are individually possible, I do not consider that taken together they are likely. For that reason, I infer that Mr Ngai was present at the meeting. Although the matter is contestable, it seems to me the more likely explanation. Mr Ngai of course could have thrown some light on this issue but he was not called. Although the inference that Mr Ngai was present at the meeting may probably be drawn without resort to *Jones v Dunkel,* its application to Mr Ngai’s non-appearance at the trial, fortifies me in the correctness of that conclusion.
20. I find that Mr Ngai was present at the meeting of 23 July 2002.
21. *As to (b) (the chronology issue)*: Paragraph 124 of the pleading is set out above. It is not altogether clear what Air NZ’s argument was. Paragraphs 126-133 of Air NZ’s closing submissions on this point emphasised that on the date on which the Commission alleged the arrangement was reached (23 July 2002) the approval had already been granted (on 19 July 2002). Certainly this is true. Air NZ submitted that it was then bound to do that which it had already agreed to do. This appears to me to be the same argument pursued in relation to the issue of whether Air NZ can have reached an arrangement or understanding in light of the existence of the approval. I consider this issue below as a part of the ‘consensus issue’.
22. *As to (c) (the multiple level issue)*: Air NZ submitted that the revised methodology had four identified surcharge levels. Air NZ identified the issue as whether that revised methodology extended to any further levels which were subsequently added to the index.
23. There were two aspects to this. The first was said to be a pleading issue. It was submitted that to the extent that the Commission alleged that Air NZ gave effect to the understanding alleged in [124] by imposing a surcharge at a level other than that alleged in [124] the claim must fail.
24. If the pleading did not allege that the arrangement or understanding was subsequently varied one might entertain this argument. However, it is expressly alleged at [159]-[162], [170]-[173], [192]-[197], [204]-[208], [214]-[218] and [236]-[242] of the Air New Zealand FASOC that subsequent arrangements or understandings were reached adding additional levels to the index. The allegation made by the Commission that these higher levels were implemented is, in each case, pleaded as an implementation of the arrangements in those paragraphs and not that in [124]. That the initial arrangement was subsequently varied and those variations acted upon is not an answer to the suggestion that the initial arrangement was reached. The point is, therefore, without substance. I do not, however, accept the Commission’s submission that it would have been an answer to this argument to seek refuge in the word ‘methodology’.
25. The second aspect of this point was said to be the need for the Commission to show that the revised methodology pleaded in [124] contemplated additional levels. It was then said that such a contention would encounter two identified difficulties. I do not accept the identified need for the initial arrangement expressly to contemplate its own amendment. Nor did the Commission suggest this was the case. Consequently, the two suggested difficulties have no relevance and may be put aside.
26. *As to (d) (the implementation issue)*: Here Air NZ submitted that the evidence did not demonstrate any agreement or understanding by the airlines to impose the surcharge in accordance with the HK CAD’s approval ‘per se’. Instead, so it was submitted, the evidence demonstrated that the airlines had taken the necessity to impose the approved surcharge for granted and were concerned only with the date upon which it was to be imposed.
27. I reject this submission. The approval did not impose on the airlines any obligation to charge the surcharge. It was an approval not an instruction. Approved tariffs did not have to be charged. Nor did the airlines at the meeting proceed upon the basis that the approval bound them to implement the surcharge.
28. Air NZ submitted that certain matters showed that the airlines understood that they were going to implement the surcharge as at 23 July 2002. Reference was made to the fact that the airlines discussed at the meeting the need to give notice to HAFFA of the selection of the weight basis of the surcharge and the date the surcharge would be imposed. The point of this was that none of it showed ‘any agreement between airlines that they would impose a charge’.
29. I do not accept this. The airlines had agreed on 16 May 2002 that if their application was approved they would impose a fuel surcharge. When the application was approved on 19 July 2002 none was under any legal compulsion to implement it. The meeting of 16 May 2002 created no legal obligations and the approval of 19 July 2002 required no action but only controlled the nature of any action which might be taken. In order for the surcharge to be imposed the airlines therefore had to decide to impose it. On 23 July 2002 they agreed to do so and to do so from 1 August 2002.
30. Air NZ did not submit that no decision could be reached to agree the surcharge because such an agreement had been reached on 16 May 2002. Such an argument might have had more substance although it would necessarily involve an admission of price fixing on 16 May 2002. In the absence of that argument being put, Air NZ’s argument reduces to the assertion that agreement could not be reached on 23 July 2002 to impose the surcharge either because the approval required it (it did not) or because, in some unarticulated way, the decision had already been made. The former is simply incorrect. As to the latter, I do not think that I can assess whether the 23 July 2002 agreement was preceded by another agreement to impose the surcharge without knowing what that other agreement was. This has not been explained.
31. Air NZ also submitted that the evidence of Mr Gregg assisted its arguments. Mr Gregg, of course, was not at the meeting. The person who was at both meetings was Mr Ngai and Air NZ decided not to call him as a witness. Mr Gregg’s evidence was that he understood that the HK CAD had imposed a maximum level so that Air NZ could make its own commercial decision as to which surcharge it was going to charge. The point was that ‘he had no relevant understanding that Air New Zealand had committed to anything’. I do not regard Mr Gregg’s evidence as useful. His understanding that the approval levels were maxima was incorrect as Air NZ accepted. Further, since he was not at the critical meeting I do not think his views of what happened at the meeting are of any weight; more so when he had authorised Mr Ngai to attend and Mr Ngai generated a record of the meeting which was transmitted on the very same day.
32. *As to (e) (the 16 May 2002 meeting issue)*: this argument, which was a variant of the one just considered, was that whatever had happened before 19 July 2002 was rendered irrelevant by the approval granted on that day. Unlike the preceding argument which sought to locate the decision to implement the surcharge entirely in the approval, this argument conceded the possibility that the airlines had decided to do something before the approval but that whatever this was – here the submission was understandably coy – it had been rendered irrelevant by the approval.
33. I do not accept this argument either. 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.
34. *As to (f) (the irrelevance of implementation)*: Air NZ submitted that little could be gleaned from the fact that the airlines had all implemented the surcharges over the following years with clock-work like efficiency. This was because they were to be seen as simply reacting to the surcharge announcements made by the HK BAR CSC. This argument ignores the meeting of 23 July 2002 when the agreement to impose the surcharge was reached.
35. *As to (g) (the consensus issue)*: Air NZ submitted that it could have reached no arrangement or understanding because it was bound to act as it did by the approval granted on 23 July 2002.
36. This is a factual submission about the subjective mental state of Air NZ. Two minds matter: that of Mr Gregg and that of Mr Ngai. Mr Gregg’s evidence about these events I have rejected on the basis that he was not present at the meeting. In any event, if I had accepted his evidence it would lead to the conclusion that he thought the approval was a maximum amount and did not bind Air NZ to do anything. This would not assist Air NZ’s argument, but, little weight ought to be given to Mr Gregg’s understanding of events to which he was not witness. Mr Gregg’s evidence about this may, in those circumstances, be put aside.
37. What of Mr Ngai? No evidence was called from him. His report to Mr Gregg of the events of 23 July 2002 contains no statement to the effect that the airlines were implementing the surcharge because they were required by the HK CAD to do so. Further, as discussed above, neither Hong Kong domestic law nor the approval granted on 19 July 2002 bound any airline to impose the approved surcharge.
38. I conclude therefore that Air NZ did not understand itself to be obliged to implement a surcharge just because it had been approved.
39. *As to (h) (the absence of agreement issue)*: Air NZ denied that there had been any meeting of the minds on 23 July 2002, or that any understanding had been reached or any express communications exchanged. I reject this submission. The emails sent shortly after the meeting abundantly show that there was agreement. Mr Ngai was present at that meeting. I infer that Mr Ngai participated in the price fixing which took place on 23 July 2002. It was the point of the meeting; it is what the reports of what occurred at the meeting suggest; and parallel pricing then followed. I may more comfortably draw that inference where Mr Ngai was not called.
40. I conclude that the arrangement or understanding alleged in paragraph 124 against Air NZ is shown to have been reached.

### 10.3.2 Garuda

1. The Commission made the same allegation against Garuda at [112] of its Amended Statement of Claim filed in the proceedings against it.
2. Both parties accepted that there was no evidence one way or the other as to whether Garuda was present at the meeting on 23 July 2002. The Commission submitted that Garuda had attended some HK BAR CSC meetings which I accept but I do not see how that advances matters very far. The Commission also submitted that a variety of circumstantial matters pointed to Garuda being a party to the arrangement or understanding. But that will not suffice in relation to the pleaded case which is that Garuda reached the arrangement or understanding ‘on or about 23 July 2002’. The Commission does not make good that case by showing that Garuda subsequently agreed that the arrangement should be extended (although it may make good another case). This is because, as the Commission’s pleading shows, there may be more than one way for an airline to arrive at the understanding: one could, for example, join into a pre-existing cartel. Being present at the meeting held on 23 July 2002 is one way an airline might have come to the alleged understanding or arrangement but an airline who did not attend that meeting could nevertheless still take part by joining in later. The point is 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.’
3. In those circumstances, there is insufficient material for me to draw the inference that Garuda was at the meeting of 23 July 2002. Consequently, this allegation is not made good.
4. I conclude, therefore, that Air NZ was party to the agreement or understanding reached on 23 July 2002 but that Garuda was not.

### 10.3.3 Implementation

1. There is no factual debate that both Air NZ (and Garuda) imposed the surcharge in accordance with the revised Lufthansa Methodology. Additionally, Air NZ usually announced that it was doing so to its customers. Below, when dealing with the Commission’s Hong Kong Imposition Understanding, I conclude that Garuda and Air NZ took part in every surcharge variation under the modified Lufthansa Methodology.
2. Air NZ submitted this was not so because it was not acting pursuant to any arrangement or understanding reached on 23 July 2002 but instead was acting pursuant to the requirements of the HK CAD.
3. I have concluded above that this is not so and that: each airline, including Air NZ, had decided to use the revised Lufthansa Methodology because they actively wished to do so; that the HK CAD approval did not require them to levy the surcharge; that the decision to do so was a collective one between the airlines; and that the approval had bound them, once that decision was made, to do no more than they wished to do. That they acted only once the approval was granted does not negate the fact that they were acting in accordance with the arrangement or understanding which was approved. Whilst a firm who engages in price fixing behaviour because it is in fact compelled to do so by a foreign legal system will not be shown thereby to have made the commitment which Australian trade practices law requires to make good an agreement, arrangement or understanding under s 45, the opposite is also true. Firms who procure the creation of foreign legal requirements as a cloak for their own motives do not take themselves outside of s 45:

The real question is *whose* acts are the subject of inquiry. If the acts are those of the foreign government within its own jurisdiction, then the antitrust exception applies. The situation is the same if the foreign government through its laws, regulations, or orders, *requires* private parties to perform the anticompetitive acts. If, on the other hand, the acts complained of are in reality those of private parties who seek to hide behind the cloak of foreign law, the courts will attach antitrust liability.

See Wilbur L Fugate, ‘Antitrust Jurisdiction and Foreign Sovereignty’ (1963) 49 *Virginia Law Review* 925, 932.

1. Accordingly, I reject this argument as a matter of fact.

### ***10.3.4*** Were the provisions of the understanding ones to which s 45A applied?

1. The Commission contends that each of the provisions of the arrangement was a price fixing provision. To make good this point the Commission must establish that the provisions had the purpose or had or were likely to have the effect of fixing, controlling or maintaining the price of providing the service of the carriage of air cargo. It must also establish under s 45A that the airlines were in competition with each other. This last issue cannot seriously be questioned and I say no more about it.
2. Air NZ, supported by Garuda in this regard, pointed to the word ‘price’ in s 45A and argued that a component of a price was not a price to which s 45A applied. They submitted that this point had been determined in their favour by Lindgren J in *ACCC v CC (NSW) Pty Ltd* at [184] where his Honour said:

[I]t is not enough for the Commission to establish, as it has pleaded, that the UTF understanding was likely to have the effect of controlling a component of the price: it must establish that it was likely to have the effect of controlling the overall price.

1. At paragraph [23] of its closing submissions the Commission accepted that the relevant question was whether the understandings had the likely effect of controlling the overall price. On this view, it was not, therefore, necessary for it to show that the overall price *was* fixed, controlled or maintained only that this was its purpose, effect or likely effect.
2. Putting to one side some semantic issues about expressions such as ‘purpose’, ‘effect’, ‘likely effect’ and ‘fix, maintain or control’ 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.
3. That general observation cannot, however, be a substitute for the inquiries for which s 45A calls. The section requires an assessment of the quality of purposes, effects or likely effects. That quality is fixing, controlling or maintaining the price for goods or services.
4. There is a debate usefully, with respect, explained by Logan J in *Australian Competition and Consumer Commission v TF Woollam & Son Pty Ltd* (2011) 196 FCR 212 at [82] – [83], as to whether the expression ‘fixing controlling or maintaining’ in s 45A(1) is a composite expression or three distinct concepts informing each other’s meanings. Like Logan J I propose to adopt what was said by Lindgren J in *ACCC v CC (NSW) Pty Ltd*: ‘to fix a price is the most precise case’ (at [133]); ‘to maintain a price assumes that a price has been fixed beforehand; and, an understanding will control a price if it restrains a freedom that would otherwise exist as to a price to be charged’ (at [168]). No doubt, those concepts inform each other. In my opinion, an arrangement or understanding whose purpose, effect or likely effect is any of the above will be an arrangement or understanding to which s 45A applies. Whether this is so because the three words form a composite expression whose content consists of the union of the meaning of the three composite words or whether it is three concepts the result will be the same.
5. The Commission’s case was that the understanding of 23 July 2002 was:
6. likely to have the effect; or
7. had the purpose

of controlling the actual price charged by the airlines by way of increasing by the addition of a fixed or minimum charge (the surcharge) to the price which, apart from the surcharge, would not have been charged. Another more colloquial way of rendering this concept is that the purpose, effect or likely effect of the arrangement or understanding was that they would all put their rates up by the same amount, i.e., the amount of the surcharge. Because they were not all charging the same rate to begin with I do not think that this can be described as price fixing in its simplest sense of agreeing to charge the same amount. Nor, in this case, do I think that this practice would maintain the price because there appears to be nothing in the understanding of 23 July 2002 which would stop the individual airlines from reducing their actual cargo rates at a later time to absorb (or indeed to reverse) the effect of the surcharge having been imposed.

1. I do, however, accept at the level of principle that a decision by competitors who are charging different rates simultaneously to increase their charges by the same amount *could* be an arrangement or understanding with a price controlling effect or purpose or likely effect. That is not to answer the question at hand but rather merely to indicate the conceptual box into which the current debate is to be placed.
2. 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.
3. Air NZ, supported by Garuda, submitted that this conclusion ought not to be drawn in the case of the fuel surcharge for two reasons. The first was that the arrangement or understanding reached did not lead to a fixed increase. This was because the understanding did not specify whether it applied to chargeable or actual weight with the consequence that not necessarily the same surcharge was being imposed. I do not find this argument persuasive. Each of the airlines charged on both bases typically calculating the freight rate on chargeable weight for very light loads (such as flowers) which took up hold space. That the surcharge in such cases on an actual per kilo basis would be different is beside the point. As the Commission correctly submitted, there was nevertheless no competition in respect of the calculation of the surcharge. A similar situation would arise if the vendors of apples in the Sydney CBD market (assuming such a market exists) decided to increase the price of apples sold by the kilogram by $1 per kilo but where sold individually by 20 cents per apple. This does not cease to be price controlling merely because two different mechanisms of control are in play.
4. Air NZ’s second point was that whilst it was true that a price could be fixed, controlled or maintained without an agreement to charge literally identical charges the Commission had not pleaded such a case. Instead, it had explicitly alleged the imposition of identical surcharges. Having elected to run its case on the basis of identical charges it could not now switch to some looser concept.
5. This submission is not supported by reference to the pleadings. Paragraph 125 is the relevant paragraph and is in these terms:

125. Each of the provisions, or alternatively one or more of the provisions, of the 2002 Hong Kong Lufthansa Methodology Understanding:

125.1 had the purpose and had the effect and was likely to have the effect of fixing or controlling or maintaining the price charged by Air New Zealand and the price charged by the other parties to the 2002 Hong Kong Lufthansa Methodology Understanding for the supply of air freight services including the supply of air freight services to Australia in competition with each other; and

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

1. It is clear that this allegation relates to controlling the price for the ‘the supply of air freight services’. The pleading does not allege that the price which was fixed or controlled was the surcharge itself.
2. I accept, therefore, in principle that the Commission’s case can work. That leaves unresolved the other questions posed by s 45A, namely, whether the arrangement or understanding had the purpose, effect or likely effect of controlling that price.
3. It seems that ‘purpose’ refers to the subjective purpose of the parties: *News Limited v South Sydney District Rugby League Football Club Limited* (2003) 215 CLR 563 at [18], [31]-[43], [59]-[66] and [212]-[216]. The Commission advanced the submission that the airlines’ subjective purpose was to be inferred from three matters. These were:
4. 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;
5. the evidence of airline employees as to the significance of fuel cost as an input for the airlines; and
6. the evidence of airline employees, especially those of Air NZ, that they would not impose a fuel surcharge unless the large carriers did so.
7. 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.
8. It is true, as Garuda submitted, that at later times there was some evidence that some airlines would discount their cargo rates to overcome the effect of the surcharge. That, however, is not an answer to the Commission’s case about what happened on 23 July 2002. Cartel conduct does not cease to be such merely because there is a subsequent outbreak of cheating amongst the carteliers.
9. I am also satisfied that the effect of the understanding was that the airlines all increased their charges by the amount of the surcharge after the decision on 23 July 2002. There was, ultimately, no dispute that the surcharge had been substantially implemented.
10. That leaves the question of ‘likely effect’. Garuda, supported by Air NZ, submitted that the ‘likely effect’ limb of s 45A(1) was only available in matters which were not concerned with history. I do not accept this submission. In relation to identical words in s 47(10) the argument was rejected by the Full Court in *Universal Music Australia Pty Ltd v Australian Competition and Consumer Commission* (2003) 131 FCR 529 at 586 [247]-[248]. It is also inconsistent with the approach adopted by Lindgren J in *ACCC v CC (NSW) Pty Ltd.*
11. 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.
12. I conclude that Air NZ was a party to an understanding reached at the meeting on 23 July 2002 that the airlines would impose a fuel surcharge in accordance with the revised Lufthansa Methodology and that the purpose, effect and likely effect of this understanding was to control the price which the airlines charged for their services. The deeming provided for by s 45A is therefore enlivened.
13. Because I am of the view, however, that the relevant competition between the airlines was not competition in ‘a market in Australia’ within the meaning of s 4E, s 45 can have no application.
14. I turn then to the second way the Commission puts its case, the Hong Kong Imposition Understanding.

## 10.4 The Hong Kong Imposition Understanding

1. In the years following the reaching of the understanding at the meeting held on 23 July 2002 to impose a fuel surcharge in accordance with the revised Lufthansa Methodology a number of events occurred. One of these was a series of fluctuations in the price of aviation fuel resulting in both the increase and decrease of the fuel surcharge. Another was the addition of higher levels to the index as the price of fuel went higher than the original index contemplated (which initially had only four levels). Because the approval was always for a limited period from time to time it was also necessary for the airlines to seek to have its duration extended.
2. In the case of the fluctuations, the airlines were bound under the terms of the original (and subsequent) approvals to inform the HK CAD of each change in the surcharge as the index went up or down. In the case of the additional levels and duration extensions, such extensions in the index required further approval from the HK CAD. In all of those cases the HK BAR CSC found itself in the position of having to write to the HK CAD.
3. 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.
4. This allegation is fact rich. On 6 August 2002 Mr Leung, the then chair of the HK BAR CSC, wrote to the HK CAD to inform it that the HK BAR CSC had decided to implement the fuel surcharge with effect from 1 August 2002. This fax was copied to ‘BAR-CSC members’. There is some question as to whether Air NZ and Garuda received the fax of 6 August 2002. It was copied to ‘BAR CSC members’ but the first extant copy of the list of those airlines maintained by the HK BAR CSC is one attached to another fax dated 21 August 2002. It is headed as a ‘revised’ list indicating that an earlier version or versions existed. Air NZ and Garuda are on this list. It does not follow inevitably that they were on the earlier list or, in consequence, that they received the fax of 6 August 2002. Since I have concluded that Air NZ was represented at the meeting on 23 July 2002 by Mr Ngai I have no difficulty inferring that it was on the distribution list on 6 August 2002. I also infer from the fact that Garuda had attended prior meetings of the HK BAR CSC and the fact that it implemented the surcharges that it too received this fax.
5. The fax to the HK CAD contained an important indication of how the HK BAR CSC proposed to proceed in the future. On its second page it contained the following statement:

In order to eliminate in future the misunderstanding between BAR-CSC and CAD, I would like to reiterate the procedure of implementing the new fuel surcharge mechanism :

* BAR-CSC informs CAD with every adjustment, whether upward or downward, of the level of surcharge levied and the corresponding fuel price index.
* BAR-CSC has to wait for two consecutive weeks for the fuel index to reach or exceed a trigger point before a surcharge adjustment is made. BAR-CSC would give cargo agents one week’s notice before a surcharge adjustment is implemented.
* BAR-CSC informs CAD of the fuel price index on a regular basis or at request.

I hope the above explains the misunderstanding BAR-CSC has had for this time and the procedure for BAR-CSC to take for any surcharge adjustment in future.

…

1. On 16 August 2002 the HK BAR CSC wrote to the HK CAD. This letter is not available. However, its contents may, in part, be inferred from a letter sent on 20 August 2002. This letter was from the HK BAR CSC to the HK CAD and began ‘Further to our fax dated August 16, 2002 regarding the list of airlines that are collecting the fuel surcharge…’ I would infer from this that *a* list had been sent on 16 August 2002 to the HK CAD of participating airlines. The letter goes on ‘to explain and clarify the other six airlines’ which indicates that there must have been previous information of the *other* airlines, that is, those in the previous letter of 16 August 2002 as opposed to the six in the letter of 20 August 2002. I cannot be clear that on that day all of the airlines had likewise received the same list because I cannot determine whether the fax of 16 August 2002 was copied to all member airlines.
2. In any event, there is no question that on 21 August 2002 the HK BAR CSC provided the HK CAD with a list of 57 participating airlines. These included Air NZ and Garuda.
3. At this point it is necessary to recall two facts. The first is that the airlines present at the meeting on 23 July 2002 had decided to implement the modified Lufthansa Methodology on 1 August 2002. The first level of that index was enlivened at 115 and was set at HKD0.40/kg. At the time of the decision to implement on 23 July 2002, the index had been above 115 for more than two weeks so that this authorised the imposition of this first level charge. The decision of the meeting was to take this step on 1 August 2002.

### 10.4.1 Increase to Level 2 (Index Level: 135)

1. The next trigger in the index was 135. As at 5 September 2002, the index had exceeded 135 for two weeks and an increase in the surcharge to HKD0.80/kg therefore followed from the modified Lufthansa Methodology. As contemplated in the HK CAD’s letter of 6 August 2002 the HK BAR CSC wrote to the HK CAD on 5 September 2002. This letter indicated that the index had reached 138 and 142 respectively in the weeks of 23 August 2002 and 30 August 2002 and that an increase in the surcharge to HKD0.80/kg was authorised by the index except in Asia other than the South and South West Pacific where HKD0.40/kg was applied. The letter indicated that this second level of the surcharge would be imposed on 13 September 2002. A copy of this letter was sent by the HK BAR CSC to the participating airlines – including Air NZ and Garuda – on the same day under cover of a fax which said to each airline:

Attached please find the letter from KK Leung (for and on behalf of BAR-CSC) to Alan Shum [sic] of HKCAD in respect of increase in cargo fuel surcharge wef :SEP13, 2002.

1. Another letter sent by the HK BAR CSC on the same day asked the airlines (including Air NZ and Garuda) to notify their agents ‘so that they can have one week’s advanced notice’.
2. In their defences Air NZ and Garuda admitted that they had imposed both the initial surcharge and the first level increase on 13 September 2002 on routes flown by them.

### 10.4.2 Increase to Level 3 (Index Level: 165)

1. The modified Lufthansa Methodology had a third level which was enlivened at 165 and was HKD1.20/kg. By 12 February 2003 the index had exceeded 165 for two weeks. On 12 February 2003 the HK BAR CSC wrote to the HK CAD informing it that the new Level 3 surcharge would be imposed from 21 February 2003. The letter informed the HK CAD that it would give the freight forwarders one week’s notice and that it had written to its members, HAFFA and the Shippers’ Council, to inform them of the surcharge increase. This fax was copied to the HK BAR CSC member airlines. A number of airlines, including Air NZ, announced that they would be imposing the surcharge from 21 February 2003. Garuda did not make an announcement. Nevertheless, both airlines (and a number of other airlines) imposed the surcharge from that date.
2. On 18 February 2003 the HK BAR CSC provided the HK CAD with a revised list of airlines who were covered by the filing. On 19 February 2003 this was supplemented by some minor additions consisting of subsidiary airlines of airlines already on the list or, in two cases, the addition of airlines who had been removed from the list at an earlier time.
3. On 19 February 2003 the HK CAD issued an approval for the addition of a further five airlines. Only one of those airlines – Australian Airlines – was amongst the five mentioned the day before by the HK BAR CSC. Nothing turns on this anomaly for which I am unable to account.

### 10.4.3 Increase to Level 4 (Index Level: 190)

1. In the weeks before 13 March 2003 the fuel index exceeded 190 for more than two weeks. This potentially enlivened the fourth level of the index. The HK BAR CSC then called a meeting of the airlines for 13 March 2003. A practical consideration made such a meeting necessary because the approval granted by the HK CAD on 19 July 2002 had only provided for approval of the first four levels of the index mechanism. No meeting was necessary to increase to Level 4 but any further increases would require an amendment to the original approval to include higher levels. Consistently with this view, the HK BAR CSC wrote to the HK CAD on 13 March 2003 advising it of the Level 4 surcharge of HKD1.60/kg and that it would take effect from 27 March 2003. The letter enclosed a list of all 60 airlines who would be doing so. This letter was copied to the airlines.
2. Insofar as the increase to Level 4 was concerned, the airlines, including Air NZ and Garuda, all implemented it. In the meantime, the HK BAR CSC continued to do internal work designed to add additional levels to the approved index, as the minutes of the meeting on 19 March 2003 show.

### 10.4.4 Decrease to Level 3 (Index Level: 170)

1. On 7 April 2003 the price of fuel had moved in the opposite direction. The HK BAR CSC chair advised its members in the following terms:

The index fell to 155 in the week of March 28, 2003. If it goes below the trigger point of 170 for the following week (week of April 4, 2003), then according to the fuel surcharge mechanism the fuel surcharge should be reduced from the current HK$1.60/$0.80/kg to HKS1.20 $0.60/kg.

If we give two weeks' notice to the cargo forwarders for the cut in fuel surcharge, the effective date of the revised surcharge will take place within the week of April 21, 2003.

Therefore, would all members of BAR-CSC be prepared for the drop in fuel surcharge and the effective date of implementation. I will keep all of you informed once the decision is made.

Thank you for your attention.

1. On the following day the HK BAR CSC informed the HK CAD that in light of the reduction in the price of fuel the surcharge would be decreased to Level 3 (HKD1.20/kg for long haul) and that this would take effect from 22 April 2003. It undertook that the freight forwarders would be given two weeks’ notice of the increase. The airlines which would apply the surcharge were those appearing on the list issued on 19 February 2003. That list included Air NZ and Garuda. The letter to the HK CAD was copied to the members of the HK BAR CSC. On 22 April 2003 both Garuda and Air NZ implemented the decrease to Level 3.

### 10.4.5 Decrease to Level 2 (Index Level: 145)

1. On 24 April 2003 the price of fuel had dropped below 145 for more than two weeks which therefore required a reduction under the index. On 24 April 2003 the HK BAR CSC notified the HK CAD and its members (by copying the letter to them) that this was so and that the Level 2 surcharge (HKD0.80/kg for long haul) would be implemented from 1 May 2003. The letter attached a list of airlines which would be implementing the decrease and this list included Air NZ and Garuda. The member airlines, including Air NZ and Garuda, then implemented the surcharge decrease.
2. The approval for the modified Lufthansa Index was due to expire on 18 July 2003. In circumstances to which I return below the approval was extended by the HK CAD to 18 January 2004.

### 10.4.6 Increase to Level 3 (Index Level: 165)

1. On 5 December 2003 the fuel index had exceeded 165 for more than two weeks. On that day the Chair of the HK BAR CSC wrote to the HK CAD notifying it that, as that had occurred, the airlines would increase the fuel cargo surcharge to Level 3 (HKD1.20/kg for long haul) from 19 December 2003. The letter attached a list of 58 airlines which would be implementing the surcharge and that list included Air NZ and Garuda. The letter and the list were copied to the members of the HK BAR CSC including Air NZ and Garuda. Air NZ notified its customers that it would impose the increase. The airlines, including Air NZ and Garuda, subsequently imposed the increase to Level 3.

### 10.4.7 Increase to Level 4 (Index Level: 190)

1. On 27 April 2004 the index had exceeded 190 for more than two weeks. On that day the HK BAR CSC wrote to the HK CAD notifying it of this fact and that there would be an increase in the fuel surcharge to Level 4 (HKD1.60/kg for long haul) from 11 May 2004. The letter attached a list of the 57 airlines which would be implementing the increase. The list included Air NZ and Garuda. A copy of the letter and the list was circulated on the same day to the HK BAR CSC airlines including Air NZ and Garuda. Air NZ notified its customers of the increase. Subsequently the airlines, including Air NZ and Garuda, implemented the Level 4 increase.

### 10.4.8 Subsequent increases and decreases

1. I have set out in some detail the process by which the level of the fuel surcharges was increased and decreased over the first four levels. These levels were subsequently extended to include levels up to 12. I discuss this below.
2. Subsequently there were a further 19 variations in the index until 26 September 2006 upon each of which the Commission relies. In each the mechanism was largely identical; that is to say, a letter was sent by the HK BAR CSC to the HK CAD indicating that a trigger point had been reached and that a change in the level of the fuel surcharge would be implemented on a given date; the attachment to that letter of a list of participating airlines; the copying of that letter to the airlines (always including Garuda and Air NZ) and the subsequent implementation of the increase by the HK BAR CSC airlines including Air NZ and Garuda. There were slight variations: on some occasions the HK BAR CSC would write directly to the airlines as well (usually in addition to copying them in on the correspondence to the HK CAD); usually, Air NZ would announce the increase to its customers but Garuda would not. Although the Commission set out in its written submissions the detail of the remaining 19 variations, I have decided to exclude this detail from these reasons because it does not, in substance, differ from the variations over the first four levels. Instead, I will summarise the 19 variations as follows:

|  |  |  |
| --- | --- | --- |
| **Date letter sent to HK CAD** | **New level** | **Date of implementation** |
| 26 July 2004 | Level 5 (HKD2.00/kg) | 9 August 2004 |
| 2 September 2004 | Level 6 (HKD2.40/kg) | 16 September 2004 |
| 21 October 2004 | Level 7 (HKD2.80/kg) | 6 November 2004 |
| 2 November 2004 | Level 8 (HKD3.20/kg) | 16 November 2004 |
| 23 November 2004 | Level 7 (HKD2.80/kg) | 7 December 2004 |
| 21 December 2004 | Level 6 (HKD2.40/kg) | 4 January 2005 |
| 8 March 2005 | Level 7 (HKD2.80/kg) | 22 March 2005 |
| 22 March 2005 | Level 8 (HKD3.20/kg) | 5 April 2005 |
| 28 June 2005 | Level 9 (HKD3.60/kg) | 12 July 2005 |
| 23 August 2005 | Level 10 (HKD4.00/kg) | 6 September 2005 |
| 13 September 2005 | Level 11 (HKD4.40/kg) | 27 September 2005 |
| 14 October 2005 | Level 12 (HKD4.80/kg) | 28 October 2005 |
| 8 November 2005 | Level 11 (HKD4.40/kg) | 22 November 2005 |
| 15 November 2005 | Level 10 (HKD4.00/kg) | 29 November 2005 |
| 22 November 2005 | Level 9 (HKD3.60/kg) | 6 December 2005 |
| 7 February 2006 | Level 10 (HKD4.00/kg) | 21 February 2006 |
| 25 April 2006 | Level 11 (HKD4.40/kg) | 9 May 2006 |
| 2 May 2006 | Level 12 (HKD4.80/kg) | 16 May 2006 |
| 26 September 2006 | Level 11 (HKD4.40/kg) | 10 October 2006 |

### 10.4.9 Was the Understanding reached and implemented?

1. The Commission’s pleaded case in relation to Air NZ (which, it will be recalled, was the same as Garuda’s) on this was as follows:

**Hong Kong Imposition Understanding**

242A. Further to paragraphs 124 to 242, in respect of each increase or decrease of the fuel surcharge and each extension of approval for the fuel surcharge mechanism by the CAD:

242A.1 the HK BAR-CSC wrote to member airlines (including Air New Zealand) informing them of the fuel surcharge to be imposed by member airlines and (when relevant) the date of commencement;

242A.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 Air New Zealand) who would be imposing the surcharge and the latest fuel index movements upon which the fuel surcharge mechanism was based;

242A.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 Air New Zealand) who were imposing fuel surcharges in accordance with the fuel surcharge mechanism approved by the CAD;

242A.4 the member airlines included on the lists referred to in 242A.2 and 242A.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

242A.5 the member airlines included on the lists referred to in 242A.2 and 242A.3 imposed the fuel surcharges in accordance with the notification to the CAD.

[particulars omitted]

1. The various changes in the index levels which occurred between February 2003 and September 2006 exhibit the following features:
2. the sending of a letter to the HK CAD indicating that a new surcharge would be levied and the date upon which this would occur;
3. the copying in of all participating airlines (usually between 55 and 60) who were identified on an attached list; and
4. the imposition of the surcharge by the airlines.
5. Air NZ and Garuda were copied on each of the increases and decreases. Garuda admits that it imposed the relevant surcharge. Air NZ admits imposing the long haul surcharge in respect of each change to the surcharge level. It should be noted that there was no evidence that Air NZ imposed the lower surcharge to Asia except in the South and South West Pacific.
6. 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.
7. Air NZ submitted that this conclusion should not be reached for five reasons. Largely, these arguments did not seek to cavil with the existence of the consensus but sought instead to say that the consensus was forced upon it. The first reason was that it was not possible to regard Air NZ as having made an arrangement when it was compelled to impose the surcharge in accordance with the HK CAD approval. I reject this argument. Air NZ was not compelled to do anything. It did not have to include itself within the HK CAD filing. It chose to do that because it wished to impose the surcharge using the index mechanism. The HK CAD approval thereafter merely provided it with the permission to act in accordance with its own desires.
8. The second argument was allied to the first. Here it was said that the relevant entity which made the arrangement was the HK CAD. I reject this argument too. Rather than being the entity which made the arrangement, the application to the HK CAD was the device by which the airlines facilitated their own collusive behaviour.
9. The third argument was that there was no arrangement or understanding because none of the parties could have understood themselves to have been subject to an obligation between themselves to impose the relevant surcharge because that obligation was provided by the HK CAD approval. I reject this argument. The approval generated no obligation; it was merely a permission. The obligation arose between the airlines themselves and it was an obligation to impose the surcharge just as each of the other airlines was imposing it.
10. The fourth argument was that there was no commitment on the part of any airline because this was supplied by the approval. This is the same as the third argument and I reject it for the same reason.
11. The fifth argument was that the TPA should not be interpreted to apply to conduct authorised under foreign law. Because I have reached the conclusion both that the conduct was not in respect of a market in Australia and that foreign law did not authorise the alleged conduct this question does not arise. However, if it had, as I indicate at Chapter 5, I would have rejected it.
12. The pleading against Garuda was not materially different. 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.
13. 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.
14. 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.

## 10.5 The First Hong Kong Surcharge Extension Understanding

1. It will be recalled that the initial approval of the modified Lufthansa Methodology was limited in the sense both that it only had four levels and also in that it expired on 19 July 2003. As the time of expiry approached it became necessary for the airlines to seek to extend its operation. The Commission alleges that the airlines agreed amongst themselves to apply the modified Lufthansa Methodology for a further period and to seek approval from the HK CAD to do so and that this, as with the modified Lufthansa Methodology Understanding, was to be seen as an arrangement or understanding in relation to the fixing or controlling of prices.
2. The formal pleading against Air NZ is at paragraph 143 which is as follows:

**First Hong Kong Surcharge Extension Understanding**

143. On or about 12 June 2003, Air New Zealand made an arrangement or arrived at an understanding, with Aeroflot, Air Hong Kong, Air Canada, Air France, Air India, Air Mauritius, Alitalia, All Nippon Airways, Asiana Airlines, Australian Airlines, British Airways, Cargolux, Cathay Pacific, China Airlines, Air China, China Southern Airlines, China Eastern Airlines, Continental Airlines, El Al, Emirates, EVA Air, Evergreen, FedEx, Finnair, Garuda, Gulf Air, Dragonair, Japan Airlines, KLM, Korean Air, Lufthansa, Malaysia Airlines, Mandarin Airlines, Martinair, Nippon Cargo, Northwest Airlines, Orient Thai Airlines, Pakistan International Airlines, Philippine Airlines, Polar Air, Qantas, Royal Brunei Airlines, Nepal Airlines, Saudi Arabian Airlines, SAS, Singapore Airlines, South African Airways, SriLankan Airlines, Swiss International Air Lines, Thai Airways, United Airlines, UPS, Vietnam Airlines and Virgin Atlantic 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 (the **“First Hong Kong Surcharge Extension Understanding**”).

[emphasis in original]

1. The pleading against Garuda (at [131]) is not materially different.
2. On 5 June 2003, as the end of the one year approval approached, the Chair of the HK BAR CSC wrote to the members of the HK BAR CSC indicating that the approval was soon to expire and that if a justification for an extension in its duration could be worked out a meeting would be called to consider whether to apply for it. The Chair also raised the position of an insurance surcharge which is not presently material and can be put to one side. Thereafter, on 9 June 2003, the airlines were summoned to a meeting to be held on 12 June 2003. The topics to be discussed included extending the fuel surcharge approval granted on 19 July 2002.
3. There are no minutes available from the meeting. However, an internal Lufthansa email sent the same day by its representative at the meeting reported the following on the issue of the efforts to extend the duration of the approval:

Dear Gaby,

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. I would infer from this that the airlines at the meeting agreed that they would submit an application to extend the current fuel surcharge mechanism. Unlike the meeting of 23 July 2002 an attendance sheet of the 12 June 2003 meeting was kept. It shows that Garuda was present but there is no record of Air NZ being in attendance. I conclude that Garuda was present but that Air NZ was not.
2. I conclude, in those circumstances, that the First Hong Kong Extension Understanding was reached. I conclude that Garuda was a party to it but that Air NZ was not. Garuda submitted that this did not constitute an agreement or understanding to fix or control prices but instead an agreement to apply to the HK CAD to extend its initial approval. I reject this argument. 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.
3. On 20 June 2003 the Chair of the HK BAR CSC applied to the HK CAD to extend the approval by one year. By letter of 11 July 2003 the HK CAD granted a six month extension to 18 January 2004.
4. I also conclude that Garuda gave effect to the understanding by subsequently implementing fuel surcharge increases and decreases in accordance with the modified Lufthansa Methodology during the extended period. For the same reasons I have given in relation to the Hong Kong Lufthansa Methodology Understanding and the Hong Kong Imposition Understanding I conclude this arrangement or understanding was one to which s 45A applied and that, but for the absence of a market in Australia, Garuda’s conduct would have constituted a breach of ss 45(2)(a)(ii) and 45(2)(b)(ii) of the TPA.

## 10.6 The Second to Eighth Surcharge Extension Applications

1. The extensions in this part of the Commission’s case either involved the making of applications to the HK CAD to extend the duration of the approval it had already granted or to add additional levels to the index to provide for increased surcharges as the price of fuel went higher. The first extension (above) was as to duration and was granted for six months. The remaining seven were as follows:

### Second Extension (additional six months)

1. This was an extension in the duration of the approval for six months from 17 January 2004 to 18 July 2004. The Chair of the HK BAR CSC applied for this on 18 December 2003 and it was approved by the HK CAD on 17 January 2004

### Third Extension (additional year, new levels 5 and 6)

1. This extension was both as to duration and levels. On 20 May 2004 the Chair of the HK BAR CSC applied to extend the Lufthansa Index with the addition of two new levels, 5 and 6, and this was approved by the HK CAD on 30 June 2004. As to duration, the Chair of the HK BAR CSC applied to extend the approval thus augmented for a further year on 16 June 2004 and this was granted by the HK CAD on 2 July 2004. Together these two variations constitute the ‘Third Extension’ but it is to be kept in mind that this extension involved two variations, one as to duration and one as to levels, and was the subject of two applications and two approvals.

### Fourth Extension (new levels 7 and 8)

1. On 7 October 2004 the Chair of the HK BAR CSC applied to the HK CAD for the addition of two new levels to the index, levels 7 and 8. This application was approved on 21 October 2004 by the HK CAD.

### Fifth Extension (additional year, new levels 9 and 10)

1. Like the Third Extension, the Fifth Extension was double-barrelled involving separate extensions of the duration of the approval and the addition of new levels. On 7 April 2005 the Chair of the HK BAR CSC applied to the HK CAD to add new levels, 9 and 10, to the index and this received approval on 19 April 2005. As to the duration, the Chair applied on 12 May 2005 for an extension of the approval of one year expiring on 18 July 2006. This was granted by the HK CAD on 1 June 2005.

### Sixth Extension (new levels 11 and 12)

1. On 29 August 2005 the Chair of the HK BAR CSC applied to the HK CAD to add new levels 11 and 12 to the index and this was approved on 8 September 2005.

### Seventh Extension (new levels 13 and 14)

1. On 17 October 2005 the Chair of the HK BAR CSC applied to the HK CAD for approval of new levels 13 and 14 and this was granted on 1 November 2005.

### Eighth Extension (additional year)

1. On 5 June 2006 the Chair of the HK BAR CSC applied to the HK CAD for an additional year’s approval. The HK CAD did so on 21 June 2006 extending the approval to 18 July 2007.
2. Before dealing with the understandings alleged to relate to these extensions it is useful to locate the debate. To this point I have concluded that:
3. Air NZ was party with a large number of other airlines to an understanding reached at a meeting in Hong Kong held on 23 July 2002 to the effect that they would impose fuel surcharges in accordance with the then form of the Lufthansa Index. Since Garuda is not shown to have been at this meeting I have not found that it was a party to this understanding;
4. in the years which followed, the airlines (including Air NZ and Garuda) took part in the joint application procedure and imposed their fuel surcharges accordingly. This extended over times during which the original approval was extended both as to its various levels and also its duration. I have found that a circumstantial case that the airlines, including Air NZ and Garuda, had reached an understanding that they would impose a fuel surcharge as each level was reached has been shown. This is an understanding to do what the index, as approved, required.
5. when the first understanding to apply the Lufthansa Index was reached that index only had four levels. Although I have found that each time a surcharge was imposed this was done pursuant to the imposition understanding in (b), that understanding took as its point of departure an existing index.
6. The Commission’s case about the extension understandings ran, in a sense, parallel to the imposition understanding. Whilst the imposition understanding was an understanding to impose surcharges in accordance with the index (whatever it was), the extension understandings were a set of eight alleged understandings about changes to the index itself or the duration of its approval.
7. The first extension involved extending the duration of the existing approval for six months to 18 January 2004. The understanding was reached, as I have held above, at a meeting at which Garuda was present, but Air NZ was not, held on 12 June 2003. Hence, I have concluded above that Garuda was a party to that understanding but Air NZ was not.
8. The remaining seven extensions (nos. 2-8 above) were in contrast not the result of explicit meetings between the airlines.
9. The Commission’s case about these seven extensions was quite different. It pleaded that each could be inferred from meetings or other interactive activities of two sub-committees of the HK BAR CSC. These subcommittees were the HK BAR CSC SWG and the BAR CSC Ex Com.
10. The SWG, established by the Chair of the HK BAR CSC in November 2003, consisted of eight airlines and did not include Air NZ or Garuda. The BAR CSC Ex Com was established by a meeting of the HK BAR CSC held on 15 March 2004 at which Air NZ, but not Garuda, was present. When formed, its membership did not include either Air NZ or Garuda.
11. As to the Second Extension, I find that the SWG agreed on 16 December 2003 that it should recommend to the Chair of the HK BAR CSC that he should apply to extend the then approval. I have already found that he did so apply and that this application was approved by the HK CAD.
12. Did Air NZ and Garuda reach this alleged understanding? It is important to attend to the way the Commission pleaded its case. At [151] of the Air New Zealand FASOC (with a substantially identical version at [139] of Garuda’s ASOC) it was alleged that the understanding was reached on 16 December 2003 (the day of the SWG meeting) by Air NZ. The particulars provided indicate that the understanding was to be proved by the fact of the SWG meeting on that day.
13. Early in the trial, the Commission expressly disavowed any case that the SWG was authorised to reach understandings on behalf of Air NZ or Garuda. This occurred during the course of an extensive debate about the admissibility of evidence during which the Commission submitted in writing that it did ‘not plead that the Chair of BAR-CSC or any member of [the EC] or SWG entered into any of the pleaded understandings on behalf of a participating airline’, a submission recorded in *Australian Competition and Consumer Commission v Air New Zealand Ltd (No 1)* (2012) 207 FCR 448 at 452 [9] (‘*ACCC v Air NZ No 1*’).
14. How then did the Commission’s case work since the only matter it said proved the understanding was the meeting of the SWG held on 16 December 2003? Paragraph 118 of the Commission’s pleading alleged that the SWG had authority to deal with surcharges on behalf of the HK BAR CSC members, although it was not alleged that it had authority to reach understandings about them. I recognized the validity of this distinction and its significance at 452 [10] of the ruling in *ACCC v Air NZ (No 1)*. Further, the Commission was clear in its submissions that this was the agency it was alleging, not an agency to enter into understandings.
15. Granted that this is so, the allegation is that Air NZ (and Garuda – the pleading is relevantly indistinguishable) reached the understanding to seek an extension of the approval because the SWG decided to do so, it having the authority of Air NZ and Garuda to deal with fuel surcharges but explicitly *not* the authority to reach an understanding about them.
16. Viewed in isolation, I do not see how this case can succeed. One can imagine a broader case in which it is alleged that Air NZ and Garuda took the agreement of the SWG and somehow used it as a springboard to form an understanding with the other airlines about the six month extension. But that is not alleged at [151] – all that can be found there is the bare allegation that the understanding is to be proved by the meeting of the SWG on 16 December 2003. I cannot see how, absent an allegation of authority to reach an understanding, this allegation can succeed.
17. In its written submissions, the Commission argued that the Chair’s submission to the HK CAD of the application for a six month extension happened in circumstances where:
18. the SWG had recommended that the Chair should submit it:
19. all participating airlines were advised of the SWG’s recommendations and the BAR CSC’s intentions;
20. none of the airlines had objected (including Air NZ and Garuda);
21. the Chair had submitted the application; and
22. the airlines continued to impose surcharges during the six month period.
23. It is not difficult to follow this case. However, it is not the case the Commission has pleaded. In fact, on the case in (i) to (v) just outlined, the actions of the SWG are irrelevant. What matters instead is that the airlines knew that the extension would be applied for and allowed this to occur.
24. Air NZ submitted, correctly, that points (i) to (v) were not the Commission’s pleaded case. Indeed, I have already held this to be so: *ACCC v Air NZ (No 1)* at 452-453 [14]-[19]. The situation then was that Air NZ and Garuda sought to exclude evidence at trial on the basis that (i) to (v) were outside the pleaded case. I upheld that submission but ruled the material admissible on my reading of what was alleged in [151] of the Air New Zealand FASOC, leaving (at 452 [8]) for final judgment, whether that case could succeed.
25. This then is a case where the airlines have sought to confine the Commission to its pleaded case and have not stood by and allowed it to tender material relevant to that issue. It is distinguishable in that important regard from the situation in *Betfair Pty Ltd v Racing New South Wales* (2010) 189 FCR 356 at 374 [51] (FC). In the same vein, the Commission did not apply, after I ruled in *ACCC v Air NZ (No 1)* that the argument was outside the pleadings, to amend those pleadings. Had it done so, significant discretionary questions would have arisen, the positive resolution of which in favour of the Commission is far from obvious.
26. It follows that I will disregard the submissions of the Commission to the extent they advance this now twice rejected argument. That leaves the bare allegation in [151]. For reasons already given that case cannot succeed.
27. The same conclusion is to be reached in relation to each of the other extensions. That is, the Third through to Eighth Extension Understandings. The only difference is the identity of the sub-committee which for these was the BAR CSC Ex Com. However, precisely the same problem arises. It follows that the Commission’s case on the Second to Eighth Extension Understandings must fail against both airlines.

## 10.7 The October 2001 Hong Kong Insurance Surcharge Understanding

1. The Commission pleaded its case by alleging that on or about 3 October 2001 Air NZ and Garuda reached an understanding or made an arrangement with the other HK BAR CSC member airlines that they would all impose an insurance surcharge from 11 October 2001 at the level of HKD0.50/kg.
2. There is no doubt that a meeting occurred on 3 October 2001 and that Air NZ and Garuda attended. It is also not disputed that at the meeting a decision was made by a majority of airlines present 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. I did not understand it to be in dispute, and an email sent on 4 October 2001 to the HK CAD with a list of carriers who voted in favour demonstrates, that Air NZ and Garuda were amongst the airlines who supported the making of the application. It was not in dispute than an application was made (on 3 October 2001); that it was, after some to-ing and fro-ing, approved by the HK CAD on 19 October 2001; and that it was imposed by both Air NZ and Garuda.
3. Air NZ submitted that all that could be gleaned from these facts was that the airlines had agreed to make an application. I do not agree. They agreed they were going to impose the surcharge at the same level if they could get approval. They were not obliged to make the application jointly and took advantage of the approval process as an event making convenient joint action. The situation is indistinguishable from that obtaining with respect to the 2002 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).
4. I conclude that this arrangement or understanding was reached and for the same reasons as I have given in relation to the fuel surcharges that, apart from the market in Australia issue, a contravention of the TPA would have been established.

## 10.8 The December 2002 Hong Kong Insurance Surcharge Understanding

1. The Commission pleads that on or around 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.
2. There was a meeting held on 2 December 2002 between a number of airlines to discuss a proposal by Cathay Pacific to reduce the insurance surcharge. Garuda was at this meeting; Air NZ was not. A report of what occurred at the meeting was prepared by an employee of Martinair. It was apparent that Cathay was proposing to reduce its surcharge to HKD0.25/kg (although the suggested alteration appears to have initially been proposed at HKD0.20/kg by Cathay). A number of airlines did not agree but a number, including Garuda, did. It was agreed amongst those who favoured a decrease in line with the Cathay proposal of HKD0.25/kg, that an application to the HK CAD for approval would be made. Such an application was made on 16 December 2002 and it was approved with effect from 11 January 2003. Along with other airlines, Garuda and Air NZ both implemented it.
3. Garuda was present at the meeting of 3 December 2002 and I conclude that it was party to this understanding. Air NZ was absent from the meeting because it could not attend. However, prior to the meeting it completed a survey form indicating that it would follow Cathay’s cargo insurance surcharge. This constituted a sufficient consensus with Cathay and the other airlines to constitute an understanding within the meaning of s 45. I conclude, therefore, that it was a party to this understanding too.
4. For reasons already given I accept that every other aspect of the Commission’s case in relation to this topic, apart from the issue of market in Australia, is satisfied.

## 10.9 Conclusions on the facts in Hong Kong

1. The Commission fails entirely because it has not established that the conduct took place in a market in Australia.
2. If I am wrong in that, I find that Air NZ contravened s 45 of the TPA in reaching the 2002 Hong Kong Lufthansa Methodology Understanding and the Hong Kong Imposition Understanding. I would also find it had reached both the October 2001 Hong Kong Insurance Surcharge Understanding and the December 2002 Insurance Surcharge Understanding. I find that each was implemented.
3. Subject to the market in Australia issue, I would have found that Garuda breached s 45 of the TPA in reaching the Hong Kong Imposition Understanding and the First Hong Kong Surcharge Extension Understanding. I also find it reached the October 2001 Hong Kong Insurance Surcharge Understanding and the December 2002 Hong Kong Insurance Surcharge Understanding. Each of these was implemented.
4. I turn then to the Commission’s case in Singapore.

# 11 THE COMMISSION’S CASE IN SINGAPORE

## 11.1 Introduction

1. It will be recalled from the discussion of the Commission’s case in Hong Kong that Lufthansa had put in place its modified methodology on a worldwide basis on 23 January 2002. It is set out above at paragraph [535]. By that time no airlines were charging an FSC although at earlier times they had. By April 2002 the price of jet fuel had increased and the airlines once more began to impose FSCs. The Commission did not allege that the events of April 2002 directly involved the implementation of an arrangement contrary to s 45(2) although it did rely upon those events as part of its evidence for one of the understandings it alleged.
2. Following the renewed imposition of FSCs in April 2002 there followed between September 2002 and September 2005 what the Commission alleged were 11 variations of the FSCs imposed by various airlines including Air NZ. As will be seen in due course there were, in fact, more than 11.
3. The Commission’s first, and principal case, in Singapore was that Air NZ had been party to what it termed the ‘Overarching Singapore Understanding’ of which the eleven FSC impositions were to be seen as implementations. In this section I will call it the Overarching Understanding. The terms of the understanding were complex and were set out at paragraph 112 of the Commission’s Further Amended Statement of Claim. The full text appears later in these reasons at paragraph [1093]. For present purposes it is to be emphasised that the allegation was said to have involved an understanding to fix or control the fuel surcharges but, in the alternative also to have involved an exchange of future pricing intentions. The internal mechanics of these two allegations were very different. If a price fix were involved then the understanding would be deemed by s 45A to have the effect or likely effect of substantially lessening competition in the relevant market. After that deeming was enlivened the reaching of the understanding would infringe s 45(2)(a)(ii) and its implementation s 45(2)(b)(ii).
4. On the other hand, under the Act prior to 6 June 2012, it was not per se unlawful to exchange future pricing information (after that it was only unlawful in quite circumscribed circumstances). In any event, if there was no arrangement or understanding to fix, maintain or control the price then the deeming by s 45A that the arrangement or understanding could or would be likely substantially to lessen competition would not occur and the Commission would be bound to prove, in terms of the language of s 45(2), that there had been or was likely to have been a substantial lessening of competition in the relevant markets. The Commission eschewed proof that substantial lessening of competition had actually occurred and only relied upon the ‘likely to lessen’ limbs of s 45(2).
5. What then were the terms of the Overarching Understanding? They were, in summary, these: the airlines would indicate to each other their respective intentions about the FSC they were going to impose by attending meetings of the Singapore BAR CSC (which is explained below) or by completing FSC surveys. After this SQ would advise the other airlines of the FSC it was going to impose and an implementation date which would be sufficiently far in the future to allow the other airlines to announce the implementation of their own FSCs. After this action by SQ the other airlines would tell SQ what they thought of its FSC and what their own intentions were. SQ would then impose its announced FSC and thereafter the other airlines would impose their FSCs of around the same amount. Each of the airlines would adhere to what they had announced.
6. It will be at once apparent that this set of allegations makes no reference to the Lufthansa Index. In fact, that index was crucial to the Commission’s case at an evidentiary level for it was the triggering of the various increase and decrease thresholds on that index that the Commission alleged provided the occasion for the airlines to discuss whether, and if so, how great an FSC to impose.
7. The material the Commission relied upon to make good the Overarching Understanding consisted of:
8. the fact of its implementation or, to put it in less loaded terms, by an analysis of the FSCs which were imposed by the airlines over the period September 2002 to September 2005. This involves a close consideration of the FSCs charged by each airline in each of the tariff conference areas (TC1-3) on the 11 separate occasions relied upon by the Commission, together with a consideration of the airlines’ internal decision-making processes for each FSC; and
9. a circumstantial case consisting of ten distinct sets of events.
10. A consideration of these matters is complicated further by the need to consider the position of Lufthansa. The Commission did not allege that Lufthansa was a party to this understanding (or any other in this case) yet it was Lufthansa’s index which the Commission submits provided the occasion for this understanding. The Commission focussed its submissions very much on Air NZ’s relationship with SQ but ignored the relationship between the two largest cargo carriers, Lufthansa and SQ.
11. For the reasons I give in Section 11.2.4, I do not think the Commission has proved that the airlines reached the Overarching Understanding. I also conclude that if the Overarching Understanding had been reached then it would not have been one to which s 45A applied because its very terms show that it was not an arrangement to fix, maintain or control prices. It would have been therefore necessary to consider the Commission’s direct alternate case under s 45(2) alone that it was to be seen as an arrangement to exchange future price intentions which was likely substantially to lessen competition. As I explain at [1107], I do not accept that the Commission would have succeeded in showing that there was likely to be a substantial lessening of competition in the relevant market just because an arrangement existed with respect to surcharges. I do not think that question could be usefully approached without examining what the actual freight rates were to which the surcharges were added. This the Commission did not do.
12. The balance of the Commission’s case was much more straightforward. It alleged three further understandings: an understanding with other airlines to fix an FSC in December 2003; an understanding with other airlines to fix an FSC in October 2004; and an understanding with other airlines to fix an ISS in January 2003. For the reasons given in Section 11.3, I have found the two FSC understandings were not reached by Air NZ but that the ISS understanding was. In relation to it I have found that it was a price fix to which s 45A applied. Apart from the absence of a market in Australia I would therefore have found that Air NZ had breached both s 45(2)(a)(ii) and 45(2)(b)(ii).
13. Before turning to the Overarching Understanding in Section 11.2, it is useful first to refer to some background matters.

### 11.1.1 The BAR CSC and the LIDC

1. There existed in Singapore a body known as the Singapore Board of Airline Representatives of which each airline operating out of Singapore was a member. It established a cargo sub-committee (the Singapore BAR CSC) which was intended to provide a forum for airlines to deal with issues which were common to them.
2. Much of the Commission’s case in Singapore focussed on the semi-regular meetings of the BAR CSC. As in Hong Kong, the practice of the BAR CSC was to appoint as its chair an employee of the national carrier, in this case, SQ. The meetings of the BAR CSC were usually well attended with most of the airlines operating out of Singapore generally present. Air NZ was represented at these meetings initially by Ms Maggie Goh and thereafter by Mr Chew. On one occasion a more junior staff member, Ms Yap, attended in lieu of Mr Chew. All three reported to Mr Gregg. SQ was represented by Mr Ros and Mr Tan who were senior employees at SQ.
3. In addition to the BAR CSC, there was also another collaborative body called the Singapore Local Industry Development Committee - Cargo (‘the LIDC-C’). The majority of the airlines operating out of Singapore were also a member of this body. At some of its meetings there was discussion of fuel surcharges. Again, Ms Goh attended these on behalf of Air NZ and after she went on leave Mr Chew attended.
4. The Commission relied heavily upon what occurred at the BAR CSC and, to a lesser extent, what happened at the LIDC-C.

### 11.1.2 The Witnesses

1. Mr Murray Gregg was the manager of global cargo sales at Air NZ from 2000 to 2008. He was responsible for the operation of Air NZ’s cargo terminals at Auckland, Christchurch and Wellington, regulating compliance and overseas ground handling contracts. Ms Goh was the regional manager – Asia/Japan Cargo for Air NZ from 7 November 2000 until April 2002 when she took extended leave and then resigned in December 2002. She reported to Mr Gregg. Mr Ronnie Chew was the cargo manager in Singapore for Air NZ from 2001 to 2006. He also reported to Mr Gregg.
2. There was considerable debate about who at Air NZ made the decisions to impose surcharges in Singapore. The Commission contended that it was Ms Goh and Mr Chew and sought to minimise the role of Mr Gregg.
3. Mr Gregg’s evidence was directed to two principal issues:
4. who authorized the imposition or withdrawal of surcharges; and
5. whether Air NZ regarded its shippers as customers.
6. Proposition (b) is relevant to the market issues which I have dealt with in Chapter 4. For reasons I have given already it is clear that Air NZ regarded both its larger shippers but also its freight forwarders as customers. Although Mr Gregg gave evidence to the contrary, I cannot accept that evidence. I do not find that he was deliberately lying about this matter, however. The more likely inference is that the passage of time and a tendency on his part to view affairs from the standpoint of Air NZ deleteriously affected his recollection. I say that notwithstanding his retirement from the organisation in 2011.
7. As to (a), the situation is less clear than either party’s submissions implied. At times it was clear that Mr Gregg was involved to an extent in the making of surcharge decisions with Ms Goh or Mr Chew. The evidence showed, for example, that he spoke to his managers by telephone when an FSC was about to incur. On other occasions, he seems to have simply approved their decisions. On many occasions, the decisions appear to have been theirs alone. Largely, the documents support this latter view. Viewed holistically, I do not accept that he had much of a role in the fixing of the surcharges. To the extent that he did his approach was very largely hands off. Again I did not find Mr Gregg’s evidence on this topic to be other than an honest attempt to give his best account. There were many inconsistencies and missteps in his evidence but none which were surprising given the near decade between the events in question and the time he gave his evidence, or the fact of his having retired from Air NZ, which can hardly be expected to have sharpened his recollection.
8. Ms Goh and Mr Chew gave evidence about their dealings at the BAR CSC, the LIDC-C and their respective understandings of what had been going on. Since both denied the price fixing allegations put at their feet they were subjected to a strong attack on their credit. I deal with that credit attack below. I will record my conclusions here, however, that I have accepted the broad thrust of Ms Goh’s evidence and have found it unsafe to rely upon Mr Chew’s evidence except where it is obviously correct or corroborated by other evidence.
9. Mr Ros was the Assistant Manager, Planning and Development for Singapore Sales at SQ’s Singapore office from 2001 to 2004 and until early 2004 he was the secretary of the BAR CSC and the LIDC-C. Mr Ros was not available to give evidence for either the Commission or Air NZ. Air NZ tendered his affidavit over the objection of the Commission and it was admitted pursuant to s 63(2) of the *Evidence Act:* see *Australian Competition and Consumer Commission v Air New Zealand Limited (No 10)* [2013] FCA 322. He gave evidence about the procedures of both bodies. According to him, the BAR CSC met every three or four months at Changi Airfreight Centre. The meetings usually lasted for about an hour. The meetings did not generally have an agenda. They were chaired by an SQ employee, the general manager of Singapore Sales (Mr Tan). The meetings were not well attended and usually a large number of airlines were not in attendance. That aspect of Mr Ros’ evidence is not consistent with my assessment of the documents. Mr Ros said that the BAR CSC and LIDC-C were not decision making bodies but provided an opportunity for the chair to distribute information. This is also not consistent with my reading of the documents. Mr Ros kept the minutes which were not intended to be a verbatim report but only a summary. They were typed up by a Ms Lee who worked in Singapore Sales as a secretary. The minutes were usually confirmed at the next meeting. Mr Ros did not recall that anyone ever asked for a correction to be noted.
10. Most of this evidence is relatively uncontroversial or unimportant and I am, subject to the matters noted above, prepared to accept it. Mr Ros’ affidavit also dealt with the way in which surcharges were dealt with at meetings. He said that he never saw any airline representative indicate agreement to charge a particular surcharge and, as I have said above, he did not regard the committees as decision making bodies. Where the word ‘agreed’ appeared in the minutes it meant that the chair had made a statement and that no-one had disagreed. He did not believe his minutes recorded agreements or understandings between the airlines. It was Mr Ros who distributed the surveys but these were never much discussed.
11. On these more controversial aspects of Mr Ros’ evidence I propose to take them into account but to give them little weight since his evidence was not tested by cross-examination. The Commission criticised a number of aspects of Mr Ros’ evidence. Most of these were matters of incorrect recollection to which I would be disinclined to give much weight. In any event, since I do not propose to give much weight to the controversial aspects of Mr Ros’ affidavit this is of little moment.
12. Mr Tan was the Deputy-General Manager Hong Kong and Macau in SQ’s Hong Kong station from 2002 until mid-2004. He was the Deputy General Manager of Singapore Sales from mid-2004 until 2006. In that role he was responsible for the management of the Singapore Sales office. From mid-2004 to 2006 he was the Chair of the BAR CSC and the LIDC-C. His affidavit was relevant both to Hong Kong and Singapore.
13. Like Mr Ros, Mr Tan said that BAR CSC meetings were not venues for deciding issues. He said that many airlines did not attend the BAR CSC meetings and he felt that LIDC-C meetings were pointless since they covered the same ground as the BAR CSC meetings. On the setting of surcharges he thought it important to consider local demand sensitivity. The surcharges he approved were often lower than those suggested by head office but he nevertheless still needed head office approval.
14. As for discussions of surcharges at meetings of the BAR CSC, his evidence was that he never witnessed the airlines reaching agreements about surcharges at BAR CSC meetings. He did not believe SQ was under any obligation to the other airlines to impose an FSC nor did he believe that they were under any obligation to coordinate with SQ with respect to their surcharges. There was no agreement that the other airlines should follow SQ’s lead on surcharges.
15. Like Mr Ros, Mr Tan was not available for cross-examination and his affidavit was tendered over the Commission’s objection. His evidence directly contradicts the Commission’s case. As in Mr Ros’ case, given that the evidence has not been tested by cross-examination I propose to give it little weight although I do not discard it altogether. The Commission also criticised Mr Tan’s evidence on a number of bases which, in fairness to Mr Tan since he has not had an opportunity to respond to them, I propose to give little weight. This underscores the difficulties inherent in assessing the controversial aspects of his evidence.

## 11.2 The Overarching Understanding

1. In what follows it is important, I think, to be clear about the areas in which the FSCs were imposed. As discussed earlier in these reasons, the airline industry through IATA has divided the globe into three areas:
2. IATA American Tariff Conference Area (‘TC1’) including North, South and Central America together with the Caribbean;
3. IATA European and African Tariff Conference Area (‘TC2’) including Africa, Europe and the Middle East; and
4. IATA Asian Tariff Conference Area (‘TC3’) consisting of Japan, Korea, South Asia, the South Asian Sub-Continent and the South West Pacific.
5. The FSCs imposed by the airlines were not uniform across these three areas (although they generally were in TC1 and TC2). Further, in TC3 a different FSC was often imposed specifically for South East Asia, sometimes North Asia and on occasion in the South West Pacific (‘SW Pacific’). I have found it useful for the clarity of my own thinking to consider separately the positions of:
6. TC1 and TC2;
7. TC3 (South Asia); and
8. TC3 (North Asia).
9. The separate rate in the SW Pacific is sufficiently rare not to require separate treatment.
10. I have set out above the broad outline of the Overarching Understanding. In substance when considered in conjunction with the Commission’s evidence it is an allegation that airlines used the Lufthansa Index, not to fix the surcharges, but as providing the occasion each time its trigger points were reached to engage in price signalling behaviour at BAR CSC meetings and through fuel surcharge surveys. Following that, it is alleged SQ would announce the move in its FSC with a long enough lead time to permit the other airlines to announce their own. The Commission contended that this Overarching Understanding was given effect on 11 separate occasions between September 2002 and September 2005 when various airlines operating in Singapore, including Air NZ and SQ, moved their FSCs in what was said to be a co-ordinated fashion. The Commission invited, based on a number of additional circumstantial matters, the inference that this parallel behaviour was the result of the Overarching Understanding. The Commission’s case consisted, for the most part, of the eleven instances of implementation and ten circumstantial matters. The ten were that:
11. the historical background surrounding resolution 116ss showed that the airlines had a motive for seeking to agree fuel surcharges. Further, there were individual statements made by various airlines, including Air NZ, which were consistent with the existence of this motive;
12. there were admissions made by various airlines in email correspondence that they had the purpose of collectively agreeing fuel surcharges;
13. there were dealings between the airlines prior to April 2002 in which they sought from each other information about their respective fuel surcharges and Air NZ was actively involved with these;
14. there were communications between the airlines in April and May 2002 in which they actively sought to settle upon co-ordinated outcomes in relation to fuel surcharges. These included an email from SQ on 9 April 2002 in which it sought to find out via a survey what the other airlines were going to do in relation to fuel surcharges prior to making up its own mind;
15. there were further communications between the airlines after the events in (d). These involved informal inquiries by SQ of the other airlines to find out what fuel surcharge they were going to levy followed by notification by it of what it was going to charge;
16. there was a meeting of the BAR CSC on 8 December 2003 which was convened by SQ. The Commission alleges that by this time the airlines all understood that they would each follow whatever SQ did and, for its part, SQ understood that they would each follow it. At this meeting the Commission alleged an understanding was worked out about the appropriate level of surcharge to be imposed. The minutes use the word ‘compromise’ and the Commission submitted that this was direct evidence that an understanding between the airlines was in existence;
17. there were subsequent meetings of the BAR CSC which the Commission alleges were occasions upon which the co-ordinated behaviour was furthered;
18. from 2002 until October 2004 SQ conducted surveys of the surcharge practices of other airlines the results of which it circulated amongst them. This was alleged to have facilitated agreement between the airlines on fuel surcharges;
19. from 20 January 2005 communications between the airlines on fuel surcharges appear to have significantly decreased. The Commission alleged that the airlines had become aware that the Singapore government had introduced a competition law and that they had become concerned that communication of their co-ordinated actions might breach it; and
20. throughout the period May 2002 to October 2005 Air NZ, with minor exceptions, did follow SQ’s surcharge amendments.
21. The Commission’s resort to this morass of evidence was dictated largely by the fact that, as will be seen, the contemporaneous documents provide little direct support for the Overarching Understanding. This is in marked contrast to the position in Hong Kong (above) and Indonesia (below).
22. Air NZ’s response was threefold: first, it submitted that SQ made its decisions about what fuel surcharges it would be imposing on a worldwide basis and in response only to what it was that Lufthansa was doing (it being the worldwide market leader). Air NZ, in turn, had decided to implement a policy across its international network of following the fuel surcharge practice of the market leader in each port, in the case of Singapore, SQ. Given that SQ was following what Lufthansa internationally did and that Air NZ (and others) were following in Singapore what SQ did, a degree of parallel behaviour in pricing was only to be expected. The Commission’s suggested circumstantial case that the parallel behaviour was the result of concerted action had, therefore, to fail: SQ had no interest in reaching an understanding with other airlines in Singapore, certainly not Air NZ; its management was focused on its chief competitor Lufthansa. Similarly, Air NZ had no interest in reaching such an arrangement. As a minnow in the Singapore pond it had no choice but to follow the market leader. The pressure which the rising fuel prices placed it under meant that it would impose a fuel surcharge whenever it could but it could not do so unless the market leader itself did so. To act otherwise would have been commercially imprudent. Its pricing decisions moved directly along a path therefore dictated by the Scylla of its desire to charge as much as it could (powered from beneath by rising fuel prices) and Charybdis of its inability to charge more than SQ (powered from above by SQ’s dominance of the market).
23. Secondly, Air NZ noted that the alleged parallel behaviour was not, on close examination, as parallel as the Commission contended. There were instances where Air NZ did not act to charge its FSC at all or where it acted contrary to the alleged arrangement. This not only negatived the existence of the agreement suggested by the Commission but was more consistent with Air NZ’s submission that what was taking place was the behaviour of a follower not a fixer.
24. Thirdly, Air NZ attacked directly the circumstantial case put against it. It sought either to deny the relevance of each matter relied upon by the Commission (for example, [737 (a)] above), or to place a different characterisation upon each of the matters. In particular, it pointed to the evidence of Mr Chew, Ms Goh and Mr Gregg each of whom denied that they had reached any understanding with SQ of the kind alleged by the Commission. These witnesses were extensively cross-examined and the Commission’s basic response was that I should reject their evidence. As outlined above, Air NZ also tendered two affidavits of employees from SQ, Mr Ros (the secretary of the BAR CSC) and Mr Tan (the chair of the BAR CSC), and as noted above their evidence was that the airlines did not seek to co-ordinate FSCs.
25. Ultimately, what is in play between the parties are competing explanations for what appears sometimes to have been, although not perfectly, parallel pricing behaviour. The Commission’s case is that this is to be explained by the Overarching Understanding; Air NZ’s that it is to be explained by the airlines operating out of Singapore including Air NZ following SQ’s practices and SQ following Lufthansa’s, i.e., oligopolistic interdependence.
26. Much ink was spilled by the parties on this issue (several hundred pages of written submissions) the detail of which can at times be overwhelming.
27. I propose to approach this issue in a somewhat different order to that adopted by the parties. The structure of this section is as follows:
28. in Section 11.2.1 I gather the available data on the movements in the level of the FSC over the relevant period for the various airlines involved including Lufthansa, SQ and Air NZ over TC1, TC2 and TC3 (both North Asia and South East Asia). I have found graphs to be a useful aid to understanding the large amount of data involved and I include these so that my reasoning can be fully understood. These graphs cannot be understood in black and white and must be examined in colour if they are to be an aid to comprehension;
29. in Section 11.2.2 I make the specific findings of fact which support the tables and graphs in Section 11.2.1. I also chart the decision making processes within SQ and Air NZ for each of the price movements. In the case of each movement I then draw preliminary conclusions on what that direct evidence suggests viz a viz the Overarching Understanding;
30. in Section 11.2.3 I consider the 10 aspects of the Commission’s circumstantial case and Air NZ’s responses to that case; and
31. in Section 11.2.4 I consider all of the material globally to ascertain whether the Commission has made good the Overarching Understanding.

### 11.2.1 FSC movements in the period September 2002 to September 2005

1. In this section there is set out in tabular and graphical form the data which emerges from the findings of fact in Section 11.2.2. Except where otherwise indicated the FSCs in this section are all ex-Singapore. Where possible (which is in the majority of cases) the FSC has been expressed in Singapore dollars. There is a degree of fluidity in some airlines’ approach to the question of currency, driven by a number of factors including the fact that the Lufthansa Index itself was expressed in Euros and also because some airlines did not operate internally on Singapore dollars. An added layer of complexity exists because the exchange rates used by some airlines do not appear to have been spot rates. For example, some airlines utilized US dollars and for much of the time seem to have assumed a very basic conversion rate between the US dollar and the Euro of one-to-one. Neither the Commission nor Air NZ suggested that the currency question had any impact on the substantive issues. I mention it for completeness and so that any person having regard to the primary documentation can know that these reasons were written cognisant of this matter.
2. Also relevant to note is that whilst all airlines seem to have treated TC1 and TC2 (Europe, Africa, the Americas and the Middle East) as a single area in which the same FSC was charged this is not so with TC3 (Asia). Many airlines seem to have wished to have divided TC3 into North Asia and South East Asia. At times the nomenclature can be confusing. An FSC will be applied to ‘TC1, TC2 and North Asia’. Although very few of the airlines did this I have rendered this more formally as TC1, TC2 and ‘TC3 North Asia’. Correspondingly, a reference in airline correspondence to ‘SE Asia’ I have recorded as ‘TC3 SE Asia’. A very small number of airlines – principally Qantas – further broke down TC3 to include a separately charged zone for the South West Pacific. Although I have included this in the tables which follow its inclusion in the graphs would be cumbersome and I have left it out. The matter has not, however, been ignored.
3. The tables and graphs also do not distinguish between the FSCs imposed by actual weight and those charged by chargeable weight. I deal with a submission developed about that matter below. In short, I do not accept that the difference matters. I have not thought it useful, in that circumstance, to clutter the present section with that additional material.
4. There are three further matters to note. First, the airlines listed for each implementation allegation sometimes vary from those listed in other implementation allegations and often some data is missing. This deficiency is a constraint imposed by the evidence. Secondly, I have included several price moves which were not the subject of an allegation by the Commission. I have done this because I accept Air NZ’s submission that one needs to look at the whole picture and not just the parts which the Commission has picked out as suiting its case. Thirdly, the Commission’s allegations commence with the first increase under the Lufthansa Index in September 2002. That methodology had been utilized earlier (a neutral term) when a decision had been made to reintroduce the FSC in April 2002. I have included the initial position in April 2002 to give the complete picture. It is not, however, part of the Commission’s specific allegation although it does form part of its circumstantial case.
5. The material is arranged into three sets: (a) TC1 and TC2; (b) TC3 North Asia; and (c) TC3 SE Asia. I have indicated where an FSC corresponds to one of the Commission’s implementation allegations.

#### Data for FSCs charged ex-Singapore in TC1 and TC2

1. I find FSCs were charged as follows:

|  |  |  |  |
| --- | --- | --- | --- |
| Airline | Amount | Announcement  Date | Effective  Date |
| The introduction of the FSC in April 2002 (not directly relied on by Commission) | | | |
| Lufthansa | SGD0.08/kg | 1 Apr 2002 | 15 Apr 2002 |
| Singapore  Airlines Cargo | SGD0.10/kg | 22 Apr 2002 | 1 May 2002 |
| Air New Zealand | SGD0.10/kg | 24 Apr 2002 | 1 May 2002 |
| Thai Airways | SGD0.10/kg | 22 Apr 2002 | 1 May 2002 |
| Cathay Pacific | SGD0.08/kg | unknown | 1 May 2002 |
| Japan Airlines | SGD0.10/kg | unknown | 13 May 2002 |
| China Airlines | SGD0.08/kg | unknown | 1 May 2002 |
| Eva Air | SGD0.08/kg | unknown | 1 May 2002 |

|  |  |  |  |
| --- | --- | --- | --- |
| Airline | Amount | Announcement  Date | Effective  Date |
| The First Implementation Allegation | | | |
| Lufthansa | SGD0.17/kg | 6 Sep 2002 | 23 Sept 2002 |
| Singapore  Airlines Cargo | SGD0.17/kg | 12 Sep 2002 | 1 Oct 2002 |
| Air New Zealand\* | SGD0.10/kg | 23 Sep 2002 | 1 Oct 2002 |
| Thai Airways | SGD0.17/kg | 16 Sep 2002 | 1 Oct 2002 |
| Cathay Pacific | SGD0.17/kg | unknown | 1 Oct 2002 |
| Japan Airlines | SGD0.17/kg | unknown | 16 Oct 2002 |
| China Airlines | SGD0.17/kg | unknown | 1 Oct 2002 |
| Eva Air | SGD0.17/kg | unknown | 1 Oct 2002 |

\* Air NZ had intended to increase to SGD0.17/kg but failed to do so.

|  |  |  |  |
| --- | --- | --- | --- |
| Airline | Amount | Announcement  Date | Effective  Date |
| The Second Implementation Allegation | | | |
| Lufthansa | SGD0.28/kg | 19 Feb 2003 | 3 Mar 2003 |
| Qantas | SGD0.25/kg | unknown | unknown |
| Singapore  Airlines Cargo | SGD0.25/kg | 14 Feb 2003 | 1 Mar 2003 |
| Air New Zealand | SGD0.25/kg | 24 Feb 2003 | 1 Mar 2003 |
| Thai Airways | SGD0.25/kg | 19 Feb 2003 | 1 Mar 2003 |
| Cathay Pacific | unknown | unknown | unknown |
| Japan Airlines | SGD0.25/kg | unknown | unknown |
| China Airlines | unknown | unknown | unknown |
| Eva Air | unknown | unknown | unknown |

|  |  |  |  |
| --- | --- | --- | --- |
| Airline | Amount | Announcement  Date | Effective  Date |
| The March 2003 FSC spike (omitted from Commission’s case) | | | |
| Lufthansa | SGD0.38/kg | 10 Mar 2003 | 24 Mar 2003 |
| Singapore Airlines Cargo | SGD0.38/kg | 13 Mar 2003 | 19 Mar 2003 |
| Air New Zealand | SGD0.25/kg | (held) | (held) |
| Qantas | SGD0.38/kg | 21 Mar 2003 | 7 Apr 2003 |
| Thai Airways | SGD0.38/kg | 18 Mar 2003 | 1 Apr 2003 |

|  |  |  |  |
| --- | --- | --- | --- |
| Airline | Amount | Announcement  Date | Effective  Date |
| The Third Implementation Allegation | | | |
| Lufthansa\* | SGD0.28/kg | 7 Apr 2003 | 21 Apr 2003 |
| Singapore  Airlines Cargo | SGD0.17/kg | 11 Apr 2003 | 16 Apr 2003 |
| Air New Zealand | SGD0.17/kg | unknown | 16 Apr 2003 |
| Thai Airways | SGD0.17/kg | 17 Jun 2003 | 1 Jul 2003 |
| Cathay Pacific | SGD0.17/kg | unknown | 1 May 2003 |
| Japan Airlines | SGD0.17/kg | unknown | unknown |
| China Airlines | SGD0.17/kg | unknown | 21 Apr 2003 |
| Eva Air | SGD0.17/kg | unknown | 16 Apr 2003 |
| Qantas\* | SGD0.17/kg | 28 Apr 2003 | 1 May 2003 |

\* Lufthansa announced a further decrease on 22 April 2003 to SGD0.19/kg, effective from 6 May 2003.

\*\* Qantas in fact first announced a decrease to SGD0.25/kg on 11 April 2003, effective from 22 April 2003.

|  |  |  |  |
| --- | --- | --- | --- |
| Airline | Amount | Announcement  Date | Effective  Date |
| The Fourth Implementation Allegation | | | |
| Lufthansa | SGD0.31/kg | 5 Dec 2003 | 18 Dec 2003 |
| Singapore  Airlines Cargo | SGD0.25/kg | 9 Dec 2003 | 23 Dec 2003 |
| Air New Zealand | SGD0.25/kg | 15 Dec 2003 | 23 Dec 2003 |
| Thai Airways | SGD0.25/kg | 16 Dec 2003 | 1 Jan 2004 |
| Cathay Pacific | SGD0.25/kg | unknown | 1 Jan 2004 |
| Japan Airlines | SGD0.25/kg | unknown | 1 Jan 2004 |
| China Airlines | SGD0.25/kg | unknown | 23 Dec 2003 |
| Eva Air | SGD0.25/kg | unknown | 23 Dec 2003 |
| Qantas | SGD0.25/kg | unknown | 23 Dec 2003 |

|  |  |  |  |
| --- | --- | --- | --- |
| Airline | Amount | Announcement  Date | Effective  Date |
| The Fifth Implementation Allegation | | | |
| Lufthansa | SGD0.40/kg | 27 Apr 2004 | 10 May 2004 |
| Singapore  Airlines Cargo | SGD0.35/kg | 28 Apr 2004 | 12 May 2004 |
| Air New Zealand | SGD0.35/kg | unknown | 16 May 2004 |
| Thai Airways | SGD0.35/kg | 4 May 2004 | 16 May 2004 |
| Cathay Pacific | SGD0.35/kg | unknown | unknown |
| Japan Airlines | SGD0.35/kg | unknown | 16 May 2004 |
| China Airlines | SGD0.35/kg | unknown | unknown |
| Eva Air | SGD0.35/kg | unknown | 12 May 2004 |
| Emirates | SGD0.35/kg | unknown | 16 May 2004 |
| Qantas | SGD0.35/kg | unknown | 12 May 2004 |

|  |  |  |  |
| --- | --- | --- | --- |
| Airline | Amount | Announcement  Date | Effective  Date |
| The Sixth Implementation Allegation | | | |
| Lufthansa | SGD0.62/kg | 21 September 2004 | 4 Oct 2004 |
| Emirates | SGD0.51/kg | unknown | 4 Oct 2004 |
| Singapore  Airlines Cargo | SGD0.50/kg | 27 Sep 2004 | 11 Oct 2004 |
| Air New Zealand | SGD0.50/kg | 1 Oct 2004 | 16 Oct 2004 |
| Thai Airways | SGD0.50/kg | 4 Oct 2004 | 16 Oct 2004 |
| Cathay Pacific | SGD0.50/kg | unknown | 11 Oct 2004 |
| Japan Airlines | SGD0.50/kg | unknown | Oct 2004  Exact date unknown |
| China Airlines | SGD0.50/kg | unknown | 11 Oct 2004 |
| Eva Air | unknown | unknown | unknown |

|  |  |  |  |
| --- | --- | --- | --- |
| Airline | Amount | Announcement  Date | Effective  Date |
| The Seventh Implementation Allegation | | | |
| Lufthansa | SGD0.73/kg | 12 Oct 2004 | 25 Oct 2004 |
| Singapore  Airlines Cargo | SGD0.60/kg | 21 Oct 2004 | 5 Nov 2004 |
| Air New Zealand | SGD0.50/kg (unchanged) | N/A | N/A |
| Thai Airways | SGD0.60/kg | 2 Nov 2004 | 16 Nov 2004 |
| Cathay Pacific | unknown | unknown | unknown |
| Japan Airlines | SGD0.50/kg (unchanged) | N/A | N/A |
| China Airlines | SGD0.60/kg | unknown | 5 Nov 2004 |
| Eva Air | unknown | unknown | unknown |

|  |  |  |  |
| --- | --- | --- | --- |
| Airline | Amount | Announcement  Date | Effective  Date |
| The Eighth Implementation Allegation | | | |
| Lufthansa | SGD0.66/kg | 21 Dec 2004 | 3 Jan 2005 |
| Singapore  Airlines Cargo | SGD0.50/kg | 22 Dec 2004 | 3 Jan 2005 |
| Air New Zealand | SGD0.50/kg  (unchanged) | N/A | N/A |
| Thai Airways | SGD0.50/kg | 3 Jan 2005 | 16 Jan 2005 |
| Cathay Pacific | unknown | unknown | unknown |
| Japan Airlines | SGD0.50/kg  (unchanged) | N/A | N/A |
| China Airlines | unknown | unknown | unknown |
| Eva Air | unknown | unknown | unknown |
| Qantas | SGD0.50/kg | unknown | 16 Jan 2005 |

|  |  |  |  |
| --- | --- | --- | --- |
| Airline | Amount | Announcement  Date | Effective  Date |
| The Ninth Implementation Allegation (first increase) | | | |
| Lufthansa | SGD0.75/kg | 8 Mar 2005 | 21 Mar 2005 |
| Singapore  Airlines Cargo | SGD0.75/kg | unknown | 23 Mar 2005 |
| Air New Zealand | SGD0.50/kg  (unchanged) | N/A | N/A |
| Thai Airways | SGD0.50/kg  (unchanged) | N/A | N/A |
| Japan Airlines | SGD0.50/kg  (unchanged) | N/A | N/A |
| China Airlines | unknown | unknown | unknown |
| Eva Air | unknown | unknown | unknown |

|  |  |  |  |
| --- | --- | --- | --- |
| Airline | Amount | Announcement  Date | Effective  Date |
| The Ninth Implementation Allegation (second increase) | | | |
| Lufthansa | SGD0.86/kg | 22 Mar 2005 | 4 Apr 2005 |
| Singapore  Airlines Cargo | SGD0.60/kg | 24 Mar 2005 | 7 Apr 2005 |
| Air New Zealand | SGD0.60/kg | 4 Apr 2005 | 16 Apr 2005 |
| Thai Airways | SGD0.60/kg | 28 Mar 2005 | 16 Apr 2005 |
| Japan Airlines | SGD0.60/kg | unknown | Apr 2005  (day unknown) |
| China Airlines | unknown | unknown | unknown |
| Eva Air | unknown | unknown | unknown |
| Cathay Pacific | SGD0.60/kg | 17 Mar 2005 | 1 Apr 2005 |

|  |  |  |  |
| --- | --- | --- | --- |
| Airline | Amount | Announcement  Date | Effective  Date |
| The Tenth Implementation Allegation | | | |
| Lufthansa | SGD0.92/kg | 28 Jun 2005 | 11 Jul 2005 |
| Qantas | SGD0.75/kg | unknown | 13 Jul 2005 |
| Singapore  Airlines Cargo | SGD0.75/kg | 29 Jun 2005 | 13 Jul 2005 |
| Air New Zealand | SGD0.70/kg | 6 Jul 2005 | 16 Jul 2005 |
| Thai Airways | SGD0.75/kg | 1 Jul 2005 | 16 Jul 2005 |
| Cathay Pacific | SGD0.75/kg | 30 Jun 2005 | 16 Jul 2005 |
| Japan Airlines | SGD0.75/kg | 1 Jul 2005 | 16 Jul 2005 |
| China Airlines | unknown | unknown | unknown |
| Eva Air | unknown | unknown | unknown |

|  |  |  |  |
| --- | --- | --- | --- |
| Airline | Amount | Announcement  Date | Effective  Date |
| The Eleventh Implementation Allegation | | | |
| Lufthansa | SGD1.02/kg | 23 Aug 2005 | 5 Sep 2005 |
| Qantas | SGD0.90/kg | 29 Aug 2005 | 10 Sept 2005 |
| Singapore  Airlines Cargo | SGD0.90/kg | 24 Aug 2005 | 6 Sep 2005 |
| Air New Zealand | SGD0.90/kg | 29 Aug 2005 | 16 Sep 2005 |
| Thai Airways | SGD0.90/kg | 31 Aug 2005 | 16 Sep 2005 |
| Cathay Pacific | SGD0.85/kg | 26 Aug 2005 | 16 Sep 2005 |
| Japan Airlines | unknown | unknown | unknown |
| China Airlines | unknown | unknown | unknown |
| Eva Air | unknown | unknown | unknown |

#### Data for FSCs charged ex-Singapore in TC3 North Asia

|  |  |  |  |
| --- | --- | --- | --- |
| Airline | Amount | Announcement  Date | Effective  Date |
| The introduction of the FSC in April 2002 (not relied directly upon by the Commission) | | | |
| Lufthansa | SGD0.08/kg | 1 Apr 2002 | 15 Apr 2002 |
| Singapore  Airlines Cargo | SGD0.10/kg | 22 Apr 2002 | 1 May 2002 |
| Air New Zealand | SGD0.10/kg | 24 Apr 2002 | 1 May 2002 |
| Thai Airways | SGD0.10/kg | 22 Apr 2002 | 1 May 2002 |
| Cathay Pacific | SDG0.05/kg | unknown | 1 May 2002 |
| Japan Airlines | SGD0.10/kg | unknown | 13 May 2002 |
| China Airlines | SGD0.05/kg | unknown | 1 May 2002 |
| Eva Air | SGD0.05/kg | unknown | 1 May 2002 |

|  |  |  |  |
| --- | --- | --- | --- |
| Airline | Amount | Announcement  Date | Effective  Date |
| The First Implementation Allegation | | | |
| Lufthansa | SGD0.17/kg | 6 Sep 2002 | 23 Sep 2003 |
| Singapore  Airlines Cargo | SGD0.17/kg | 12 Sep 2002 | 1 Oct 2002 |
| Air New Zealand \* | SGD0.10/kg | 23 Sep 2002 | 1 Oct 2002 |
| Thai Airways | SGD0.17/kg | 16 Sep 2002 | 1 Oct 2002 |
| Cathay Pacific | SDG0.10/kg | unknown | 1 Oct 2002 |
| Japan Airlines | SGD0.17/kg | unknown | 16 Oct 2002 |
| China Airlines | SGD0.10/kg | unknown | 1 Oct 2002 |
| Eva Air | SGD0.10/kg | unknown | 1 Oct 2002 |

\* Air NZ had intended to implement at SGD0.17/kg but omitted to do so.

|  |  |  |  |
| --- | --- | --- | --- |
| Airline | Amount | Announcement  Date | Effective  Date |
| The Second Implementation Allegation | | | |
| Lufthansa | SGD0.28/kg | 19 Feb 2003 | 3 Mar 2003 |
| Singapore  Airlines Cargo | SGD0.25/kg | 14 Feb 2003 | 1 Mar 2003 |
| Air New  Zealand | SGD0.25/kg | 24 Feb 2003 | 1 Mar 2003 |
| Thai Airways | SGD0.25/kg | 19 Feb 2003 | 1 Mar 2003 |
| Cathay Pacific | unknown | unknown | unknown |
| Japan Airlines | SGD0.25/kg | unknown | unknown |
| China Airlines | unknown | unknown | unknown |
| Eva Air | unknown | unknown | unknown |
| Qantas | SGD0.25/kg | unknown | unknown |

|  |  |  |  |
| --- | --- | --- | --- |
| Airline | Amount | Announcement  Date | Effective  Date |
| The March 2003 FSC Spike (omitted from the Commission’s case) | | | |
| Lufthansa | SGD0.38/kg | 10 Mar 2003 | 24 Mar 2003 |
| Singapore  Airlines Cargo | SGD0.38/kg | 13 Mar 2003 | 19 Mar 2003 |
| Air New Zealand | SGD0.25/kg | hold | hold |
| Qantas | SGD0.38/kg | 21 Mar 2003 | 7 Apr 2003 |
| Thai Airways | SGD0.38/kg | 18 Mar 2003 | 1 Apr 2003 |

|  |  |  |  |
| --- | --- | --- | --- |
| Airline | Amount | Announcement  Date | Effective  Date |
| The Third Implementation Allegation | | | |
| Lufthansa\* | SGD0.28/kg | 7 Apr 2003 | 21 Apr 2003 |
| Singapore  Airlines Cargo | SGD0.17/kg | 11 Apr 2003 | 16 Apr 2003 |
| Air New Zealand | SGD0.17/kg | unknown | 16 Apr 2003 |
| Thai Airways | SGD0.17/kg | 17 Jun 2003 | 1 Jul 2003 |
| Cathay Pacific | SDG0.10/kg | unknown | 1 May 2003 |
| Japan Airlines | SGD0.10/kg | unknown | unknown |
| China Airlines | SGD0.17/kg | unknown | 21 Apr 2003 |
| Eva Air | SGD0.17/kg | unknown | 16 Apr 2003 |
| Qantas\*\* | SGD0.17/kg | 28 Apr 2003 | 1 May 2003 |

\* Lufthansa announced a further decrease on 22 April 2003 to SGD0.19/kg, effective from 6 May 2003.

\*\* Qantas in fact first decreased to SGD0.25/kg on 11 April 2003, effective from 22 April 2003.

|  |  |  |  |
| --- | --- | --- | --- |
| Airline | Amount | Announcement  Date | Effective  Date |
| The Fourth Implementation Allegation | | | |
| Lufthansa | SGD0.31/kg | 5 Dec 2003 | 18 Dec 2003 |
| Singapore  Airlines Cargo | SGD0.25/kg | 9 Dec 2003 | 23 Dec 2003 |
| Air New Zealand | SGD0.20/kg | 15 Dec 2003 | 23 Dec 2003 |
| Thai Airways | SGD0.25/kg | 16 Dec 2003 | 1 Jan 2004 |
| Cathay Pacific | SGD0.15/kg | unknown | 1 Jan 2004 |
| Japan Airlines | SGD0.25/kg | unknown | 1 Jan 2004 |
| China Airlines | SGD0.25/kg | unknown | 23 Dec 2003 |
| Eva Air | SGD0.25/kg | unknown | 23 Dec 2003 |
| Qantas | SGD0.25/kg | unknown | 23 Dec 2003 |

|  |  |  |  |
| --- | --- | --- | --- |
| Airline | Amount | Announcement  Date | Effective  Date |
| The Fifth Implementation Allegation | | | |
| Lufthansa | SGD0.40/kg | 27 Apr 2004 | 10 May 2004 |
| Singapore  Airlines Cargo | SGD0.35/kg | 28 Apr 2004 | 12 May 2004 |
| Air New Zealand | SGD0.20/kg | unknown | 16 May 2004 |
| Thai Airways | SGD0.35/kg | 4 May 2004 | 16 May 2004 |
| Cathay Pacific | SGD0.20/kg | unknown | unknown |
| Japan Airlines | SGD0.35/kg | unknown | 16 May 2004 |
| China Airlines | SGD0.35/kg | unknown | unknown |
| Eva Air | SGD0.35/kg | unknown | 12 May 2004 |
| Emirates | SGD0.20/kg | unknown | 16 May 2004 |
| Qantas | SGD0.35/kg | unknown | 12 May 2004 |

|  |  |  |  |
| --- | --- | --- | --- |
| Airline | Amount | Announcement  Date | Effective  Date |
| The Sixth Implementation Allegation | | | |
| Lufthansa | SGD0.62/kg | 21 Sep 2004 | 4 Oct 2004 |
| Emirates | SGD0.30/kg | unknown | 4 Oct 2004 |
| Singapore  Airlines Cargo | SGD0.50/kg | 27 Sep 2004 | 11 Oct 2004 |
| Air New Zealand | SGD0.25/kg | 1 Oct 2004 | 16 Oct 2004 |
| Thai Airways | SGD0.50/kg | 4 Oct 2004 | 16 Oct 2004 |
| Cathay Pacific | SGD0.20/kg | unknown | 11 Oct 2004 |
| Japan Airlines | SGD0.45/kg | unknown | Oct 2004  Exact date unknown |
| China Airlines | SGD0.50/kg | unknown | 11 Oct 2004 |
| Eva Air | unknown | unknown | unknown |

|  |  |  |  |
| --- | --- | --- | --- |
| Airline | Amount | Announcement  Date | Effective  Date |
| The Seventh Implementation Allegation | | | |
| Lufthansa | SGD0.73/kg | 12 Oct 2004 | 25 Oct 2004 |
| Singapore  Airlines Cargo | SGD0.50/kg | 21 Oct 2004 | 5 Nov 2004 |
| Air New Zealand | SGD0.25/kg  (unchanged) | N/A | N/A |
| Thai Airways | SGD0.50/kg | 2 Nov 2004 | 16 Nov 2004 |
| Cathay Pacific | unknown | unknown | unknown |
| Japan Airlines | SGD0.45/kg  (unchanged) | N/A | N/A |
| China Airlines | SGD0.50/kg | unknown | 5 Nov 2004 |
| Eva Air | unknown | unknown | unknown |

|  |  |  |  |
| --- | --- | --- | --- |
| Airline | Amount | Announcement  Date | Effective  Date |
| The Eighth Implementation Allegation | | | |
| Lufthansa | SGD0.66/kg | 21 Dec 2004 | 3 Jan 2005 |
| Singapore  Airlines Cargo | SGD0.40/kg | 22 Dec 2004 | 3 Jan 2005 |
| Air New Zealand | SGD0.25/kg  (unchanged) | N/A | N/A |
| Thai Airways | SGD0.40/kg | 3 Jan 2005 | 16 Jan 2005 |
| Cathay Pacific | unknown | unknown | unknown |
| Japan Airlines | SGD0.45/kg  (unchanged) | N/A | N/A |
| China Airlines | unknown | unknown | unknown |
| Eva Air | unknown | unknown | unknown |
| Qantas | SGD0.50/kg | unknown | 16 Jan 2005 |

|  |  |  |  |
| --- | --- | --- | --- |
| Airline | Amount | Announcement  Date | Effective  Date |
| The Ninth Implementation Allegation (first increase) | | | |
| Lufthansa | SGD0.75/kg | 8 Mar 2005 | 21 Mar 2005 |
| Singapore Airlines Cargo | no finding | unknown | N/A |
| Air New Zealand | SGD0.25/kg  (unchanged) | N/A | N/A |
| Thai Airways | SGD0.40/kg  (unchanged) | N/A | N/A |
| Japan Airlines | SGD0.45/kg  (unchanged) | N/A | N/A |

|  |  |  |  |
| --- | --- | --- | --- |
| Airline | Amount | Announcement  Date | Effective  Date |
| The Ninth Implementation Allegation (second increase) (omitted from Commission’s case) | | | |
| Lufthansa | SGD0.86/kg | 22 Mar 2005 | 4 Apr 2005 |
| Singapore  Airlines Cargo | SGD0.45/kg | 24 Mar 2005 | 7 Apr 2005 |
| Air New Zealand | SGD0.30/kg | 4 Apr 2005 | 16 Apr 2005 |
| Thai Airways | SGD0.45/kg | 28 Mar 2005 | 16 Apr 2005 |
| Cathay Pacific | SGD0.30/kg | 17 Mar 2005 | 1 Apr 2005 |
| Japan Airlines | SGD0.45/kg | unknown | Apr 2005 (specific day unknown) |
| China Airlines | unknown | unknown | unknown |
| Eva Air | unknown | unknown | unknown |

|  |  |  |  |
| --- | --- | --- | --- |
| Airline | Amount | Announcement  Date | Effective  Date |
| The Tenth Implementation Allegation | | | |
| Lufthansa | SGD0.92/kg | 28 Jun 2005 | 11 Jul 2005 |
| Qantas | SGD0.35/kg | unknown | 13 Jul 2005 |
| Singapore  Airlines Cargo | SGD0.50/kg | 29 Jun 2005 | 13 Jul 2005 |
| Air New Zealand | SGD0.35/kg | 6 Jul 2005 | 16 Jul 2005 |
| Thai Airways | SGD0.50/kg | 1 Jul 2005 | 16 Jul 2005 |
| Cathay Pacific | SGD0.40/kg | 30 Jun 2005 | 16 Jul 2005 |
| Japan Airlines | SGD0.50/kg | 1 Jul 2005 | 16 Jul 2005 |
| China Airlines | unknown | unknown | unknown |
| Eva Air | unknown | unknown | unknown |

|  |  |  |  |
| --- | --- | --- | --- |
| Airline | Amount | Announcement  Date | Effective  Date |
| The Eleventh Implementation Allegation | | | |
| Lufthansa | SGD1.02/kg | 23 Aug 2005 | 5 Sep 2005 |
| Qantas\* | SGD0.35/kg | 29 Aug 2005 | 10 Sep 2005 |
| Singapore  Airlines Cargo | SGD0.55/kg | 24 Aug 2005 | 6 Sep 2005 |
| Air New Zealand | SGD0.35/kg | 29 Aug 2005 | 16 Sep 2005 |
| Thai Airways | SGD0.55/kg | 31 Aug 2005 | 16 Sep 2005 |
| Cathay Pacific | SGD0.45/kg | 26 Aug 2005 | 16 Sep 2005 |
| Japan Airlines | unknown | unknown | unknown |
| China Airline | unknown | unknown | unknown |
| Eva Air | unknown | unknown | unknown |

\* Qantas charged SGD0.45/kg in Australia and the South West Pacific.

#### Data for FSCs charged ex-Singapore in TC3 SE Asia

|  |  |  |  |
| --- | --- | --- | --- |
| Airline | Amount | Announcement  Date | Effective  Date |
| The introduction of the FSC in April 2002 (not directly relied upon by the Commission) | | | |
| Lufthansa | SGD0.08/kg | 1 Apr 2002 | 15 Apr 2002 |
| Singapore  Airlines Cargo | SGD0.10/kg | 22 Apr 2002 | 1 May 2002 |
| Air New Zealand | SGD0.10/kg | 24 Apr 2002 | 1 May 2002 |
| Thai Airways | SGD0.10/kg | 22 Apr 2002 | 1 May 2002 |
| Cathay Pacific | SDG0.05/kg | unknown | 1 May 2002 |
| Japan Airlines | SGD0.10/kg | unknown | 13 May 2002 |
| China Airlines | SGD0.05/kg | unknown | 1 May 2002 |
| Eva Air | SGD0.05/kg | unknown | 1 May 2002 |

|  |  |  |  |
| --- | --- | --- | --- |
| Airline | Amount | Announcement  Date | Effective  Date |
| The First Implementation Allegation | | | |
| Lufthansa | SGD0.17/kg | 6 Sep 2002 | 23 Sep 2002 |
| Singapore  Airlines Cargo | SGD0.17/kg | 12 Sep 2002 | 1 Oct 2002 |
| Air New Zealand\* | SGD0.10/kg | 23 Sep 2002 | 1 Oct 2002 |
| Thai Airways | SGD0.17/kg | 16 Sep 2002 | 1 Oct 2002 |
| Cathay Pacific | SDG0.10/kg | unknown | 1 Oct 2002 |
| Japan Airlines | SGD0.17/kg | unknown | 16 Oct 2002 |
| China Airlines | SGD0.10/kg | unknown | 1 Oct 2002 |
| Eva Air | SGD0.10/kg | unknown | 1 Oct 2002 |

\* Air NZ had intended to implement at SGD0.17/kg but omitted to do so.

|  |  |  |  |
| --- | --- | --- | --- |
| Airline | Amount | Announcement  Date | Effective  Date |
| The Second Implementation Allegation | | | |
| Lufthansa | SGD0.28/kg | 19 Feb 2003 | 3 Mar 2003 |
| Singapore  Airlines Cargo | SGD0.20/kg | 14 Feb 2003 | 1 Mar 2003 |
| Air New Zealand | SGD0.25/kg | 24 Feb 2003 | 1 Mar 2003 |
| Thai Airways | SGD0.20/kg | 19 Feb 2003 | 1 Mar 2003 |
| Cathay Pacific | unknown | unknown | unknown |
| Japan Airlines | SGD0.20/kg | unknown | unknown |
| China Airlines | unknown | unknown | unknown |
| Eva Air | unknown | unknown | unknown |
| Qantas | SGD0.25/kg | unknown | unknown |

|  |  |  |  |
| --- | --- | --- | --- |
| Airline | Amount | Announcement  Date | Effective  Date |
| The March 2003 FSC Spike (omitted from Commission’s case) | | | |
| Lufthansa | SGD0.38/kg | 10 Mar 2003 | 24 Mar 2003 |
| Singapore Airlines Cargo | SGD0.25/kg | 13 Mar 2003 | 19 Mar 2003 |
| Air New Zealand | SGD0.25/kg | hold | hold |
| Qantas | SGD0.38/kg | 21 Mar 2003 | 7 Apr 2003 |
| Thai Airways | SGD0.20/kg | hold | hold |

|  |  |  |  |
| --- | --- | --- | --- |
| Airline | Amount | Announcement  Date | Effective  Date |
| The Third Implementation Allegation | | | |
| Lufthansa\* | SGD0.28/kg | 7 Apr 2003 | 21 Apr 2003 |
| Singapore  Airlines Cargo | SGD0.17/kg | 11 Apr 2003 | 16 Apr 2003 |
| Air New Zealand | SGD0.17/kg | unknown | 16 Apr 2003 |
| Thai Airways | SGD0.17/kg | 17 Jun 2003 | 1 Jul 2003 |
| Cathay Pacific | SDG0.10/kg | unknown | 1 May 2003 |
| Japan Airlines | SGD0.10/kg | unknown | unknown |
| China Airlines | SGD0.17/kg | unknown | 21 Apr 2003 |
| Eva Air | SGD0.17/kg | unknown | 16 Apr 2003 |
| Qantas\*\* | SGD0.17/kg | 28 Apr 2003 | 1 May 2003 |

\* Lufthansa announced a further decrease on 22 April 2003 to SGD0.19/kg, effective from 6 May 2003.

\*\* Qantas in fact first decreased to SGD0.25/kg on 11 April 2003, effective from 22 April 2003.

|  |  |  |  |
| --- | --- | --- | --- |
| Airline | Amount | Announcement  Date | Effective  Date |
| The Fourth Implementation Allegation | | | |
| Lufthansa | SGD0.31/kg | 5 Dec 2003 | 18 Dec 2003 |
| Singapore  Airlines Cargo | SGD0.20/kg | 9 Dec 2003 | 23 Dec 2003 |
| Air New Zealand | SGD0.20/kg | 15 Dec 2003 | 23 Dec 2003 |
| Thai Airways | SGD0.20/kg | 16 Dec 2003 | 1 Jan 2004 |
| Cathay Pacific | SGD0.15/kg | unknown | 1 Jan 2004 |
| Japan Airlines | SGD0.20/kg | unknown | 1 Jan 2004 |
| China Airlines | SGD0.25/kg | unknown | 23 Dec 2003 |
| Eva Air | SGD0.20/kg | unknown | 23 Dec 2003 |
| Qantas | SGD0.20/kg | unknown | 23 Dec 2003 |

|  |  |  |  |
| --- | --- | --- | --- |
| Airline | Amount | Announcement  Date | Effective  Date |
| The Fifth Implementation Allegation | | | |
| Lufthansa | SGD0.40/kg | 27 Apr 2004 | 10 May 2004 |
| Singapore  Airlines Cargo | SGD0.20/kg | 28 Apr 2004 | 12 May 2004 |
| Air New Zealand | SGD0.20/kg | unknown | 16 May 2004 |
| Thai Airways | SGD0.20/kg | 4 May 2004 | 16 May 2004 |
| Cathay Pacific | SGD0.20/kg | unknown | unknown |
| Japan Airlines | SGD0.20/kg | unknown | 16 May 2004 |
| China Airlines | SGD0.20/kg | unknown | unknown |
| Eva Air | SGD0.20/kg | unknown | 12 May 2004 |
| Qantas\* | SGD0.20/kg | unknown | 12 May 2004 |
| Emirates | SGD0.20/kg | unknown | 16 May 2004 |

\* Qantas charged SGD0.25/kg in the South West Pacific.

|  |  |  |  |
| --- | --- | --- | --- |
| Airline | Amount | Announcement  Date | Effective  Date |
| The Sixth Implementation Allegation | | | |
| Lufthansa | SGD0.62/kg | 21 Sep 2004 | 4 Oct 2004 |
| Emirates | SGD0.30/kg | unknown | 4 Oct 2004 |
| Singapore  Airlines Cargo | SGD0.25/kg | 27 Sep 2004 | 11 Oct 2004 |
| Air New Zealand | SGD0.25/kg | 1 Oct 2004 | 16 Oct 2004 |
| Thai Airways | SGD0.25/kg | 4 Oct 2004 | 16 Oct 2004 |
| Cathay Pacific | SGD0.20/kg | unknown | 11 Oct 2004 |
| Japan Airlines | SGD0.25/kg | unknown | Oct 2004  Exact date unknown |
| China Airlines | SGD0.25/kg | unknown | 11 Oct 2004 |
| Eva Air | unknown | unknown | unknown |

|  |  |  |  |
| --- | --- | --- | --- |
| Airline | Amount | Announcement  Date | Effective  Date |
| The Seventh Implementation Allegation | | | |
| Lufthansa | SGD0.73/kg | 12 Oct 2004 | 25 Oct 2004 |
| Singapore  Airlines Cargo | SGD0.30/kg | 21 Oct 2004 | 5 Nov 2004 |
| Air New  Zealand | SGD0.25/kg  (unchanged) | N/A | N/A |
| Thai Airways | SGD0.30/kg | 2 Nov 2004 | 16 Nov 2004 |
| Cathay Pacific | unknown | unknown | unknown |
| Japan Airlines | SGD0.25/kg  (unchanged) | N/A | N/A |
| China Airlines | SGD0.30/kg | unknown | 5 Nov 2004 |
| Eva Air | unknown | unknown | unknown |

|  |  |  |  |
| --- | --- | --- | --- |
| Airline | Amount | Announcement  Date | Effective  Date |
| The Eighth Implementation Allegation | | | |
| Lufthansa | SGD0.66/kg | 21 Dec 2004 | 3 Jan 2005 |
| Singapore  Airlines Cargo | SGD0.25/kg | 22 Dec 2004 | 3 Jan 2005 |
| Air New Zealand | SGD0.25/kg  (unchanged) | N/A | N/A |
| Thai Airways | SGD0.25/kg | 3 Jan 2005 | 16 Jan 2005 |
| Cathay Pacific | unknown | unknown | unknown |
| Japan Airlines | SGD0.25/kg  (unchanged) | N/A | N/A |
| China Airline | unknown | unknown | unknown |
| Eva Air | unknown | unknown | unknown |
| Qantas | SGD0.25/kg | unknown | 16 Jan 2005 |

|  |  |  |  |
| --- | --- | --- | --- |
| Airline | Amount | Announcement  Date | Effective  Date |
| The Ninth Implementation Allegation (first increase) | | | |
| Lufthansa | SGD0.75/kg | 8 Mar 2005 | 21 Mar 2005 |
| Singapore  Airlines Cargo | No finding | N/A | N/A |
| Air New Zealand | SGD0.25/kg  (unchanged) | N/A | N/A |
| Thai Airways | SGD0.40/kg  (unchanged) | N/A | N/A |
| Japan Airlines | SGD0.25/kg  (unchanged) | N/A | N/A |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
| Airline | Amount | Announcement  Date | Effective  Date | |
| The Ninth Implementation Allegation (second increase) (omitted from Commission’s case) | | | |
|  | | | | |
| Lufthansa | SGD0.86/kg | 22 Mar 2005 | 4 Apr 2005 | |
| Singapore  Airlines Cargo | SGD0.30/kg | 24 Mar 2005 | 7 Apr 2005 | |
| Air New Zealand | SGD0.30/kg | 4 Apr 2005 | 16 Apr 2005 | |
| Thai Airways | SGD0.30/kg | 28 Mar 2005 | 16 Apr 2005 | |
| Cathay Pacific | SGD0.30/kg | 17 Mar 2005 | 1 Apr 2005 | |
| Japan Airlines | SGD0.30/kg | unknown | Apr 2005 (specific day unknown) | |
| China Airlines | unknown | unknown | unknown | |
| Eva Air | unknown | unknown | unknown | |

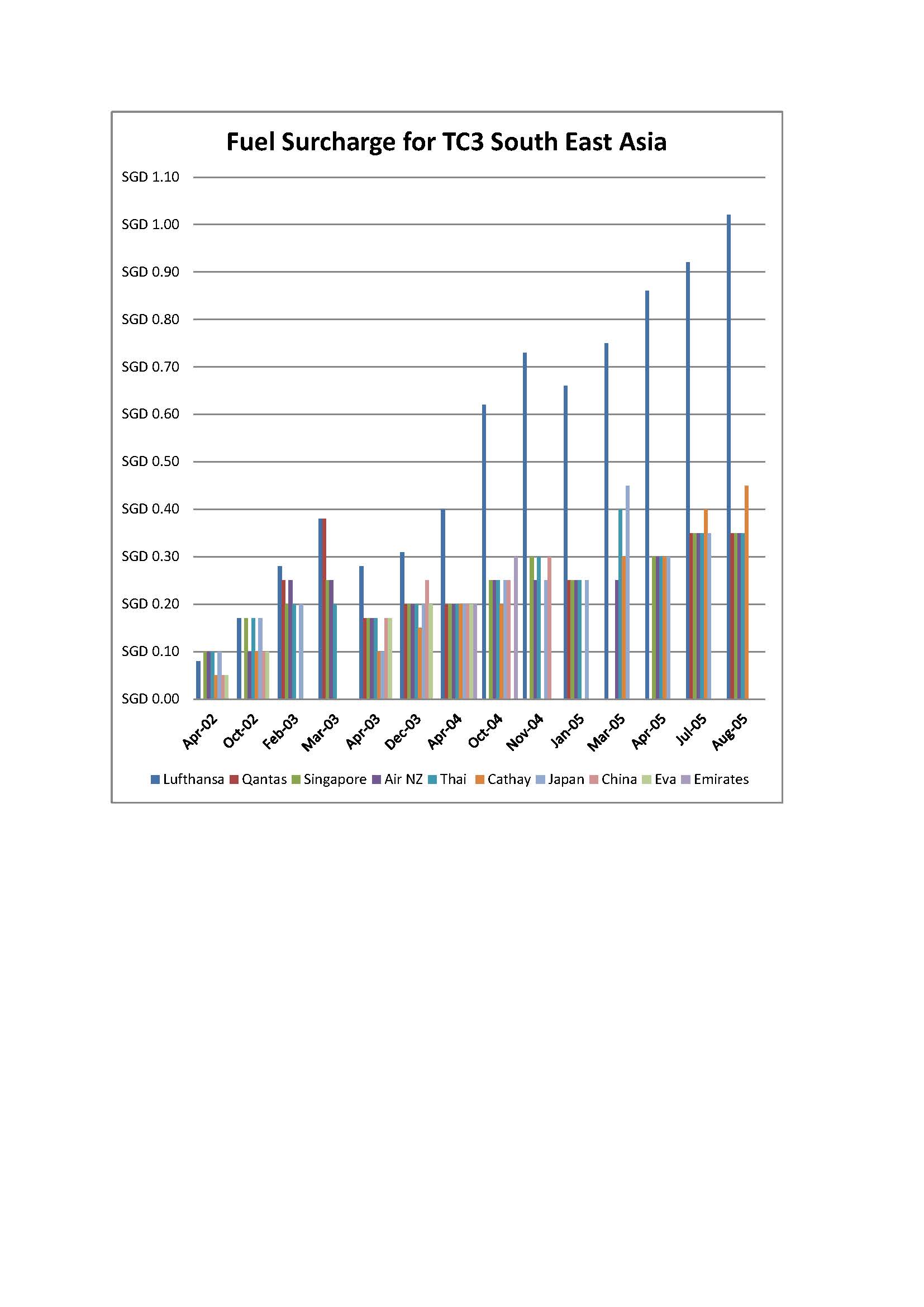
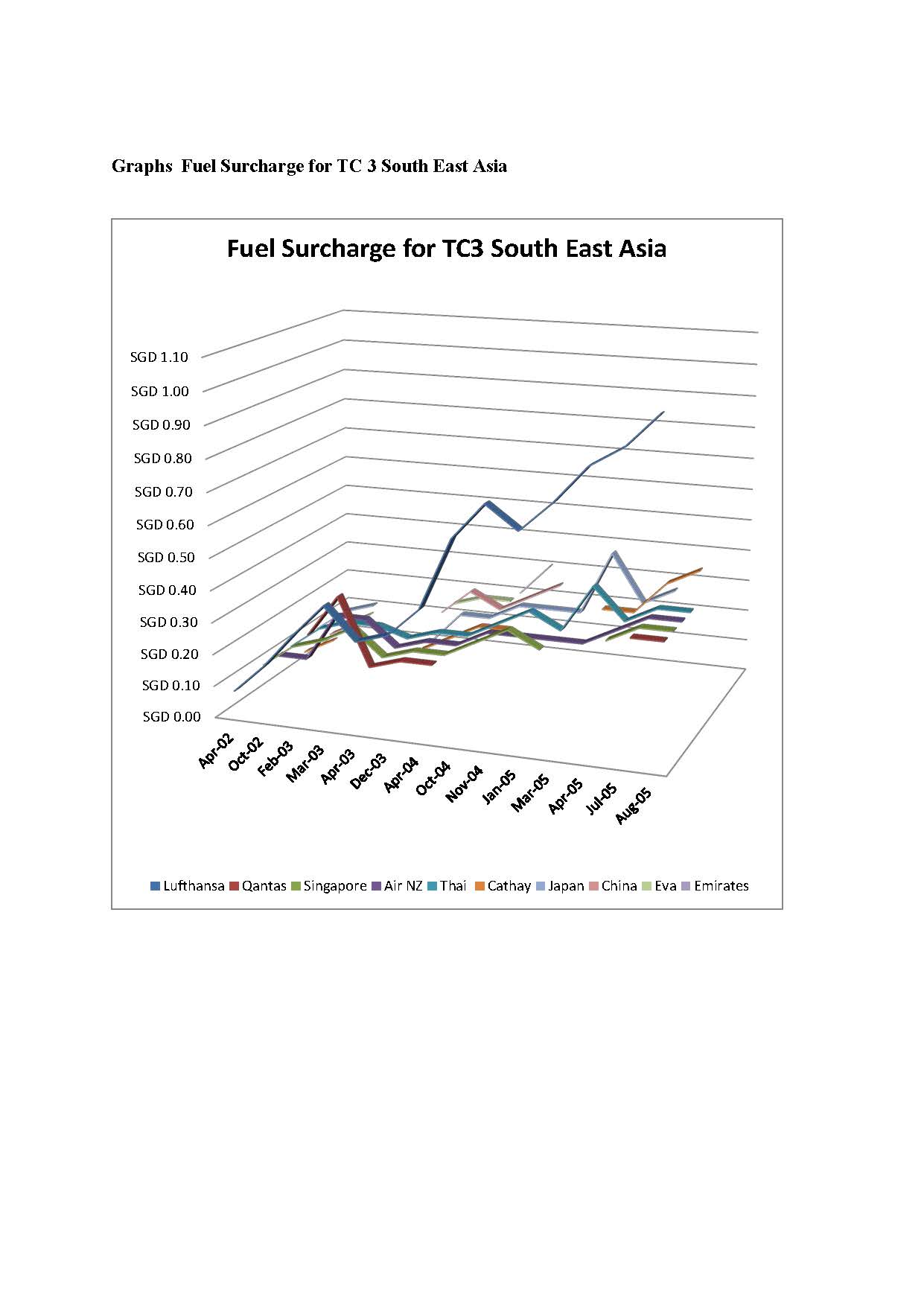
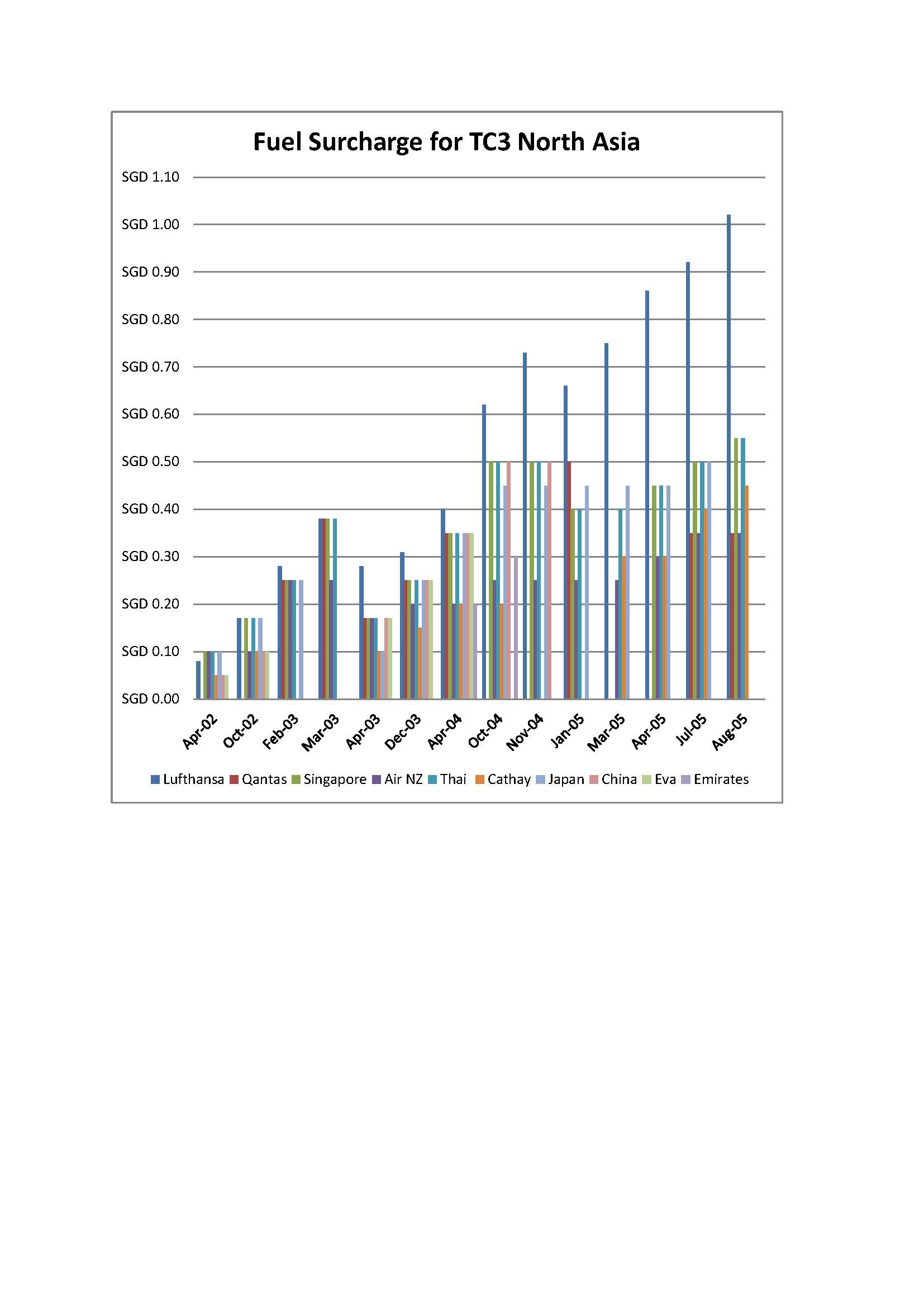
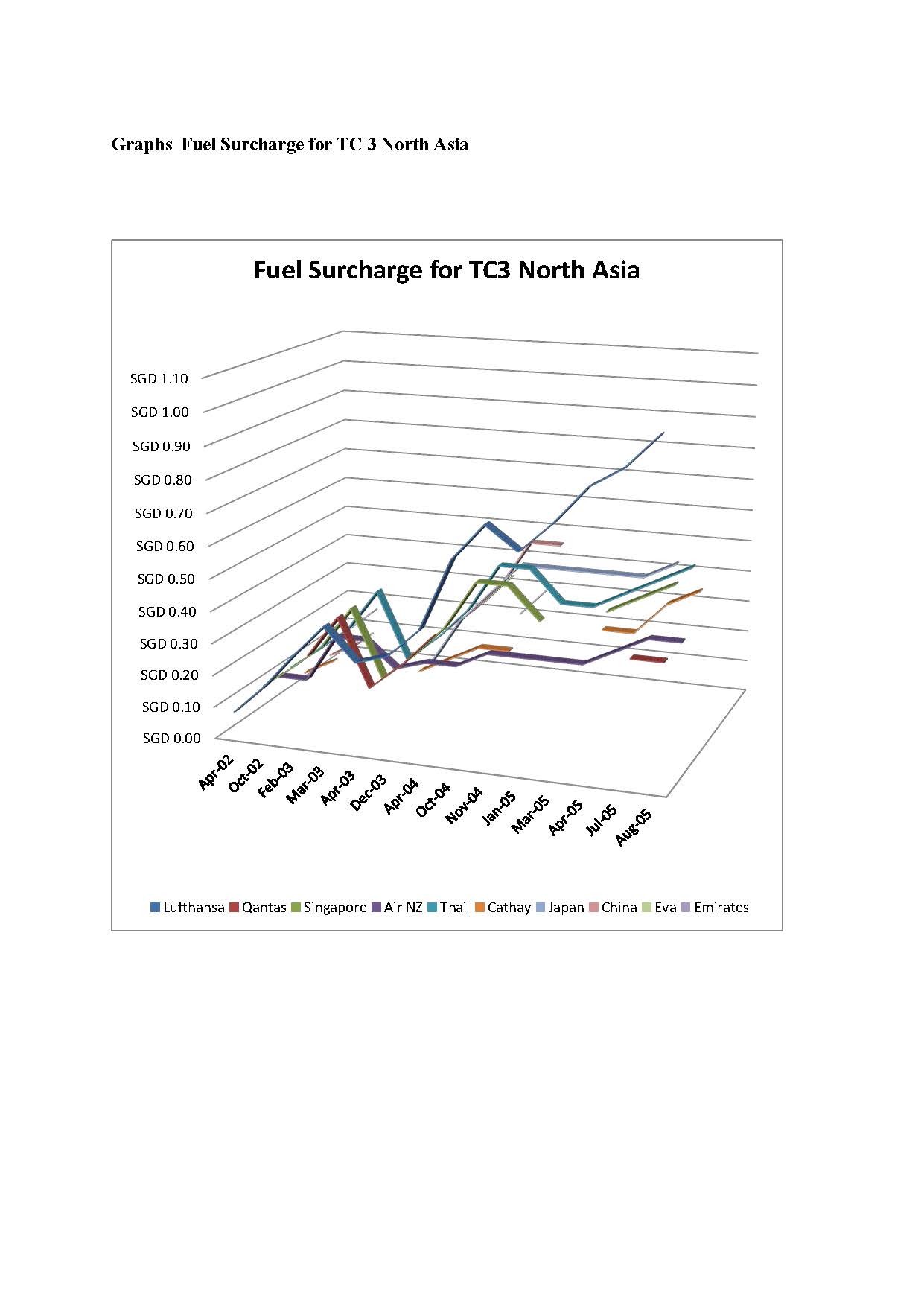
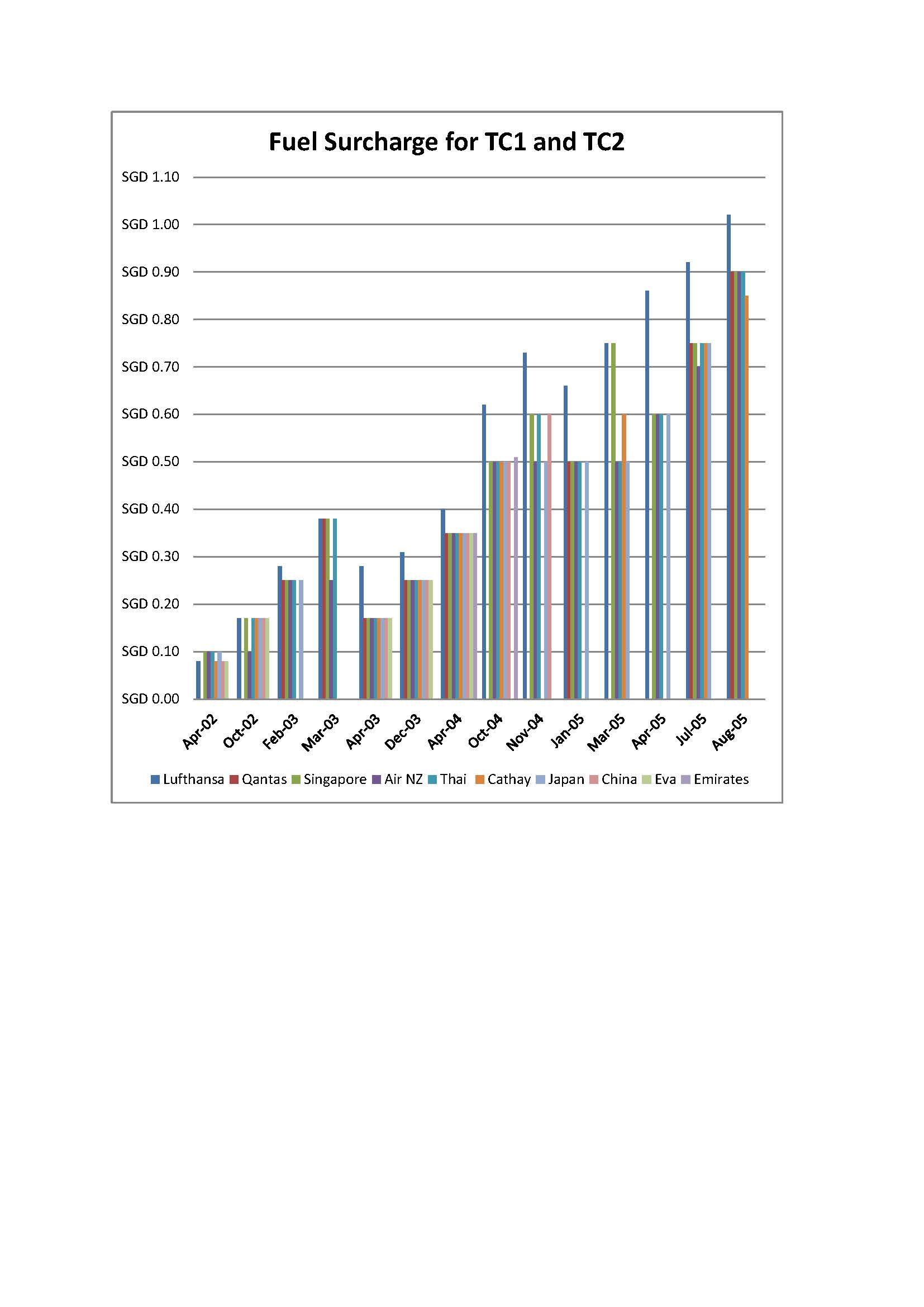
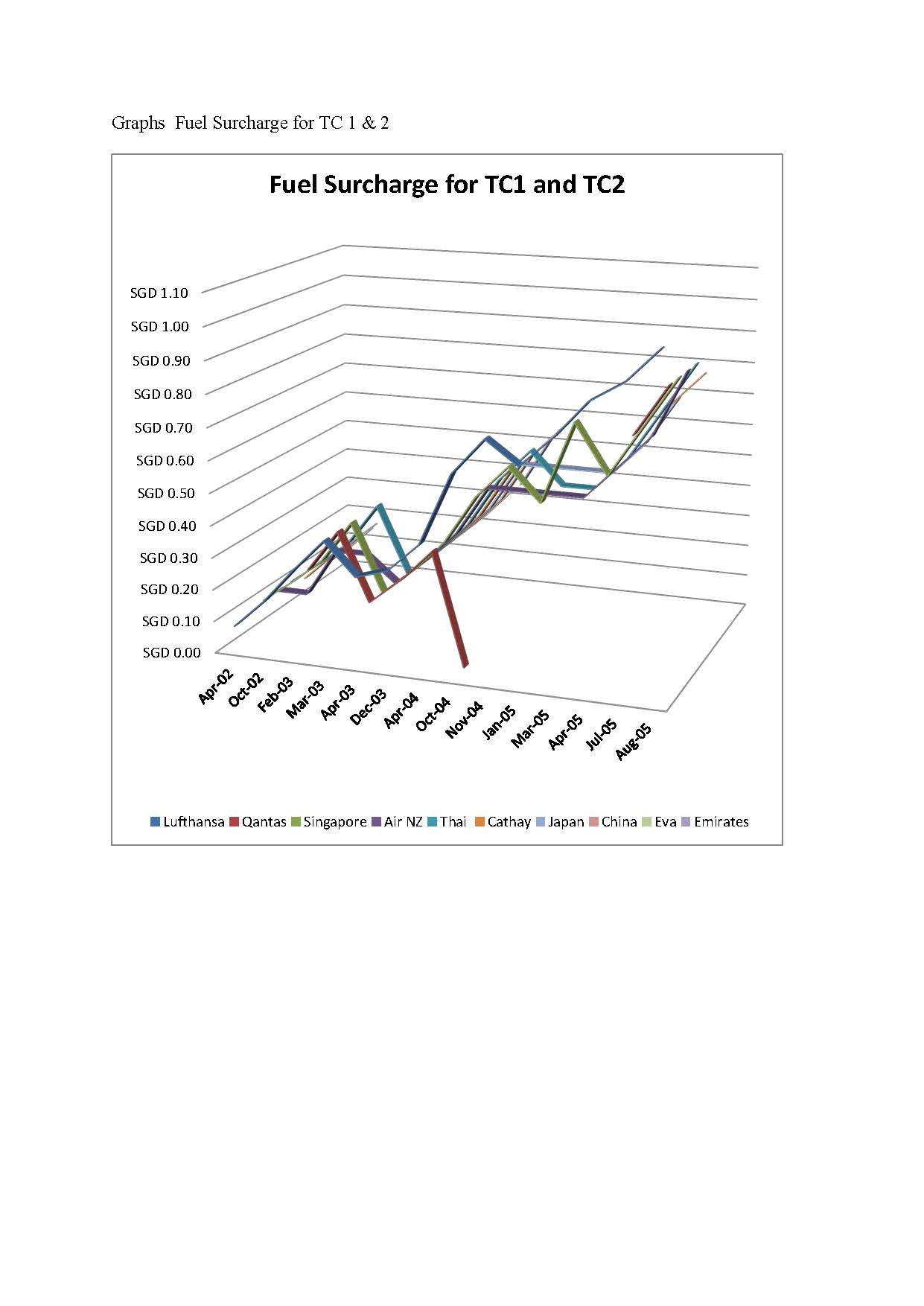
|  |  |  |  |
| --- | --- | --- | --- |
| Airline | Amount | Announcement  Date | Effective  Date |
| The Tenth Implementation Allegation | | | |
| Lufthansa | SGD0.92/kg | 28 Jun 2005 | 11 Jul 2005 |
| Qantas | SGD0.35/kg | unknown | 13 Jul 2005 |
| Singapore  Airlines Cargo | SGD0.35/kg | 29 Jun 2005 | 13 Jul 2005 |
| Air New Zealand | SGD0.35/kg | 6 Jul 2005 | 16 Jul 2005 |
| Thai Airways | SGD0.35/kg | 1 Jul 2005 | 16 Jul 2005 |
| Cathay Pacific | SGD0.40/kg | 30 Jun 2005 | 16 Jul 2005 |
| Japan Airlines | SGD0.35/kg | 1 Jul 2005 | 16 Jul 2005 |
| China Airline | unknown | unknown | unknown |
| Eva Air | unknown | unknown | unknown |

|  |  |  |  |
| --- | --- | --- | --- |
| Airline | Amount | Announcement  Date | Effective  Date |
| The Eleventh Implementation Allegation | | | |
| Lufthansa | SGD1.02/kg | 23 Aug 2005 | 5 Sep 2005 |
| \*Qantas | SGD0.35/kg | 29 Aug 2005 | 10 Sep 2005 |
| Singapore  Airlines Cargo | SGD0.35/kg | 24 Aug 2005 | 6 Sep 2005 |
| Air New Zealand | SGD0.35/kg | 29 Aug 2005 | 16 Sep 2005 |
| Thai Airways | SGD0.35/kg | 31 Aug 2005 | 16 Sep 2005 |
| Cathay Pacific | SGD0.45/kg | 26 Aug 2005 | 16 Sep 2005 |
| Japan Airlines | unknown | unknown | unknown |
| China Airline | unknown | unknown | unknown |
| Eva Air | unknown | unknown | unknown |

\* Qantas charged SGD0.45/kg in Australia and the South West Pacific.

1. This data may be illustrated graphically this way:

#### Graphs



### 11.2.2 The implementation of the FSCs

1. In this section I make the findings of fact to support the material set out in Section 11.2.1 and chart the internal decision making within the airlines underlying the surcharges imposed.

#### 11.2.2.1 The First Implementation Allegation

#### a The FSCs which were imposed

1. In September 2002 the Lufthansa Index reached its second level which indicated an increase to €0.10 which was SGD0.17. The following FSCs were imposed.

*Lufthansa*

1. Lufthansa announced in Europe on 5 September 2002 a second level increase to €0.10/kg with effect from 23 September 2002.
2. It announced the increase in Singapore the following day of €0.10/kg (SGD0.17/kg) effective from 23 September 2002. It did not say, but I assume that, this applied across TC1-3. I make this assumption for the balance of Section 11.2.2.

*SQ*

1. On 12 September 2002 SQ in Singapore announced an FSC increase to SGD0.17/kg with effect from 1 October 2002 in all areas.

*Air New Zealand*

1. On 23 September 2002 Air NZ announced that it would increase its FSC to SGD0.17/kg in all areas with effect from 1 October 2002. As events transpired, this increase was not implemented and Air NZ’s FSC remained at SGD0.10/kg

*Thai Airways*

1. On 16 September 2002 Thai Airways announced an increase in FSC across all areas to SGD0.17/kg with effect from 1 October 2002.

*Cathay Pacific*

1. With effect from 1 October 2002 Cathay increased its FSC to:
2. SGD0.17/kg in TC1 and TC2; and
3. SGD0.10/kg in TC3.

*Japan Airlines*

1. Japan Airlines increased its FSC with effect from 16 October 2002 to SGD0.17/kg, presumably across all areas.

*China Airlines*

1. China Airlines increased its FSC with effect from 1 October 2002 to:
2. SGD0.17/kg in TC1 and TC2; and
3. SGD0.10/kg in TC3.

*Eva Air*

1. Eva Air increased its FSC with effect from 1 October 2002 to:
2. SGD0.17/kg in TC1 and TC2; and
3. SGD0.10/kg in TC3.

#### b The internal decision making process of SQ

1. On 5 September 2002, Lufthansa announced that it would be implementing a surcharge of €0.10/kg across its entire network with effect from 23 September 2002. The next day Lufthansa announced the increase in Singapore and that this would amount to SGD0.17/kg in local currency. SQ Singapore was aware of Lufthansa’s move on that day, 6 September 2002. An internal email shows that staff sought to increase SQ Singapore’s fuel surcharge to SGD0.17 because of rising fuel costs and noted ‘for information’ that Lufthansa had just increased its surcharge. On 8 September 2002 a more senior employee within SQ Singapore decided that it would make a decision on its fuel surcharge by 12 September 2002. The following day, 9 September 2002, Lufthansa sent an email to SAS, Swissair, Air France, Cargolux, British Airways, KLM and SQ asking whether they would implementing the new level of the surcharge. On the same day, SQ circularised its local managers to find out what they knew and likely market responses. On 10 September 2002, Cargolux and SAS responded to Lufthansa’s question of 9 September 2002 indicating that they would be implementing the surcharge. By 10 September 2002 SQ Singapore’s internal inquiries had revealed that the ‘other’ airlines had said they would implementing the surcharge (they were ‘quite sure’) although they were waiting for head office approval. The same day Qantas announced to its customers that it would be implementing the surcharge. The next day, 11 September 2002, SQ Singapore internally decided that it would impose the surcharge.
2. Having made that decision SQ Singapore then informed the members of the BAR CSC on 12 September 2002 that it would be increasing its surcharge to SGD0.17/kg from 1 October 2002 and sought to find out what each other airline would be doing with a promise to distribute the fruits of that inquiry back to all concerned. The terms of the email were as follows:

Dear BAR members,

Please advise if your airline is increasing your fuel surcharge and the effective date. For SQ, we have decided to increase the surcharge to $0.17/kg with effect from 01 Oct 2002. This shall apply to all shipments except shipments weighing 29kg and below which will be subject to minimum charge of SGD5.

Your feedback will be tabulated and despatch to everyone by email.

1. On the same day, SQ Singapore informed its agents that it would be increasing the FSC to SGD0.17/kg from 1 October 2002. On 1 October 2002, the day of the implementation, SQ Singapore circulated to the BAR members the results of the survey it had requested on 12 September 2002. A final version of this was then made available to the BAR CSC members on 24 October 2002 at a BAR CSC meeting held that day. It showed that most carriers had increased their fuel surcharge to SGD0.17 during October 2002.
2. Before considering what Air NZ did over the same period it is worthwhile emphasising some aspects of the events described above. It is apparent that the decision about the FSC SQ Singapore was going to impose was *not* made blindly following an anterior decision made by SQ across its entire network. Rather it shows a consciousness by SQ Singapore of a move by Lufthansa followed by a close survey of what other carriers were doing in Singapore. The decision making process appears to have started on 6 September 2002 (when the Lufthansa announcement became known) and to have concluded on 11 September 2002 (when an SQ employee, Mr Foo, decided to impose the FSC).
3. At the beginning of that decision making process SQ Singapore knew only that Lufthansa was going to implement the FSC. By the end of it, it had become aware that it was highly likely most other carriers would be doing so too. On the other hand, it is also clear that the results of the formal survey it circulated on 12 September 2002 were unlikely to have been an input into the decision to impose the surcharge. This was unnecessary because by 10 September 2012 SQ Singapore was already aware through its own enquiries that the other airlines would be imposing the FSC.
4. Air NZ submitted that SQ Singapore set its FSCs through its head office and pointed to four documents to make good that proposition. The first was an email sent from SQ head office to its various station managers dated 19 April 2002. This email enclosed a general guide on how to impose FSCs and said relevantly ‘[h]ead office has prepared a document outlining the basic principle, trigger point and implementation of the fuel surcharge. This document will aid you in understanding why and when this surcharge should be apply.’ The attached document certainly appears to prescribe how the FSC was to be implemented across the network although I note that it is expressed in terms of being a recommendation. It does finish with ‘HDQ will monitor the movement of the [confidential] indices and trigger stations as to when to adjust your rates, and by what quantum’ which does suggest, going in the opposite direction, that it was SQ HQ which would be setting the FSCs across the network. These documents are general instructions, however, and are not examples of actual decisions being made.
5. The third document is an email chain in September 2002 and forms part of the material set out above. The decision to impose the surcharge was made by Mr Soo Tin Foo on 11 September 2002 at 7:13 am. Mr Foo was the Regional Vice President of South East Asian and Singapore Sales. This is inconsistent with Air NZ’s submission that the decision to impose the FSC was made at the level of SQ HQ. The document shows that the decision to impose the FSC was made at the level of the South East Asian and Singapore Sales section and not at head office level. The fourth document was an email dated 5 December 2003 from Mr Tan. It does not instance any decision being made. Rather, in it Mr Tan ruminates that ‘I think it is time for us to bite the bullet and seriously consider a fuel surcharge…Please give it a thought’. I do not accept that this shows that FSC pricing was being determined at the level of SQ HQ. Accordingly, I do not accept that the decision made on 11 September 2002 was made at the level of SQ HQ. It was a local decision made in Singapore.
6. On the other hand, neither the BAR CSC meeting on 24 October 2002 nor the surveys which preceded it, could have affected how SQ Singapore reached its decision. The die had been cast on 11 September 2002 when Mr Foo made the decision to impose the FSC. It is true, as the Commission pointed out, that its case was not tied to a suggestion that information was exchanged only at the meetings or by the surveys. Rather it had pleaded that the airlines would discuss or otherwise notify their intentions including by attending meetings or otherwise.

#### c The decision making process of Air NZ

1. Air NZ HQ was aware on 5 September 2002 (the day Lufthansa announced the imposition of the surcharge in Europe) that the second trigger point had been reached on the Lufthansa Index. On 8 September 2002 Mr Gregg inquired what this meant for Singapore. Although Lufthansa had inquired of various airlines on 9 September 2002 what they were proposing to do in respect of the Lufthansa announcement, Air NZ was not one of those who was asked in writing. Mr Chew, who was Air NZ’s cargo manager at the time in Singapore, was informed on 9 September 2002 of the Lufthansa move to the second level. He was ignorant at that time as to what SQ Singapore was going to do or what Qantas was going to do. Of course, out of Singapore Qantas and SQ were Air NZ’s chief competitors. On 12 September 2002 Mr Chew was instructed to impose the FSC (that is, the same day that SQ Singapore made its announcement). Mr Chew announced this to Air NZ’s customers on 23 September 2002 and advised that it would take effect on 1 October 2002. It seems that Air NZ thereafter received the SQ Singapore survey (a copy was produced by Air NZ). Mr Chew did not attend the BAR CSC meeting on 24 October 2012.

#### d Analysis

1. The evidence shows that: SQ Singapore made its FSC decision in Singapore after ascertaining that most airlines would almost certainly be imposing the increase. The evidence does not directly link Air NZ or Qantas to the inquiries which were made by SQ Singapore.
2. In fact, as events transpired Air NZ did not levy the increased FSC. In January 2003 SQ Singapore recirculated the results of the survey. In response Mr Chew replied that he had discovered that Air NZ had not in fact imposed the FSC and asked SQ to update its records accordingly.

#### 11.2.2.2 The Second Implementation Allegation

1. By February 2003 the Lufthansa Index had reached its third level which indicated an increase from €0.10/kg to €0.15/kg.

#### a The FSCs which were imposed

*Lufthansa*

1. On 17 February 2003 Lufthansa announced in Europe a third level increase in the FSC from €0.10/kg to €0.15/kg with effect from 3 March 2003. On 19 February 2003 Lufthansa announced in Singapore that its FSC would increase from €0.10/kg (SGD0.17/kg) to €0.15/kg (SGD0.28/kg), effective from 3 March 2003.

*SQ*

1. On 14 February 2003 SQ announced an increase in its FSC ex-Singapore with effect from 1 March 2003 as follows:
2. SGD0.25/kg in TC1, TC2 and TC3 other than SE Asia; and
3. SGD0.20/kg in TC3 SE Asia.

*Air NZ*

1. On 24 February 2003 Air NZ informed customers that it was increasing its FSC to SGD0.25/kg with effect from 1 March 2003. This was to apply in all areas.

*Qantas*

1. On or around 18 February 2003 Qantas decided to increase its FSC ex-Singapore to SGD0.25/kg. The available material does not suggest that it distinguished between different tariff conference areas.

*Thai Airways*

1. On 19 February 2003 Thai Airways announced its intention to increase its FSC with effect from 1 March 2003 to:
2. SGD0.25/kg in TC1, TC2 and TC3 except SE Asia; and
3. SGD0.20/kg in TC3 SE Asia.

*Japan Airlines*

1. On an unknown date Japan Airlines announced it would increase its FSC with effect from an unknown date to:
2. SGD0.25/kg in TC1, TC2 and TC3 except SE Asia; and
3. SGD0.20/kg in TC3 SE Asia.

#### b The internal decision making process of SQ

1. By early January 2003 the fuel index was approaching the third trigger level (165) which was €0.15/kg. There was a BAR CSC meeting held on 23 January 2003 chaired by SQ. Air NZ was represented by Mr Chew. Over 20 airlines were in attendance. According to the minutes, it was commented by members that the fuel index had increased ‘but they have not received any instruction from their head offices to increase the fuel surcharge’. An analysis of the prices of jet fuel was internally circulated within the SQ Cargo Freighter Planning section on 7 February 2003 and a senior manager recorded the view on the same day that it was ‘[t]ime to up the fuel surcharge I believe’. The following day an instruction was given to ‘check the numbers’ and to check the ‘Lufthansa website to see if it was going to increase the surcharge’. A full calculation was prepared by 10 February 2003 and this showed, apparently, that the index would lead to an increase in mid-February 2003. On the same day an internal decision was made to increase the surcharge to the next level in one week, at the same time as Lufthansa. The decision maker was Mr Raghavan and he made the decision at 9.42 am on 10 February 2003. Mr Raghavan was the Senior Vice President, Sales and Marketing Division Head Office. Unlike the first move to the second level, this decision was, therefore, made in SQ’s head office. His decision referred to only one increase in the FSC (to USD0.15/kg) and did not distinguish the position in SE Asia within TC3.
2. After that decision was made, the sales department at SQ became aware that ‘foreign carriers’ in Singapore had indicated that they would increase their surcharge too. This occurred on 14 February 2003. The same day SQ wrote to the members of the BAR CSC to inform them of SQ Singapore’s decision that it would implement the third level surcharge of SGD0.25 with effect from 1 March 2003. He informed them that a similar decision by Lufthansa and KLM was expected and asked members to let SQ Singapore know if they had ‘similar plans’. SQ made the announcement that evening. Importantly it announced an FSC out of Singapore of:
3. SGD0.25/kg to TC1, TC2 and TC3 except SE Asia; and
4. SGD0.20/kg to TC3 SE Asia.
5. Between 14 and 18 February 2003 a number of airlines (Air France, Nippon Cargo and Cargolux) advised the members of the BAR CSC that they would be implementing the surcharge of SGD0.25/kg with effect from 1 March 2003. I assume this was across TC1-TC3. Japan Airlines did not state an implementation date but said that it would implement an FSC of SGD025/kg to TC1 and TC2 and SGD0.20/kg to TC3 SE Asia. KLM indicated that it would keep members informed of its plans. As noted above, Lufthansa announced its FSC change in Europe on 17 February 2003 and in Singapore on 19 February 2003.

#### c The internal decision making process of Air NZ

1. Mr Chew informed Mr Gregg, his HQ superior, on 15 February 2003 that SQ had announced an increase in its FSC and that Air NZ would follow suit when this was verified. It appears that Mr Chew advised in his weekly report to head office that Air NZ would follow SQ’s actions in imposing the new FSC of SGD0.25/kg ‘besides SE Asia dest’. Air NZ informed its customers on 24 February 2003 that it would levy a new FSC of SGD0.25/kg from 1 March 2003. That announcement was, however, for SGD0.25/kg for all destinations out of Singapore. It did not impose SQ’s FSC of SGD0.20/kg to SE Asia. There is no direct evidence that Air NZ ever replied to SQ’s request of 14 February 2003 to let it know if it was intending to introduce a surcharge.
2. The Commission submitted that the Court should infer that Air NZ likely informed SQ that it was imposing an FSC and that this occurred somewhere between 14 February and 11 April 2003. The material said to support this inference was set out in footnote 151 of its submissions and was: the fact that the surcharge was imposed; the fact that Air NZ did respond to a similar request made by SQ in May 2003; and that Mr Chew advised internally at Air NZ that it would be reducing its surcharge with effect from 16 April 2003. I decline to draw the inference from that material. Air NZ did not inform SQ of its intentions.

#### d Analysis

1. Looked at in isolation these events do not suggest any arrangement or understanding between Air NZ and SQ. SQ may have been interested in what the larger carriers were doing but the evidence does not really support the idea that SQ and Air NZ had an understanding or arrangement with each other. SQ appears to have moved of its own motion for other reasons. Further, whilst SQ imposed an FSC of SGD0.20/kg in SE Asia, Air NZ imposed one of SGD0.25/kg.

#### 11.2.2.3 The Third Implementation Allegation

1. In March 2003 SQ had in place an FSC ex-Singapore of:
2. SGD0.25/kg to TC1-3 except TC3 SE Asia; and
3. SGD0.20/kg TC3 SE Asia.
4. On the other hand Air NZ had in place an FSC ex-Singapore of SGD0.25/kg across all areas.
5. The Commission’s Third Implementation Allegation concerns a price movement in April 2003 down to SGD0.17/kg. However, the Commission omits any reference to a price *increase* which occurred in March 2003. The table provided to the Court by the Commission referred to the Second Implementation at SGD0.25/kg (in February 2003) and the Third Implementation at SGD0.17/kg (in April 2003). This suggests a movement down from SGD0.25/kg to SGD0.17/kg. In fact, in March there was a price increase to SGD0.38/kg and, at least as far as SQ was concerned, the movement down was from that figure to SGD0.17/kg. Air NZ submitted that this was an important omission. When the price movements are traced it can be seen there is merit in Air NZ’s submission on this point. The FSC movements were as follows:

*Lufthansa*

1. On 10 March 2003 Lufthansa announced it would increase its FSC across its network with effect from 24 March 2003 from €0.15 to €0.20. This was equivalent to SGD0.38.
2. On 7 April 2003 Lufthansa announced it would decrease its FSC across its network with effect from 21 April 2003 from €0.20 to €0.15. This was equivalent to SGD0.28/kg. On 22 April 2003 it announced a decrease to €0.10 (approximately SGD0.19/kg) effective 6 May 2003.

*SQ*

1. On 13 March 2003 SQ announced that it would be increasing its FSC with effect from 19 March 2003 to:
2. SGD0.38/kg in TC1, TC2 and TC3 excluding SE Asia;
3. SGD0.25/kg in TC3 SE Asia.
4. On or around 9 April 2003 SQ announced that it would be decreasing its FSC ex-Singapore with effect from 16 April 2003 from SGD0.38/kg to SGD0.28/kg. I was not taken to direct documentary evidence of this decrease. An internal Air NZ email refers to it as having occurred. It is dated 11 April 2003 and says:

SQ is revising their fuel surcharge **again** from SGD0.38/kg to SGD0.17/kg effective from 16 April 03 to **all destinations now.**

Previously, SQ just revised their fuel surcharge from SGD0.38/kg to SGD0.28/kg (for North Asia only) on the 9th April 03 –

two days ago. SIN will follow the reduction to SGD0.17/kg.

[emphasis in the original]

1. I infer from this email that SQ had announced on 9 April 2003 an immediate decrease in TC3 North Asia. At this stage (9 April 2003) SQ was, therefore, charging three FSC’s ex-Singapore:
2. SGD0.38/kg to TC1 and TC2;
3. SGD0.28/kg to TC3 North Asia; and
4. SGD0.25/kg to TC3 SE Asia.
5. On 11 April 2003 SQ announced that all its FSC’s ex-Singapore would be decreased to SGD0.17/kg, i.e., TC1-TC3, with effect from 16 April 2003.
6. It was this final movement which the Commission referred to as the Third Implementation.

*Air NZ*

1. Air NZ did not follow SQ when it increased its FSC to SGD0.38/kg to TC1/2/3 (North Asia) and SGD0.25/kg to TC3 SE Asia and it did not follow SQ in its North Asian reduction.
2. However, on 14 April 2003, Air NZ reduced its FSC across all areas ex-Singapore from SGD0.25 to SGD0.17. This was with effect from 16 April 2003.

*Qantas*

1. On 21 March 2003 Qantas announced it would increase its FSC ex-Singapore from SGD0.25/kg to SGD0.38/kg, effective from 7 April 2003. It does not appear to have distinguished between the various tariff conference areas.
2. On 11 April 2003 Qantas announced it would decrease its FSC ex-Singapore to SGD0.25/kg with effect from 22 April 2003. This appears to have been across all areas.
3. On 28 April 2003 Qantas announced that it would decrease its FSC ex-Singapore from SGD0.25/kg to SGD0.17/kg with effect from 1 May 2003. Again this appears to have been across all areas.

*Thai Airways*

1. On 18 March 2003 Thai Airways announced an increase to its FSC ex-Singapore with effect from 1 April 2003 as follows:
2. SGD0.38/kg to TC1, TC2 and TC3 North Asia; and
3. SGD0.20/kg to TC3 SE Asia (which was unchanged from the 1 March 2003 rate).
4. On 17 June 2003 Thai Airways announced a decrease in its FSC to 0.17/kg with effect 1 July 2003. I assume this occurred in TC1-3.

*Cathay, Japan Airlines, China Airlines and Eva Air – upward movement to SGC0.38*

1. Because the Commission’s submission ignored the movement in March and April I was not provided with any pricing information by it for these airlines for this period. It is likely that similar increases by these airlines would have occurred given what SQ and Lufthansa had done but I am unable to say what the actual level of any particular FSC would have been in any particular conference area or when it would have taken effect.

*Cathay Pacific*

1. On an unknown date Cathay announced it would decrease its FSC with effect 1 May 2003 to:
2. SGD0.17/kg to TC1 & TC2; and
3. SGD0.10/kg to TC3.

*Japan Airlines*

1. It is known that Japan Airlines decreased its FSC to:
2. SGD0.17/kg to TC1 & TC2; and
3. SGD0.10/kg toTC3
4. However, it is not known when this was announced or when it took effect.

*China Airlines*

1. With effect from 21 April 2003 China Airlines decreased its FSC to SGD0.17/kg apparently across all three areas.

*Eva Air*

1. With effect from 16 April 2003 Eva Air decreased its FSC to SGD0.17/kg. I assume this occurred in TC1-3.

#### a SQ’s internal decision making process (increase to SGD0.38)

1. On 7 March 2003 SQ was monitoring the price of fuel. An internal email suggested that the previous increase to SGD0.25/kg (SGD0.20/kg TC3 SE Asia) (which had taken effect only six days before on 1 March 2003) was ‘not enough’. The next day an internal SQ direction was given to update the figures and to check where the Lufthansa Index was up to. On 10 March 2003 SQ was internally reporting that the Lufthansa Index had passed through the fourth trigger point of 192 on 28 February 2003 and if it remained there for two weeks the index would indicate a move to a higher level.
2. This was thought to mean that the trigger would be activated within the next few days. It was on this day, as has been noted, that Lufthansa announced its increase.
3. The next day (11 March 2003) a senior manager advised Mr Foo (the Regional Vice President for South East Asian and Singapore Sales) and others that Lufthansa had just announced its increase. The manager had spoken with ‘SVPSM’ (which I assume means Senior Vice President for Sales and Marketing) and reported that SQ would be increasing its FSC to SGD0.38/kg (and SGD0.30/kg for TC3 SE Asia) on 19 March 2003. Before doing so SQ would be contacting ‘major carriers’ and if ‘nothing adverse’ emerged SQ would announce its increase on 12 March 2003. On the following day (12 March 2003) SQ informed at least Thai Airways of its proposal. On the same day there appears to have been internal dissention that the rate increase might be too steep in relation to TC3 SE Asia.
4. Differences were noted between the position of Lufthansa and SQ. In particular, SQ was considering an increase to SGD0.25/kg in TC3 SE Asia by this stage as compared with Lufthansa’s announced increase to €0.20/kg (SGD0.38/kg). By 12 March 2003 SQ had learned that Cargolux was going to increase to SGD0.38/kg and that Air France, Scandinavian Airlines, Korean Air, Emirates and Cathay were likely to follow suit. Internal approval was sought to move to SGD0.25/kg in SE Asia. On or around the afternoon of 13 March 2003 SQ decided to increase its FSC to SGD0.25/kg in SE Asia, but to SGD0.38/kg (US0.25/kg) in all other areas. SQ announced this decision on 13 March 2003 effective 19 March 2003.

#### b Air NZ’s internal decision making process (non-increase)

1. On 5 March 2003 Air NZ became aware that SQ had significantly dropped its cargo rates (that is, its actual cargo rates, not FSCs) on the Auckland/Christchurch route. Mr Chew recommended reducing Air NZ’s cargo rates in order to remain competitive. By 12 March 2003 Mr Chew became aware that SQ was thinking of increasing its FSC to SGD0.38/kg. By 13 March 2003 SQ had announced that it was going to increase its FSC in SE Asia to SGD0.25/kg but to SGD0.38/kg in all other areas. At this point Air NZ was charging an FSC of SGD0.25/kg across the board ex-Singapore. Air NZ now opted to keep its rates across the board steady at SGD0.25/kg even whilst SQ increased to SGD0.38/kg in TC1 and TC2. Mr Chew’s monthly report for March 2003 included this statement:

some carriers have revised the fuel surcharge from SGD0.25/kg to SGD0.38/kg on the late Mar 03. NZ did not follow the increase for the surcharge due to SQ has reduced the rates to NZL (SGD0.25/kg for every break point). We are maintaining the fuel surcharge on SGD0.25/kg so as to narrow the gap of our rates difference without upsetting our selling rates (try to maintain our yield). NZ still sell higher than SQ to NZL.

#### c Analysis

1. This increase by SQ and non-increase by Air NZ was omitted by the Commission from its case. It is inconsistent with the Overarching Understanding. It shows two things:
2. SQ was largely indifferent to the position of entities, such as Air NZ, who were not major carriers; and
3. Air NZ was quite happy not to impose the FSC at all in response to a competitive manoeuvre by SQ.
4. It is also relevant to note, as Air NZ did, that there was no evidence of any complaint by SQ about Air NZ’s failure to implement the FSC in March or any other form of retribution for breaching the alleged Overarching Understanding.

#### d SQ’s internal decision making process on decreases

1. From 19 March 2003, outside of SE Asia SQ’s FSC was SGD0.38/kg (or the local currency equivalent). On or around 9 April 2003 SQ decided to reduce its FSC in those areas to SGD0.28/kg. Two days later, on 11 April 2003, SQ announced a reduction across all areas to SGD0.17/kg (or the local currency). A head office email of 8 April 2003 read:

Based on our index our fuel surcharge has decreased but to USc 20.43. At the last round our index actually increased to USc 25 but we decided to increase only to the USc 20 level. We would like regions to hold on to the rates as far as possible as the index is reflective of the cost burden that we actually have to bear but we also realise that market pressures will dictate. Please note that some stations have not raised the level up to the USc20 level yet. Pse review for the markets were necessary and update us accordingly.

LH has announced that they will decrease the fuel surcharge to USc15 eff 21 Apr and KLM appears to have followed suit. There are variations between the method adopted by LH and ourselves hence the differences.

Lean – Germany, Netherlands and Belgium would be directly affected by LH move and we leave it to you to react accordingly.

Chong Beng – SWP has incorporated both the latest round of fuel surcharge and war surcharge in the rates eff 1 Apr but varied based on destinations. The timing may be right to look at what surcharges can still be retain in the nett rates based on our market position.

#### e Air NZ’s internal decision making process (SGD0.17)

1. At this time Air NZ was charging an FSC ex-Singapore of SGD0.25/kg having declined to increase to SGD0.38/kg in that region. When Mr Chew ascertained that SQ was reducing to SGD0.17/kg in Asia he advised on 14 April 2003 that Air NZ would follow the decision.

#### f Analysis

1. SQ circulated a survey of FSCs on 2 May 2003 and circulated the results of that survey on 7 May 2003.
2. Air NZ submits that Air NZ did not follow SQ’s increase from SGD0.25/kg to SGD0.38/kg. This is true outside of SE Asia. Within SE Asia both had an FSC of SGD0.25/kg. Thereafter when SQ reduced to SGD0.17/kg across the board, Air NZ followed suit. The alleged parallel movement is not, therefore, perfect and contains a significant instance of undercutting by Air NZ in TC1, 2 and 3 (North Asia).
3. Further, it is clear that there was intense competition between Air NZ and Singapore on the Auckland route in March-April 2003. It may be difficult to think that Air NZ was, on the one hand, fending off an aggressive drop in rates by SQ on NZ routes and at the same time observing the Overarching Understanding. That observation is consistent too with:
4. SQ’s concerns which appear to have been about Lufthansa and other carriers; and
5. the lack of any substantive communication between SQ and Air NZ outside the survey process which took place some weeks after the price movement.
6. My impression of this month is that it was a time of intense competition. There appears to me to be a lack of any outward signs of co-operative behaviour.

#### 11.2.2.4 The Fourth Implementation Allegation

#### a The FSCs which were imposed

1. By December 2003 the price of jet fuel was increasing again. The following FSCs were announced.

*Lufthansa*

1. On 4 December 2003 Lufthansa announced in Europe an increase in its FSC to €0.15/kg with effect from 18 December 2003. This appears to have been across the entire network. It announced the FSC increase in Singapore on 5 December 2003 at the local equivalent of SGD0.31/kg, effective from 18 December 2003.

*SQ*

1. On 9 December 2003 SQ announced that with effect from 23 December 2003 it would increase its FSC to:
2. SGD0.25/kg to TC1/2;
3. SGD0.25/kg to TC3 North Asia; and
4. SGD0.20/kg to TC3 South Asia.

*Air NZ*

1. On 15 December 2003 Air NZ announced that it would increase its FSCs with effect from 23 December 2003 to:
2. SGD0.25/kg to TC1/2; and
3. SGD0.20/kg to TC3.

*Thai Airways*

1. On 16 December 2003 Thai Airways announced that it would increase its FSCs with effect from 1 January 2004 to:
2. SGD0.25/kg to TC1, TC2 and TC3 North Asia; and
3. SGD0.20/kg to TC3 (excluding North Asia).

*Cathay Pacific*

1. On an unknown date Cathay Pacific announced it would increase its FSC with effect from 1 January 2004 to:
2. SGD0.25/kg in TC1/2; and
3. SGD0.15/kg in TC3.

*Japan Airlines*

1. On an unknown date Japan Airlines announced it would increase its FSC with effect from 1 January 2004 to:
2. SGD0.25/kg to TC1/2 and TC3 North Asia; and
3. SGD0.20/kg TC3 (other than North Asia).

*China Airlines*

1. On an unknown date but with effect from 23 December 2003 China Airlines increased its FSC to SGD0.25/kg. I assume this was across TC1-3.

*Eva Air*

1. On an unknown date but with effect from 23 December 2003 Eva Air increased its FSC to:
2. SGD0.25/kg in TC1/2 and North Asia; and
3. SGD0.20/kg in TC3 (excluding North Asia).

*Qantas*

1. On an unknown date but with effect from 23 December 2003, Qantas increased its FSC to:
2. SGD0.25/kg in TC1/2 and TC3 North Asia and Australia; and
3. SGD0.20/kg in TC3 excluding North Asia.

#### b The decision making process within SQ and Air NZ

1. In its written submissions the Commission placed some particular emphasis on the events surrounding this next move in the Lufthansa Index. Following its decrease in April 2003 to SGD0.17/kg the price of kerosene had entered a period of relative stability. However, by September 2003 it was beginning to trend up again. By the beginning of December 2003 it was widely anticipated in many quarters that the Lufthansa Index would soon have remained north of 165 for more than two weeks (which would trigger an increase). On 4 December 2003 Lufthansa evidently came to the view that this was, in fact, the case for on that day it announced, in Frankfurt, that with effect from 18 December 2003 it would be increasing its FSC to €0.15/kg.
2. This announcement attracted attention within SQ. The manager of distributions and industry affairs immediately suggested to a raft of SQ staff, including Mr Raghavan, that SQ should implement the same increase effective 18 December 2003. Mr Raghavan was not convinced that Lufthansa had actually made the decision to increase the FSC. In an email he said:

Hold yr horses. Do not announce it yet.

Lean: Plse cfm if LH Board approved it? I spoke with Erwin yesterday morning (FRA time) and he said paper was with the Board but no decision yet. Plse also adv status of AF, KL, BA and CV.

Other copy addressees: plse adv status in yr region.

1. Reports then filtered back about the actions of other carriers. American Airlines had announced an increase the previous day; JAL was contemplating an increase from 1 February 2004. As at 5 December 2003, SQ was not aware of immediate plans in Hong Kong, Taiwan or Korea. Nippon Cargo was supportive of an increase. Importantly, there is no trace of any discussion with Air NZ.
2. On 5 December 2003 Mr Tan at SQ wrote a note internally saying it was time ‘to bite the bullet’ on an FSC, asking that the position of other carriers be ascertained.
3. On 5 December 2003 Lufthansa announced an increase in Singapore of the FSC to €0.15/kg (SGD0.31/kg) effective 18 December 2003. It is not clear how the various inquiries which SQ made coalesced into a decision to increase the FSC. However, SQ did take the step of calling an urgently convened BAR CSC meeting on 8 December 2003. Its purpose was ‘to discuss the new developments in the jet fuel price’. The meeting was called on the morning of 8 December 2003 and took place the same afternoon. Mr Chew attended the meeting for Air NZ and about 15 other airlines were represented. The minutes read:

1.1 Fuel Surcharge

1.1.1 The extraordinary meeting was convened to discuss and seek feedback from BAR carriers on their plans for fuel surcharge following sustained increase in fuel prices, and announcements in other markets of increases in fuel surcharge.

1.1.2 Chairman informed the meeting that SQ plans to increase its fuel surcharge to SGD0.25 per kg and SGD0.20 per kg to IATA Areas TC1/2 and TC3 respectively from 23 December 2003. Although it will not cover the cost increase, the lower fuel surcharge for TC3 is a compromise to avoid putting too much burden on the customers, as the freight rates in this area are relatively lower.

1.1.3 BAR discussed whether the North Asian markets will be able to absorb the full quantum of the necessary fuel surcharge as these are stronger markets. Following the discussions, SQ, JL and CI agreed to apply the full surcharge of SGD0.25 per kg for North Asia.

1.1.4 PR requested for a survey to be carried out amongst members to seek their implementation dates and quantum of their fuel surcharge. Secretary BAR will disseminate the information to all carriers once the survey is completed.

1. From this I conclude that SQ had made a decision to implement an FSC of SGD0.25/kg out of Singapore *prior* to the meeting. The Commission placed reliance upon the word ‘compromise’ as signalling the presence of agreement between the airlines. I do not accept that reading of the minutes. The compromise referred to is not a compromise between airlines but rather a compromise between the desire to increase the FSC by the full amount which Lufthansa had adopted (SGD0.31/kg) and the traditionally lower cargo rates in SE Asia. At the end of the discussion Philippine Airways requested a survey of FSC levels.
2. The next day, on 9 December 2003, SQ announced it would increase its FSC in Singapore to SGD0.25/kg for areas TC1, TC2 and TC3 North Asia. On the same day Mr Chew reported to Mr Gregg:

SQ will release a letter on these few days of indicating the increase in fuel surcharge effective from the 23rd Dec 03.

NZ SIN will follow the increase but have to take note on the responses from EK and QF on how much they are increasing on our sectors. Our current FSC is SGD0.17/kg.

Expect SQ on their new revision on FSC:

SGD 0.20/kg for area 3.

SGD 0.25/kg for area 1 & 2 (plus N.Asia , Japan and Korea)

LH has just released the letter in SIN – SGD 0.31/kg effective on 18th Dec 03.

Will keep you all update on this development.

1. On 15 December 2003 Air NZ informed its agents of the increase.

#### c Analysis

1. On this occasion Air NZ moved identically with SQ, other than having two rates within TC3. Although the airlines met on the afternoon of 8 December 2003, the available documents indicate SQ had already made its decision prior to the meeting. I detect no interest on SQ’s part in anything Air NZ was doing. The documents generated within Air NZ suggest a policy of following SQ in Singapore.

#### 11.2.2.5 The Fifth Implementation Allegation

#### a The FSCs which were imposed

*Lufthansa*

1. On 26 April 2004 Lufthansa announced an increase in its FSC in Europe from €0.15/kg to €0.20/kg with effect from 10 May 2004. I infer this was in TC1, TC2 and TC3.
2. On 27 April 2004 Lufthansa announced an increase in its FSC in Singapore from €0.15/kg to €0.20/kg which was said to be SGD0.40/kg. This took place with effect from 10 May 2004.

*SQ*

1. On 28 April 2004 SQ announced that it would increase its FSC with effect from 12 May 2004 as follows:
2. SGD0.35/kg actual weight in TC1, TC2 and TC3 North Asia; and
3. no change in the balance of TC3, i.e., SGD0.20/kg.

*Emirates*

1. On 30 April 2004 Emirates moved its FSC with effect from 16 May 2004 to:
2. SGD0.35/kg in TC1 and TC2; and
3. SGD0.20/kg in TC3.

*Qantas*

1. By 3 May 2004 Qantas had decided to implement an FSC increase with effect from 12 May 2004 as follows:
   * + 1. SGD0.35/kg actual weight in TC1, TC2 including North Asia;
       2. SGD0.20/kg in TC3 except the South West Pacific; and
       3. SGD0.25/kg in TC3 South West Pacific.

*Thai Airways*

1. On 4 May 2004 Thai Airways announced an FSC increase with effect from 16 May 2004 as follows:
2. SGD0.35/kg actual weight in TC1, TC2 and TC3 North Asia; and
3. SGD0.20/kg actual weight in TC3 (excluding North Asia).

*Air New Zealand*

1. By 10 May 2004 Air NZ had decided to increase its FSC with effect from 16 May 2004 to:
2. SGD0.35/kg in TC1 and TC2; and
3. SGD0.20/kg (no change) in TC3.

*Cathay Pacific*

1. On an unknown date with effect from an unknown date Cathay Pacific announced it would increase its FSC as follows:
2. SGD0.35/kg in TC1 and TC2; and
3. SGD0.20/kg in TC3.

*China Airlines*

1. On an unknown date with effect from an unknown date China Airlines decided to increase its FSC to:
2. SGD0.35/kg in TC1, TC2 and TC3 North Asia; and
3. SGD0.20/kg to TC3 excluding North Asia.

*Eva Air*

1. On an unknown date with effect from 12 May 2004 Eva Air increased its FSC to:
2. SGD0.35/kg TC1, TC2 and TC3 North Asia; and
3. SGD0.20/kg in TC3 excluding North Asia.

*Japan Airlines*

1. With effect from 16 May 2004 Japan Airlines increased its FSC to:
2. SGD0.35/kg in TC1, TC2 and TC3 (North Asia); and
3. SGD0.20/kg in TC3 (excluding North Asia).

#### b SQ’s decision-making process

1. The earliest trace of thinking about an increase in the FSC appears to have occurred on 27 January 2004 at a meeting of the LIDC-C on that day. At that meeting the Nippon Airlines representative asked whether SQ had any plans to increase the FSC given the state of the index. The minutes record:

KZ asked if SQ plan to increase its fuel surcharge as the fuel index has risen. Chairman said that he has not heard of any new developments from LH or any instructions for SQ head office to raise the fuel surcharge.

1. Air NZ submits this is evidence that SQ was most interested in the position of Lufthansa. I accept this is evidence of that.
2. On 22 March 2004 internal SQ communications reveal that SQ was contemplating calling a meeting of the BAR CSC ‘to gauge what the other operators are likely to do’. Air NZ submits this is inconsistent with the understanding alleged by the Commission. I do not accept this submission. The Overarching Understanding included a provision that the parties might notify their intentions at meetings.
3. Subsequently, on 20 April 2004, a BAR CSC meeting was called for 22 April 2004. Lufthansa replied the same day asking SQ whether there was ‘any intention of SQ to raise fuel surcharges’. The meeting was then held on 22 April 2004 and Mr Chew attended for Air NZ. The minutes record:

Fuel Surcharges

Queries were made with regards to the above given the sustained increases to jet fuel in recent months. Chairman advised the meeting that SQ has yet to decide on the impetus for any increase to the existing fuel surcharge structure but will keep all informed should there be a revision.

1. On 26 April 2004, SQ inquired of Lufthansa whether it was planning an FSC increase to €0.20/kg in view of the fact that the index trigger point appeared to be a week away. The same day Lufthansa replied that the trigger point had been met and that Lufthansa would announce an increase to €0.20/kg with effect from 10 May 2004. It also asked SQ whether it would be following suit. That question was in an email which read:

Dear Kevin,

we had a warning and preinfo for our staff there.

Are you planning to follow accordingly?

And another question, should wwe stay in touch for the issues revolving around surcharges?

Kind regards

1. A reply was received from SQ which read:

Dear Axel,

Internally, we’re in the process of review.

Yes. It’d be a great idea to stay in touch on such issues.

Until then..

Have a great week.

1. This email exchange suggests a direct interest between Lufthansa and SQ about each other’s FSCs.
2. The following day Lufthansa announced its increase. SQ too decided on that day (27 April 2004) the amount of its increase and this was announced the following day, 28 April 2004.
3. There was an extraordinary meeting of the BAR CSC on 28 April 2004. SQ informed the meeting of the increase it had decided upon the day before following its discussions with Lufthansa. Air NZ was not in attendance (there appears to have been a difficulty in sending notice of the meeting to some of the airlines). Lufthansa requested that a survey be conducted of the airlines’ FSCs and it was decided that the results of this would be distributed amongst them. This survey was sent on 10 May 2004 along with the formal minutes of the meeting.
4. The results of the survey were received back by 20 May 2004. SQ distributed the results to the member airlines noting that the feedback thus far had been ‘less than satisfactory’.
5. About these events I would conclude that they suggest:
6. SQ exchanged no pricing information with Air NZ prior to making its decision. SQ’s predominant concern was with what Lufthansa was going to do; and
7. although a survey was sent it was poorly responded to and came well after the event.

#### c Air NZ’s decision making process

1. As early as 29 January 2004 Mr Chew was aware that SQ was monitoring the possibility of increasing its FSC. On the day that the BAR CSC meeting was held at which SQ announced its FSC increases (28 April 2004) Mr Chew sent an email to his superiors telling them that ‘SQ Feedback that it will not increased Fuel surcharge at this moment due stronger SIN dollar against US dollar.’ This email was sent at 13:49, an hour or so before the meeting at which SQ then took an entirely different approach.
2. Mr Chew did not attend that meeting but received an email containing informal minutes later the same day. Mr Chew may or may not have read those minutes. By 29 April 2004, however, he was aware of the SQ increase because his assistant received news of it from a freight forwarder.
3. It is unclear how Air NZ made its FSC decision thereafter although it is clear from internal emails that the decision had been made by at least 12 May 2004. This is so because Mr Chew reported to Mr Gregg on 12 May 2004 that Air NZ had followed SQ. On 20 May 2004 Mr Chew also provided to the BAR CSC the information sought in the survey (earlier information apparently provided by Air NZ was incorrect).
4. From this one might conclude that Air NZ was quite unaware of what SQ was going to do until after SQ had done it. Of course, the Commission does not allege co-ordination of that kind. Its argument is that Air NZ and SQ understood that Air NZ would follow SQ’s lead after a respectable period of time. My impression is to the contrary. Air NZ appears to have been acting in a reactive fashion to SQ and, as I have said, SQ’s co-ordinations seem to have been with Lufthansa with little or no interest in other airlines including Air NZ.

#### d Analysis

1. By themselves, the internal decision making processes of the airlines in relation to the Fifth Implementation do not provide compelling support for the understanding alleged.

#### 11.2.2.6 The Sixth Implementation Allegation

#### a The FSCs which were imposed

1. By early September 2004 the sixth level of the Lufthansa Index (240) was being approached. The airlines responded as follows:

*Lufthansa*

1. On 20 September 2004 Lufthansa in Europe announced an increase from €0.25/kg to €0.30/kg (SGD0.62/kg) with effect from 4 October 2004. On 21 September 2004 Lufthansa in Singapore announced an increase in FSC from €0.25/kg to €0.30/kg (SGD0.62/kg) with effect from 4 October 2004.

*SQ*

1. The day after Lufthansa’s initial announcement SQ announced on 21 September 2004 that it would be increasing the FSC in Europe to €0.30/kg (from €0.25/kg) with effect from 1 October 2004 and in the Americas to USD$0.30/kg with effect from 16 October 2004.
2. No announcement was made by SQ in Singapore until 27 September 2004 when it announced an FSC increase with effect from 11 October 2004:
3. to SGD0.50/kg TC1, TC2 and TC3 North Asia; and
4. to SGD0.25/kg TC3 excluding North Asia.

*Emirates*

1. Emirates announced an FSC increase with effect from 4 October 2004 to:
2. SGD0.51/kg TC1 and TC2; and
3. SGD0.30/kg TC3.

*Air NZ*

1. On 1 October 2004 Air NZ announced an FSC increase with effect from 16 October 2004 to:
2. SGD0.50/kg TC1 and TC2; and
3. SGD0.25/kg TC3.

*Thai Airways*

1. On 4 October 2004 Thai Airways announced an FSC increase with effect from 16 October 2004 to:
2. SGD0.50/kg for TC1, TC2 and TC3 North Asia; and
3. SGD0.25/kg for TC3 excluding North Asia.

*China Airlines*

1. China Airlines imposed an FSC increase with effect from 11 October 2004 to:
2. SGD0.50/kg for TC1, TC2 and TC3 North Asia; and
3. SGD0.25/kg for TC3 excluding North Asia.

*Japan Airlines*

1. Japan Airlines increased its FSC with effect from an unknown date in October 2004 to:
2. SGD0.50/kg for TC1 and TC2;
3. SGD0.45/kg for TC3 North Asia; and
4. SGD0.25/kg for TC3 excluding North Asia.

*Cathay Pacific*

1. Cathay Pacific increased its FSC with effect from 11 October 2004 to:
2. SGD0.50/kg for TC1 and TC2; and
3. SGD0.20/kg for TC3.

#### b SQ’s internal decision making process

1. Lufthansa had announced its increase to €0.30/kg on 20 September 2004. This brought a rapid response from SQ in the Americas and in Europe. The following day SQ announced an increase in FSC in Europe to €0.30/kg and also to USD0.30/kg in the Americas. Whereas Lufthansa’s increase took effect on 4 October 2004 SQ’s European increase was to come into effect a few days before on 1 October 2004 and 12 days later in the Americas on 16 October 2004.
2. In Singapore itself affairs were a little more complex. By 22 September 2004 SQ’s Singapore position remained finally undetermined. The day before, 21 September 2004, an internal email from the Assistant Manager Industry Affairs had instructed all ‘stations’ to increase to €0.30/kg ‘in line with your markets’. This appears to have been met with some resistance. An internal email in the Singapore station queried whether the surcharge could be increased and SQ’s staff in Melbourne and Adelaide thought that any increase in the FSC would be offset by necessary reductions in cargo rates. The email read:

1. Understand the fuel cost is increasing and agree to increase. However, what had happened previously in MEL was that freight rate dropped even we increase fuel rate to compensate for market condition. --- net effect, rates in the market went down because of excess capacity, agent’s in better bargaining situation. Say, we were previously carrying cargo at 0.65/kg, we increased to 0.70/kg b’coz of FSC; if competitor carrying at 0.60/kg and remained unchanged, we maintained cargo by dropping to 0.60-0.55/kg. So, nett nett, instead of going up $0.05/kg, we instead reduced by $0.10-0.15.

In addition, I pulled some examples, our ongoing rate in MEL has dropped approx 30% in some instances since last Nov. Hence, market conditions will dictate our freight rate, in MEL it might result in larger yield dilution to compensate for FSC increase.

2. Agents has associated SQ as the carrier that has one-stop (all in rate).

1. On its face this may appear to be inimical to the Commission’s case suggesting, as it does, an absence of co-ordination or any economic consequence flowing from the imposition of an FSC. It is important to keep in mind, however, that this related to the FSC ex-Australia rather than ex-Singapore. Nevertheless this email, and the email which provoked it (‘Can we put up the surcharge? If not why’) suggest, especially in Asia, a concern as to whether the market would bear a further increase and this is not necessarily on all fours with the elaborate terms of the understanding alleged by the Commission.
2. In any event, by 24 September 2004 SQ had arrived at a view internally that it would be imposing an FSC of SGD0.25/kg in TC3 apart from North Asia where it would impose SGD0.50/kg. On that day SQ convened an extraordinary meeting of the BAR CSC to discuss FSCs in light of the increase in the price of jet fuel. This meeting was held in the afternoon. The minutes record:

1.1 Fuel Surcharge

* + 1. The extraordinary meeting was convened to discuss and seek feedbacks from BAR Cargo Sub-committee carriers on their plans for the fuel surcharge in view of the soaring fuel price and announcements of fuel surcharge increases in other markets.
    2. Acting Chairman informed the meeting that SQ plans to increase its fuel surcharge of SGD0.15 cents per kg for shipments to IATA Areas TC1/TC2/North Asia, and SGD0.5 cents to SGD 0.25 per kg for shipments to IATA Area TC3 (excluding North Asia) from 11 October 2004.
    3. BAR members discussed on whether North Asia should be treated on part with IATA Areas TC1 and TC2 as the demand and the airfreight rates to North Asia may not be strong enough to absorb the fuel surcharge at the same quantum as that for IATA Areas TC1 and TC2.
    4. Some BAR members showed their concerns on the increase in the fuel surcharge for shipments to IATA Area TC3 (excluding North Asia) as it is already difficult for the market to afford the airfreight rates with the current fuel surcharge. As such, some members proposed that for TC3 including North Asia, the revised fuel surcharge should be at SGD 0.35 per kg while for TC1 and TC2, it be at SGD 0.50 per kg.
    5. CX mentioned that the revised fuel surcharge to IATA Area TC3 (including North Asia) should be about SGD 0.28 per kg.
    6. JL informed the meeting that the Japanese government had approved the fuel surcharge to be no less than SGD 0.45 per kg.
    7. Based on the feedbacks from the meeting, SQ will review its fuel surcharge adjustments.
    8. The planned fuel surcharge adjustments of various BAR carriers are consolidated in Annex 1.

1. I should say that Air NZ was represented at this meeting by a more junior employee, Ms Angeline Yap, rather than Mr Chew. The attached Annex 1 to the minutes (which I have not set out) records only ‘N.A’ for Air NZ.
2. It is tolerably clear from paragraph 1.1.2 that SQ had reached a reasonably firm view as to what it was going to charge but paragraph 1.1.7 suggests that this view was not entirely final. Most of the uncertainty appears to have been related to the position of TC3 and particularly North Asia. There were questions as to whether it was really sensible to include North Asia in the same price basket as TC1 and TC2 and whether the airfreight rate situation in SE Asia was not perhaps a little too tight to bear a further increase in the FSC.
3. It is, I think, reasonably clear that SQ did receive some information at this meeting about the future pricing intentions of several airlines in relation to FSCs. This is borne out in the attached annexure to the minutes. The annexure does not, however, reveal any such sharing of information by Air NZ.
4. On 27 September 2004, SQ announced an increase in its FSC with effect from 11 October 2004 to SGD0.50/kg TC1, TC2 and TC3 North Asia and SGD0.25/kg in TC3 excluding North Asia. In an email sent shortly before that announcement SQ informed the other airlines of its intentions and asked that those airlines who had not informed it of their FSC increases to do so.

#### c Air NZ’s internal decision making process

1. Mr Chew was not present at the extraordinary BAR CSC meeting held on 24 September 2004. As I have said, Air NZ was represented at that meeting by a more junior employee, Ms Yap. The survey conducted at the meeting does not appear to have obtained any information about Air NZ’s FSC intentions. SQ announced its position on 27 September 2004. Leading up to that time there is no evidence of any communication between Air NZ and SQ about FSCs apart from Ms Yap’s attendance at the meeting. On the other hand, two days after SQ’s announcement Mr Chew reported to Air NZ HQ that SQ would implement an FSC of SGD0.25/kg in TC3 and SGD0.50/kg in TC1/2. Mr Chew told HQ that Air NZ was ‘following the national carrier’. Thereafter, it did so.

#### d Analysis

1. The material suggests that SQ arrived at its view of the appropriate FSC without knowledge of what Air NZ was going to do. On the other hand, Air NZ appears to have followed SQ. By itself, the Sixth Implementation does not demonstrate the existence of the understanding or arrangement alleged by the Commission.

#### 11.2.2.7 The Seventh Implementation Allegation

#### a The FSCs which were imposed

1. The nominal price of jet fuel now approached a 20 year high in October 2004 and the Lufthansa Index reached Level 7 at which an FSC of €0.35/kg was indicated. The following FSCs were imposed:

*Lufthansa*

1. On 11 October 2004 Lufthansa announced in Frankfurt that it would be increasing its FSC to €0.35/kg with effect from 25 October 2004. It made a similar announcement the next day in Singapore, increasing its FSC ex-Singapore to SGD0.73/kg with effect from 25 October 2004.

*SQ*

1. On 21 October 2004 announced an increase in its FSC in Singapore to:
2. SGD0.60/kg in TC1 and TC2;
3. SGD0.50/kg in TC3 North Asia; and
4. SGD0.30/kg in TC3 excluding North Asia.

This was with effect from 5 November 2004.

*Air NZ*

1. Air NZ did *not* implement the seventh level of the Lufthansa Index.

*Thai Airways*

1. On 2 November 2004 Thai Airways announced an increase in its FSC with effect from 16 November 2004 to:
2. SGD0.60/kg in TC1 and TC2;
3. SGD0.50/kg in TC3 North Asia; and
4. SGD0.30/kg in TC3 excluding North Asia.

*Japan Airlines*

1. Japan Airlines did not implement the seventh level index increase.

*China Airlines*

1. China Airlines announced on an unknown date an increase in its FSC with effect from 5 November 2004 as follows:
2. SGD0.60/kg for TC1 and TC2;
3. SGD0.50/kg for TC3 North Asia; and
4. SGD0.30/kg for TC3 excluding North Asia.

#### b SQ’s internal decision making process

1. SQ in Europe had become aware of Lufthansa’s increase in Europe on 11 October 2004. It seems that despite responding rapidly in Europe (on 12 October 2004) a final decision was not made in Singapore until 20 October 2004. On that day the BAR CSC met and SQ informed the meeting it would be increasing its FSC to SGD0.60/kg for TC1 and TC2 and SGD0.30/kg for TC3 excluding North Asia (the rate in TC3 North Asia remained unchanged at SGD0.50/kg). Although discussion then took place at the meeting it does not seem to have been material to SQ’s decision which had already been made. The decision was announced to the market the following day.

#### c Air NZ’s decision making process

1. Mr Chew attended the meeting of the BAR CSC held on 20 October 2004. However, whilst Mr Chew reported to Mr Gregg what he understood SQ was going to do, he gave evidence that no increase was ever imposed by Air NZ. There are no documents which suggest Air NZ ever did implement such an increase. I deal with Mr Chew’s evidence in more detail later. For present purposes I accept his evidence which is consistent with the absence of any document suggesting that an increase took place.

#### d Analysis

1. SQ had made its decision before the BAR CSC meeting. Air NZ did not implement the FSC. This is material tending against the Commission’s case.

#### 11.2.2.8 The Eighth Implementation Allegation

#### a The FSCs which were imposed

1. During December 2004 the price of fuel dropped and this prompted a number of airlines to reduce their FSCs.

*Lufthansa*

1. On 20 December 2004 Lufthansa in Europe announced a reduction in its FSC effective 3 January 2005 from €0.35/kg to €0.30/kg. On 21 December 2004 Lufthansa in Singapore announced a reduction in its FSC to SGD0.66/kg, also effective from 3 January 2005.

*SQ*

1. On 21 December 2004 SQ decided internally that it would reduce its FSC in Singapore to €0.30/kg (SGD0.66/kg). This notification did not distinguish the various tariff conference areas. On 22 December 2004, however, SQ announced that it would reduce its FSCs in Singapore as follows:
2. to SGD0.50/kg in TC1 and TC2;
3. to SGD0.40/kg in TC3 North Asia; and
4. to SGD0.25/kg in TC3 excluding North Asia.
5. This was to be effective 3 January 2005.

*Air NZ*

1. Air NZ had not increased its FSC in November 2004 and it did not move it this time either.

*Thai Airways*

1. On 3 January 2005 Thai Airways announced it would decrease its FSC with effect from 16 January 2005 to:
2. SGD0.50/kg in TC1 and TC2;
3. SGD0.40/kg in TC3 North Asia; and
4. SGD0.25/kg in TC3 excluding North Asia.

*Japan Airlines*

1. Japan Airlines did not alter its FSC.

*Qantas*

1. Effective from 16 January 2005 Qantas reduced its FSC ex-Singapore to:
2. SGD0.50/kg in TC1, TC2 and TC3 North Asia; and
3. SGD0.25/kg in TC3 South West Pacific and Denpasar.

#### b SQ’s internal decision making process

1. SQ was informed of Lufthansa’s move in Europe on the day it was announced and followed in Singapore and Europe the next day. There is no evidence that it consulted any other airline, although some internal Qantas minutes indicate that a meeting was scheduled between SQ and Qantas on 22 December 2004.
2. There was a meeting of the BAR CSC on 20 January 2005. The minutes are mis-dated 20 October 2004. SQ informed the meeting of what it had done. They read:

2.1.1 Acting Chairman informed the meeting that, with effect from 03 January 2005, SQ had adjusted its fuel surcharges to SGD 0.50 per kg to IATA Area TC1/TC2, SGD 0.40 per kg to North Asia and SGD 0.25 per kg to IATA Area TC3 (except North Asia).

* + 1. BAR members discussed whether a meeting should be held before any fuel surcharge adjustments to be implemented by SQ in future. Decision on this will be made in the subsequent meetings.

1. The minutes do not suggest that any other airline told SQ what it was going to do.
2. The minutes also record:

3.1 Competition Act 2004

3.1.1 In view of the newly implemented Competition Act 2004, BAR members would like to have a better understanding of the Act and its implications as soon as the relevant information is available.

1. I return to the significance of this later.

#### c Air NZ’s internal decision making process

1. Air NZ did not vary its FSC in the way that SQ did.

#### d Analysis

1. The events surrounding this move by SQ do not suggest in themselves the existence of the understanding for which the Commission contends.

#### 11.2.2.9 The Ninth Implementation Allegation

#### a The FSCs which were imposed

1. In March 2005 the price of aviation fuel began again to increase. In response the following FSC’s were imposed.

*Lufthansa*

1. On 7 March 2005 Lufthansa in Europe announced it would increase its FSC from €0.30/kg to €0.35/kg with effect from 21 March 2005. On the following day, 8 March 2005, it announced the same increase ex-Singapore (to SGD0.75/kg) also effective from 21 March 2005.
2. Lufthansa then increased its FSC a second time. On 21 March 2005 it announced in Europe a further increase from €0.35/kg to €0.40/kg. It made a similar announcement in Singapore the following day (where the equivalent was SGD0.86/kg). These were to take effect from 4 April 2005.

*SQ*

1. SQ quickly followed both of these increases. On 8 March 2005 an instruction was given across its networks to increase the FSC to €0.35/kg with effect from 23 March 2005 ‘or equivalent as per local market convention.’
2. Ordinarily an announcement was made by SQ with respect to its position ex-Singapore. I was not taken to any such announcement in the case of this increase. It seems unlikely, based on SQ’s prior behaviour, that it would have charged the same FSC across TC1-3 but I am not able to make any finding other than that I consider it likely the €0.35/kg was applied only in TC1 and TC2. I make no finding about pricing in TC3.
3. SQ also followed Lufthansa’s second move. On 22 March 2005 (the day after Lufthansa’s announcement of its increase to €0.40/kg) SQ issued an internal instruction to move its FSC to €0.40/kg across the network with effect from 4 April 2005. On 24 March 2005 SQ announced the following rates ex-Singapore:
4. to SGD0.60/kg in TC1 and TC2;
5. to SGD0.45/kg in TC3 North Asia; and
6. to SGD0.30/kg in TC3 excluding North Asia.
7. These rates were effective from 7 April 2005.
8. There is an anomaly here for which I am unable to account. The internal Lufthansa and SQ materials suggest that both airlines moved up first to €0.35/kg and then to €0.40/kg. It is not clear what the first increase was for SQ in Singapore Dollars. But regardless, it is unlikely insofar as the second rise was concerned that €0.40 was equivalent to SGD0.60. This may suggest discounting from the head office determined rate or it may denote use of a different exchange rate. On the material before me I cannot make a finding.

*Air New Zealand*

1. Air NZ did not follow the first increase by Lufthansa and SQ to €0.35/kg. It did however, follow the second one. On 4 April 2005 it announced an FSC increase with effect from 16 April 2005 as follows:
2. to SGD0.60/kg in TC1 and TC2; and
3. to SGD0.30/kg in TC3.

*Air France and Cargolux*

1. It seems that Air France and Cargolux followed the first increase from 21 March 2005, although the specific rates for each area are unclear. Their position with respect to the second increase was not referred to in the parties’ submissions.

*Cathay Pacific*

1. Cathay Pacific decided on 17 March 2005 to increase its FSC to ‘$0.60’ in TC1 and TC2 and ‘$0.30’ in TC3 with effect from 1 April 2005. I assume these are SGD amounts. There is a curiosity about this. The Commission’s submissions about this assumed that Cathay’s increase was part of the same process under which SQ announced its increase to SGD0.60/kg in TC1 and TC2 on 24 March 2005. This view of the world has Cathay pre-empting SQ and Lufthansa’s announcement of their second increase. It is much more likely that Cathay’s announcement was a response to the first increase.

*Thai Airways*

1. On 28 March 2005 Thai Airways announced that it would be increasing its FSC with effect from 16 April 2005 to:
2. SGD0.60/kg in TC1 and TC2;
3. SGD0.45/kg in TC3 North Asia; and
4. SGD0.30/kg in TC3 excluding North Asia.

*Japan Airlines*

1. On an unknown date Japan Airlines increased its FSC with effect from April 2005 to:
2. SGD0.60/kg in TC1 and TC2;
3. SGD0.45/kg in TC3 North Asia (unchanged); and
4. SGD0.30/kg in TC3 excluding North Asia.

#### b SQ’s internal decision making process

1. Lufthansa informed SQ on 1 March 2005 that it would likely announce an increase in its FSC with effect from 21 March 2005. There is no evidence of any further discussions or communications occurring prior to SQ’s own decision on 8 March 2005 which followed Lufthansa’s announcements on 7 and 8 March 2005. There was no communication with any other airline and certainly not with Air NZ.
2. A similar process ensued with the second increase. Lufthansa informed SQ of its increase on 21 March 2005 and both carriers announced or decided to increase the FSC the following day. Other airlines were not communicated with.
3. Unlike the situation which occurred with many of the other increases, there was no subsequent BAR CSC meeting. Indeed, the next BAR CSC meeting was not held until 21 April 2005. I infer this was because the airlines had become concerned about the impact of the recently enacted Singapore *Competition Act.* An internal Cathay Pacific email of 17 March 2005 captures the point:

With the inmtroduction [sic] of competition law (anti-trust as some of us may know it as), carriers now communicate very little about pricing issues, usually SQ will call for fsc mtg but to date nothing of that sort. Neither do we want to be in breach by apporaching [sic] them.

1. I accept that it was this sentiment which reduced the quantity of communications between the airlines. It did not, it will be noted, prevent communication between Lufthansa and SQ.
2. I conclude that, at least on their face, the two price moves by SQ in Singapore were done by reference to the actions of Lufthansa. The position of other carriers appears to have been irrelevant to the decisions.

#### c Air NZ’s internal decision making process

1. Air NZ did not make the first increase at all. As to the second increase, it appears that Mr Chew reported to Air NZ’s head office on 24 March 2005 that he expected SQ to increase its FSC ‘next week’ (the increase was in fact announced that day). Mr Chew advised head office of Air NZ’s increase on 30 March 2005. There is no evidence of any communication between Air NZ and SQ.

#### d Analysis

1. The circumstances of the Ninth Implementation provide little support for the Commission’s case. Air NZ did not put in place the first increase at all. As to the second it simply followed SQ’s announcement.

#### 11.2.2.10 The Tenth Implementation Allegation

#### a The FSCs which were imposed

*Lufthansa*

1. It seems clear that Lufthansa indicated that it would increase its FSC in Europe on 27 June 2005. Emails were in evidence bearing that date which were sent from Lufthansa to ‘colleagues’ enclosing (a now unavailable) announcement document. One of the recipients of that email was SQ. On 28 June 2005 Lufthansa announced in Singapore that it would increase its FSC from €0.40/kg to €0.45/kg with effect from 11 July 2005. In Singapore, this corresponded to SGD0.92/kg.

*SQ*

1. On 29 June 2005 (that is, the following day) SQ announced that it would be increasing its FSC with effect from 13 July 2005 to:
2. SGD0.75/kg in TC1 and TC2;
3. SGD0.50/kg in TC3 North Asia; and
4. SGD0.35/kg in TC3 excluding North Asia.

*Air NZ*

1. On 6 July 2005 Air NZ announced it would be increasing its FSC with effect from 16 July 2005 to:
2. SGD0.70/kg in TC1 and TC2; and
3. SGD0.35/kg in TC3.
4. It will be noted that Air NZ’s TC1/2 rate was lower than SQ’s.

*Qantas*

1. Qantas imposed an increase in its FSC ex-Singapore with effect from 13 July 2005 as follows:
2. SGD0.75/kg in TC1 and TC2; and
3. SGD0.35/kg in TC3.

*Thai Airways*

1. On 1 July 2005 Thai Airways announced it would increase its FSC with effect from 16 July 2005 as follows:
2. SGD0.75/kg in TC1 and TC2;
3. SGD0.50/kg in TC3 North Asia; and
4. SGD0.35/kg in TC3 excluding North Asia.

*Cathay Pacific*

1. On 30 June 2005 Cathay announced that it would increase its FSC with effect from 16 July 2005 to:
2. SGD0.75/kg in TC1 and TC2; and
3. SGD0.40/kg in TC3.

*Japan Airlines*

1. On 1 July 2005 Japan Airlines announced that it would be increasing its FSC with effect from 16 July 2005 to:
2. SGD0.75/kg in TC1 and TC2;
3. SGD0.50/kg in TC3 North Asia; and
4. SGD0.35/kg in TC3 excluding North Asia.

#### b SQ’s internal decision making process

1. There was a BAR CSC meeting held on 21 April 2005 but it does not appear that FSCs were discussed at that time. There was, however, a discussion of the *Competition Act 2004*. The minutes record:

2.2.1 It was updated in the BAR meeting that Competition Act 2004 will be implemented in phases:

Phase 1 (effective from 01 January 2005)

* Interpretation of the Act; Constitution and proceedings of the Competition Commission of Singapore (“CCS”)

Phase 2 (effective from 01 January 2006)

* Sections 3 3 to 5 3, 6 1 to 9 4 of the Act. These parts a re primarily related anticompetitive agreements, abuse of dominance, enforcement, anti-competitive and appeal process.

Phase 3 (effective from at lease 12 months after phase 2)

* The rest of the Act (concerning mergers and acquisitions)

2.2.2 BAR Cargo members were informed that briefings of the Act would be held by various parties (e.g. the main BAR meeting, CAAS etc). BAR Cargo members are encouraged to attend such briefings.

1. I take from this what I have already mentioned above, namely, that by this time the airlines were aware of the risks, at least from the perspective of appearances, of discussing the FSC in an open forum.
2. It seems that SQ became aware of Lufthansa’s announcement in Europe or Singapore on 27 June 2005. Although the documentary record is not entirely clear it is known that Lufthansa sent an email informing ‘colleagues’ of an announcement. A copy of this email was produced by SQ. I infer it was a recipient of the Lufthansa email. There is nothing to suggest, however, any interaction between SQ and any other airline apart from Lufthansa. My impression is that SQ decided to increase its FSC simply because Lufthansa did. The slim material available provides scant support for any interest on SQ’s part in what the other carriers were doing.

#### c Air NZ’s internal decision making process

1. Lufthansa announced its increase in Singapore on 28 June 2005. Before that occurred Mr Gregg of Air NZ had asked Mr Chew to consider whether the FSC should be increased in light of the steep increase in the price of jet fuel.
2. In his report for 28 June 2005 Mr Chew reported that KLM and Air France had increased their FSCs to SGD0.94/kg from 7 July 2005 and that SQ had not yet responded. Plainly at the time the report was prepared Mr Chew had not become aware of SQ’s announcement. Indeed, according to Mr Chew he only became aware of SQ’s FSC increase on 30 June 2005 when informed of it by a freight forwarder.
3. There is no evidence as to what happened between 30 June 2005 (when Mr Chew found out) and 6 July 2005 when Ms Yap notified Air NZ’s customers of the increase. Of course, Air NZ did not institute the same FSC as SQ. SQ had implemented SGD0.75/kg in TC1 and TC2. Air NZ implemented SGD0.70/kg. Further SQ had implemented SGD0.50/kg in North Asia whereas Air NZ imposed SGD0.35/kg across all of TC3. There is no evidence of how Air NZ arrived at its decision although Mr Chew’s report of 6 July 2005 suggests that Air NZ followed SQ. There are some difficulties with this since it appears different rates were imposed to those which SQ imposed. Nevertheless, there is nothing which is consistent with the Commission’s alleged understanding. Quite the opposite appears to be the case. Mr Chew was not able to explain why this rate was imposed. Although (as I indicate later) I did not regard his evidence as generally reliable I am not particularly surprised at his inability to explain a rate change 8 years after the event.

#### d Analysis

1. Air NZ did not implement this increase in the same way that SQ did. Different rates were charged in TC1, TC2 and TC3 North Asia. SQ’s decision making process was focussed on Lufthansa. This implementation provides little support for the Commission’s case and, indeed, arguably undermines it.

#### 11.2.2.11 The Eleventh Implementation Allegation

#### a The FSCs which were imposed

1. In September 2005 there was a further round of fuel surcharge increases. The FSCs which were imposed were:

*Lufthansa*

1. On 22 August 2005 Lufthansa announced an increase in its FSC in Europe from €0.45/kg to €0.50/kg with effect from 5 September 2005.
2. On 23 August 2005 Lufthansa announced an increase in its FSC ex-Singapore to SGD1.02/kg, with effect from 5 September 2005.

*SQ*

1. On 24 August 2005 SQ announced an increase in its FSC with effect from 6 September 2005 as follows:
2. SGD0.90/kg in TC1 and TC2;
3. SGD0.55/kg in TC3 North Asia; and
4. SGD0.35/kg in TC3 except North Asia.

*Air NZ*

1. On 29 August 2005 Air NZ announced that it would be increasing its FSC ex-Singapore with effect from 16 September 2005 to:
2. SGD0.90/kg in TC1 and TC2; and
3. SGD0.35/kg in TC3 (unchanged).

*Cathay Pacific*

1. On 26 August 2005 Cathay announced it would increase its FSC ex-Singapore with effect from 16 September 2005 to:
2. SGD0.85/kg in TC1 and TC2; and
3. SGD0.45/kg in TC3.

*Thai Airways*

1. On 31 August 2005 Thai Airways announced it would increase its FSC ex-Singapore with effect from 16 September 2005 to:
2. SGD0.90/kg in TC1 and TC2;
3. SGD0.55/kg in TC3 North Asia; and
4. SGD0.35/kg in TC3 except North Asia.

*Qantas*

1. On 29 August 2005 Qantas in Singapore announced an increase in its FSC with effect from 10 September 2005 to:
2. SGD0.90/kg TC1 and TC2;
3. SGD0.45/kg Australia and the South West Pacific; and
4. SGD0.35/kg in all areas in Asia.

#### b SQ’s internal decision making process

1. On 23 August 2005 SQ was internally aware that the Lufthansa Index was about to pass through a level which would indicate an increase in the FSC to €0.50/kg. An instruction was given on that day that SQ’s FSC would be increased accordingly ‘or equivalent as per local market convention.’ It does not seem that that decision was expressed to have been made by reference either to what Lufthansa or any other airline had done. I infer that SQ staff in Singapore would have been aware of what Lufthansa had done in Europe the day before and I do this even though there is no reference to this in the documents. I do so because the material surrounding the FSC changes in general suggests a great deal of interest on SQ’s part about Lufthansa’s decisions and I do not think that it would have been different on this occasion.
2. An email dated 23 August 2005 indicates that an instruction was given to ‘gather feedback on what the competition is doing’. There is no evidence to which I was taken revealing the extent or otherwise of this information gathering process. There is nothing to indicate any communication with Air NZ.
3. By and large, the limited material which is available suggests that SQ moved its FSC principally in direct response to the movement of the index and the fact that Lufthansa had announced an increase the day before in Europe. Looked at in isolation, I cannot detect the presence of an understanding or arrangement between SQ and Air NZ that if the former raised its FSC Air NZ would follow. It is unlikely that SQ cared much about the position of smaller carriers such as Air NZ.

#### c Air NZ’s decision making process

1. It seems that Mr Chew found out about the SQ increases on 25 August 2005 when a freight forwarder provided him a copy of SQ’s announcement of the day before. In Mr Chew’s weekly report dated 30 August 2005 (the day after Air NZ’s announcement), he noted that ‘SIN will follow national carrier SQ to increase fuel surcharge to Area 1’.
2. It is significant for present purposes that Air NZ did not implement what SQ had done. Although it matched SQ in TC1/2 at SGD0.90/kg, and SGD0.35/kg in most of TC3 it did not implement at all SQ’s FSC of SGD0.55/kg in North Asia.

#### d Analysis

1. Viewed by itself the circumstances of the Eleventh Implementation do not provide much support for the Commission’s case. The implementation was partial since Air NZ did not follow in North Asia. SQ seems to have been disinterested in the position of Air NZ and Air NZ’s behaviour seems simply to have been that of a follower. No consequences appear to have accrued to it for undercutting SQ in North Asia.

### 11.2.3 The Commission’s circumstantial case

1. So much for the various implementations. They do not provide a great deal of support for the Commission’s case. However, its case was much more extensive than just the implementations. It consisted of a large amount of circumstantial material. Before examining that material, it is useful to begin with the Commission’s actual allegation. I will not set out the full pleaded version of this allegation which appears at [112] of the Air New Zealand FASOC. The allegation as it was eventually pursued was as follows: by at least 8 December 2003, Air NZ had arrived at an understanding with SQ and other members of the BAR CSC that they would each communicate their respective intentions in relation to whether they would impose or modify an FSC out of Singapore; and that SQ would advise the other airlines what it was going to charge and when it was going to do so and that this would be sufficiently far in the future to permit the other airlines to announce their changes in surcharge practice before SQ implemented its revised surcharge. Upon being told by SQ what it was going to do, the other airlines would then advise of their attitude to the pricing proposal including whether they believed it would be unprofitable and whether they would be implementing it. Following this SQ would then impose its surcharge and the other airlines would follow suit by imposing their own surcharges at approximately the same level at approximately the same time as SQ. They would not decrease their surcharge without advising SQ of their intention to do so. I have already noted of this allegation (above at [711] and [713]) that it:
2. does *not* allege price fixing by the direct utilization of the Lufthansa or any other index; and
3. does not allege that Lufthansa was involved.
4. I will return to this later but the Commission characterised this understanding both as an arrangement or understanding to fix prices within the meaning of s 45A and also an arrangement or understanding to exchange future pricing information which it alleged, without reliance on s 45A, to have the likely (but not actual) effect of substantially lessening competition.
5. As has been already noted above at [737], the Commission sought to make good this case through ten propositions. These were:
6. the historical context of resolution 116ss which was said to reveal on the part of airlines a practice of seeking to agree FSCs in a coordinated fashion;
7. what were said to be admissions by some of the airlines as to the co-ordinated nature of the FSC movements;
8. certain earlier dealings between the airlines in Singapore (i.e. in April 2002);
9. communications between the airlines said to show a desire to settle on a co-ordinated outcome for the *reintroduction* of FSCs in Singapore in April 2002;
10. communications between airlines to settle on co-ordinated *increases* of FSCs in Singapore;
11. the events at an extraordinary meeting of the BAR CSC held on 8 December 2003;
12. various matters at other BAR CSC meetings;
13. the circulation of fuel surcharge surveys;
14. the *Singapore Competition Act 2004;* and
15. the implementation of the FSCs.
16. I deal with these in turn.

#### 11.2.3.1 The historical context of the airlines’ purpose in agreeing fuel surcharges

1. The Commission’s argument was as follows:
2. the conduct of the airlines since 1997 in developing and applying FSCs was evidence that they were motivated by a common purpose;
3. the common purpose was to avoid competition inter se which might otherwise result from fluctuations in the price of jet fuel;
4. the airlines sought to achieve this purpose through the development of common fuel surcharge methodologies i.e., resolution 116ss and the Lufthansa Index;
5. their use of these methodologies was less explicit and less precise in Singapore than in Hong Kong; and
6. instead the methodologies provided a framework for the airlines to achieve a consensus. I think what was meant by this was that as each trigger point was reached this provided a timely opportunity to discuss the level of their respective FSCs with each other.
7. I have experienced some difficulty in grasping the precise point being made by this argument.
8. Read carefully it will be seen that propositions (a) to (c) are circular: the conduct relied upon to prove the purpose in (a) is the same conduct referred to in (c), i.e., using FSC indexes. The point in (d) and (e) is that the methodologies were not used as precise mechanisms for price fixing but rather that their trigger points were catalysts for discussions between airlines. Reduced in that way it seems that under this heading the Commission really had two points:
9. the index methodologies provided the occasion for discussions to take place between the airlines; and
10. the conduct of putting in place the methodologies revealed a purpose of seeking to avoid competition on FSCs.
11. I do not have any particular difficulty in embracing proposition (a). The account I have given above in Section 11.2.2 of the various price movements in Singapore shows that as each price point approached, Lufthansa and SQ certainly opened the channels of communication between each other. The same is true also of Air NZ although to a lesser extent. In the account I have given above I did not exhaustively examine the position of the other airlines such as Emirates, Cathay Pacific, China Airlines and Qantas (and others). Despite that I certainly accept that often enough the approach of an index trigger point caused ‘airline chatter’.
12. I have difficulty in understanding precisely what I should do with proposition (b). So far as the events in Singapore are concerned only one index is relevant and that is Lufthansa’s. The material in Section 11.2 probably does not permit a full understanding of Lufthansa’s motives to be divined because the Commission omitted Lufthansa from its allegations. Lufthansa’s announcements were generally made in Europe and it did not, as a rule, provide for different rates as between TC1, TC2 and TC3. Whilst there is plenty of evidence to suggest some curiosity on Lufthansa’s part about what SQ might do I do not accept that Lufthansa was publishing its index to provide the occasion (when trigger points were reached) for other airlines to start talking to each other. This is not only because there is not a trace of such a proposition in the very many emails to which the parties took me; not only because Lufthansa rarely featured in these discussions because it had already announced its price increase; but most principally because having read all the implementation material it is clear that Lufthansa generally had little – usually no – interest in what other airlines in Singapore were doing apart from SQ (although in September 2002 it did ask a number of airlines if they would implement a new level FSC and it did twice ask SQ to find out what the airlines in Singapore were proposing to do: see [763], [861] and [1008]). Even if that were not so I was not taken to any material to suggest that Lufthansa created its index to provide the occasion for other airlines to further their own discussions with a view to coordinated action.
13. Even if Lufthansa had had such an interest one might ask, and Air NZ did, what this had to do with a pleaded case in which Lufthansa was *not* said to be one of the airlines involved. Here, at least so it seemed to me, the Commission’s case became a little difficult to follow. It was, according to paragraph 182 of the Commission’s submissions, the airlines’ adoption of, relevantly, the Lufthansa methodology which provided ‘the impetus’ and ‘the framework’ for airlines to communicate. But the only airline which adopted the Lufthansa Methodology was Lufthansa. SQ frequently departed from it – often in TC1 and TC2 – almost invariably in TC3. The position with Air NZ was worse still because its implementation of the Lufthansa Index was even less complete than SQ’s. What this suggests is that no airline – apart from Lufthansa – ‘adopted’ the Lufthansa Index. In a sense the Commission’s suggestion that the methodologies were adopted to provide the framework for discussion proves the point: why one would need to adopt a methodology if its only point was to open the channels for communication? Adopting a methodology makes some sense where, as for example in Hong Kong, the methodology is directly used to facilitate parallel action. But that is not the use to which the Commission sought to put the Lufthansa Index in Singapore. It was not a device for parallel action; on the Commission’s case it was a device to encourage discussion.
14. I am prepared to accept that the Lufthansa Index (and if it is necessary, before it, resolution 116ss) did in fact provoke discussions between airlines as trigger points were approached. I am not satisfied, as I have said, that this is the reason why Lufthansa put up its index on its website. Further, as there was no methodology adopted by Air NZ it is incoherent to ask why it implemented the methodology. I do not think there was any understanding by the airlines that they would utilize the index as a springboard to further discussion. Some of them, no doubt, did communicate as trigger points were approached but this was how events unfolded; it was not a matter of design, it was not contemplated as a desired outcome and it was not understood as a device to achieve such an outcome.
15. I therefore accept proposition (a) but not (b).

#### 11.2.3.2 The airlines’ admissions as to the purpose of their conduct

1. The second proposition the Commission sought to establish was that there were contemporaneous statements made by various airlines in Singapore which indicated that their purpose was to co-ordinate common or consistent fuel surcharges. The Commission pointed to a number of documents. Thus Eva Air on 10 April 2002 confirmed in an email that it would be charging a fuel surcharge most likely of SGD0.08/kg but went on to say:

EVA Air wish to adopt a concensus policy inline with all International carriers operating into S'pore. Please inform us of any decision and policy for the implementation of Fuel surcharge. We are anxious to implement Fuel surcharge effective from 1st May 2002. Your urgent reply is much appreciated.

1. On 11 April 2002 Cathay Pacific wrote to BAR CSC members indicating that it wished to implement a higher fuel surcharge in these terms:

CX position on fsc is that she would want to implement it. However, the carriers implementing fsc are so far the European carriers and applicable for Area 1&2, which CX is not a major player. Our trunk sectors are in Area 3 and unless there are sufficient Asian carriers implementing an Area 3 fsc, we will adopt a wait-and-see position so as to maintain some semblance of competitiveness as our rates are already on the higher end.

1. On first reading this it is easy to be struck by the words ‘some semblance of *competitiveness’* and to construe it as meaning ‘some semblance of *competition’* but that is not what it says. In fact, what this email is saying is that if Cathay increases its FSC in TC3 when the other carriers have not done so this will render it uncompetitive in the sense of being overpriced.
2. A few days later on 15 April 2002 Cathay advised the other airlines in relation to a fuel surcharge survey that had been distributed to BAR CSC members:

I believe you had left our CX response wherein we are awaiting for more Asian carriers participation and also a 2nd tier fsc for Area 3 before we consider implementation.

1. On 25 April 2002 a representative of Thai Airways attended a meeting with other airlines during which he suggested that the airlines should adopt a consistent fuel surcharge level to ‘stabilise’ the market. The minutes relevantly provide:

NOTES OF THE LOCAL INDUSTRY DEVELOPMENT

COMMITTEE – CARGO MEETING

HELD ON 25 APRIL, 2002 AT 1530 HOURS

IN THE SIA CARGO SALES CONFERENCE ROOM

….

4. NEW DEVELOPMENTS

4.1 Fuel Surcharge

4.1.1 Due to escalating jet fuel prices, most carriers will be implementing fuel surcharge in May 2002.

4.1.1 TG suggested airlines to adopt a consistent surcharge level to stabilise the market. Chairman felt this may lead to allegations that BAR is a price-fixing cartel.

…

1. I would be prepared to infer from these documents a *desire* on the part of Thai Airways, Cathay Pacific and Eva Air to fix the level of the surcharge.
2. The Commission also relies upon statements made by KLM in an email dated 14 February 2003. This email was sent by KLM in response to an email sent to BAR CSC members by SQ on 14 February 2003 in which it indicated that it would increase its fuel surcharge to SGD0.25/kg with effect from 1 March 2003. In response, a Mr Alfred Quek responded on behalf of KLM that it had not made any official announcement yet but would ‘keep all members informed in due course’. SQ had itself anticipated an announcement by KLM and Lufthansa in another email dated 14 February 2003. The use to which the Commission seeks to put this material is to show that the airlines had the purpose of co-ordinating common or consistent fuel surcharges. I accept that the KLM email is capable of furthering that case.
3. The Commission submitted that the same purpose could also be perceived from an email sent by Japan Airlines on 12 December 2002 to the other airlines. It advised that its fuel surcharge was at SGD0.17/kg and that there would be ‘no change so far until further notice’. I accept that this is evidence that some airlines were co-ordinating common or consistent fuel surcharges.
4. I accept that some of the statements above are capable of supporting the proposition that some airlines had a purpose, or perhaps more accurately, a desire to deal with FSCs on a collective or co-operative basis. One needs to be clear, however, about the precise nature of this evidence and the use to which it may be put.
5. Taken at its highest the evidence is that:
6. Eva Air, Cathay Pacific, Thai Airways, KLM, SQ and Japan Airlines;
7. during the period 10 April 2002 to 14 February 2003;
8. made statements indicating that their respective desires were to agree FSCs if possible.
9. How are such statements admissible against Air NZ? Here the Commission’s answer was that each of these airlines was a party to the Overarching Understanding along with Air NZ. Thus the statements were ‘admissions made in furtherance of the common purpose of the understanding’.
10. There are some difficulties with this. The first is logical. The Commission’s basal contention is that Air NZ was a party to the Overarching Understanding. As part of its method of proof it relies upon the alleged admissions of Eva Air, Cathay Pacific, Thai Airways, KLM, SQ and Japan Airlines. In order to make these admissible against Air NZ it claims that each airline and Air NZ were parties to the Overarching Understanding. But that, of course, is the very thing the Commission is seeking to prove. This argument, therefore, involves the fallacy of assuming the correctness of the outcome to which the argument is directed.
11. This logical problem then reveals a problem of redundancy. If one can approach the present debate only once it is known whether the Overarching Understanding has been established then the present argument has no utility. If the Overarching Understanding has already been established from other material it is surplus; if the Overarching Understanding is not established then the statements cannot be admissions.
12. Nevertheless, the material is relevant to a determination of whether there was a group of airlines colluding on FSCs. It does not assist in determining whether Air NZ was a member of that group but it does assist the Commission’s case at least to the extent that it shows that co-ordinated action was taking place.
13. Apart from these statements made by other airlines the Commission also relied upon particular statements made by Air NZ. It pointed to an email written by Ms Goh some years before on 20 January 2000. She had been asked by another Air NZ employee about whether SQ would be likely to change its mind (at that time) about not imposing a fuel surcharge. In her reply she recited a number of difficulties there were in imposing fuel surcharges, mostly of a commercial nature. The final paragraph read:

Here we talk abt high cost of fuel and Cargo told to collect more money. Pax meanwhile are offering discounts and special fares.. Thats the mkt in SIN now and QF/BA/SQ/LH etc are having airfare offers. (good for the consumer and I just purchase 5tkts on BA tvlg SIN/PER/SIN in mid Feb) Even NZ had offers with car rental or hotel stay throw in. Does not make sense to me why Cargo have to do the increase while our pax brothers can continue to spent them??? If only there is a body to govern such things ie Iata wud be good and more collective agreement will take place.

As most European carriers are going ahead with the FS but not BA.. Perhaps BA and QF are working this out together.??

1. Ms Goh was cross-examined:

So you were concerned that if there wasn’t a collective decision to apply fuel surcharges or rate increases, some airlines would undercut other airlines by not imposing those charges; that was your concern, wasn’t it?---Yes, it was a concern.

1. I do not get from this more than a lament on Ms Goh’s part that life might be easier for Air NZ if there existed some form of co-operative arrangement under some industry body like IATA. But her point was that there were no such arrangements. Whilst one can glean from this a certain fondness on Ms Goh’s part for joint pricing arrangements, it is a yearning for the existence of a body such as IATA. It is too much to extract from Ms Goh’s statement an intimation of her desire to engage in unlawful behaviour, particularly given the ordinarily legitimate role of IATA. Rather, I read it as an expression of opinion that it would be preferable if the FSCs could be lawfully fixed under some form of open procedure.
2. Mr Chew also understood that the reason SQ was sending out a survey of the other airlines’ surcharge practices was to find out whether other airlines were going to follow its lead. For example, in his weekly report emailed on 12 March 2003 Mr Chew said.

SQ having an intention of having another round of fuel surcharge increase from SGD0.25/kg to SGD0.38/kg. SQ is conducting a survey – checking out if other carriers would follow his plan. He had mentioned one of the European carriers (LH) is going for it on the 24th Mar 03.

1. Mr Chew was cross-examined about his understandings of what it was that SQ understood about the point of its survey practice. The Commission submitted that Mr Chew’s evidence under cross-examination on this issue was evasive. Nevertheless it relied upon Mr Chew’s evidence that he understood that the purpose of SQ conducting a fuel surcharge survey of BAR CSC members was to ‘check out’ if other airlines would follow its fuel surcharge plan. Air NZ submitted that this was not an admission that the airlines were seeking to agree a common pricing structure for FSCs in Singapore. This is true but that is not what the Commission alleges. Its case is that the index provided an opportunity for SQ to signal its intentions and receive back information from other airlines about what they were going to do. In my opinion, this evidence of Mr Chew does support that case.
2. Under cross-examination Mr Gregg said that he had formed the view that communication between airlines was the appropriate mechanism for determining what other airlines were proposing to do with respect to FSCs in Singapore and Hong Kong. I accept that his evidence is capable of supporting the Commission’s case.
3. To conclude then on the Commission’s second proposition:
4. I do not think that the statements of the other airlines can be used to advance the Commission’s case on the Overarching Understanding except to the extent that they show that airlines were colluding. The statements cannot directly link Air NZ to that behaviour for the logical reasons I have given above;
5. Ms Goh’s evidence does not assist either; but
6. Mr Chew and Mr Gregg’s statements can assist that case. Both suggest a degree of co-operation between airlines on FSCs.

#### 11.2.3.3 Previous dealings between the airlines in Singapore

1. Here the Commission’s contention was that by April 2002 the airlines gave each other advance notice of each other’s fuel surcharge plans and communicated with each other on an on-going basis as to the FSCs they were in fact imposing.
2. Between 2000 and 2002 the airlines certainly met from time to time and exchanged, to varying extents, pricing information. On 10 January 2000, for example, there was a meeting in Singapore of several airlines which was attended by Ms Goh for Air NZ. The meeting was chaired by SQ. At this meeting SQ informed the airlines present that it would be increasing its freight rates (i.e. not an FSC) with effect from March 2000. It also indicated that if its head office announced the introduction of an FSC, SQ in Singapore would impose one too.
3. Similarly at a meeting of the BAR CSC held on 3 February 2000 it is clear from the minutes that 17 airlines, including Air NZ, communicated the FSCs that they were going to impose that month. Each was 17 cents. On the other hand SQ indicated it was not going to impose an FSC.
4. Similar exchanges of pricing information may be observed at BAR CSC meetings held on 5 October 2000 and 1 February 2001. I also accept that pricing information about the introduction of an insurance surcharge took place at a BAR CSC meeting held on 26 September 2001 and again on 5 October 2001. A survey administered by the LIDC-C prior to its meeting on 31 January 2002 achieved the same result, i.e., keeping those in attendance abreast of what the other airlines were charging.
5. Ms Goh gave affidavit evidence that she never directly made enquiries with other airlines about their cargo rates, pricing or surcharges. An attack was made upon this evidence arising from her presence at the meetings set out above.
6. Of course, it is quite clear that Ms Goh participated in these meetings. Indeed, she sent emails after them indicating an awareness of what other airlines were proposing. I see, however, no contradiction between these two matters. Ms Goh was merely indicating that she did not contact individual airlines outside of meetings to find out what they were doing.
7. I accept, therefore, that in the period 2000-2002 Air NZ, along with other airlines, did exchange pricing information usually at meetings, sometime by surveys.

#### 11.2.3.4 Communications between airlines to settle on a co-ordinated outcome for the reintroduction of a fuel surcharge in Singapore

1. Here the Commission focussed the field of its fire to a very narrow window, April and May 2002. This was, it will be noted, before the Commission alleged that the Overarching Understanding was first implemented (the First Implementation was alleged to have occurred in September 2002). The Commission says that during this two month period the airlines, including Air NZ, co-ordinated the reintroduction of the FSC and that the communications leading to this event show that they had assumed obligations towards each other.
2. The Commission’s case depends upon a close of analysis of the events surrounding the reintroduction of the FSC in April 2002.
3. This story begins on 2 April 2002 when Mr Hendrik Falk, a senior employee of Lufthansa, met with Mr Foo of SQ. Although I was taken to no direct evidence of this, I assume that part of the context for this meeting was an increase in the price of aviation fuel. Mr Foo told Mr Falk that SQ did not intend to impose an FSC *but* it was proposing to increase its freight rates by SGD0.10/kg. Two elements of this should be emphasised at the outset:
4. SQ’s decision was not to impose an FSC but rather a freight rate increase; and
5. it was made on or before 2 April 2002.
6. On the same day SQ HQ instructed various SQ employees to implement an increase in freight rates by US$0.10/kg.
7. Subsequently, as will be seen, SQ also announced an additional FSC on 22 April 2002 with effect from 1 May 2002. This was not the same decision and the FSC was imposed in addition to, and not in substitution for, the freight rate increase imposed in March. Both were inspired by movements in the price of jet fuel, however, they were not the same thing.
8. A few days later, on 6 April 2002, Lufthansa told SQ it would be introducing an FSC of SGD0.08/kg with effect from 15 April 2002. In an email of that date Lufthansa asked SQ to circulate an email survey to all airlines about their intentions with respect to an FSC and to do so prior to the next BAR CSC meeting. I infer that this was a request made of SQ in its capacity as the chair of the BAR CSC. From Lufthansa’s perspective it had no need of information about SQ’s position because it already knew that SQ was going to increase its freight rates by US$0.10/kg rather than impose an FSC.
9. Three days later, on 9 April 2002, SQ carried out Lufthansa’s request by emailing the members of the BAR CSC to advise that Lufthansa was imposing its FSC and to ask them to complete a survey about any FSC they were proposing to implement and the date of any such implementation. It promised to circulate the results.
10. Interestingly the email also said ‘[i]n the case of SQ, we have yet to make a decision’. That statement was, of course, inconsistent with SQ’s earlier statement to Lufthansa that it was *not* going to impose an FSC but was instead going to increase its freight rates. The email suggests, and I conclude, (as I have said above) that the decision to increase freight rates and the decision to impose an FSC were different decisions.
11. SQ received a number of responses from various airlines in response to its survey. They fell into three categories:
12. airlines that said they were going to impose an FSC from a specified date;
13. airlines that had not yet decided but were interested to know what SQ was doing; and
14. airlines that wished to introduce an FSC but were looking to SQ to act first.
15. Air NZ fell into this third category. On the same day she received the SQ survey Ms Goh advised that:

NZ is contemplating to implement fuel surcharge and awaiting for SQ and other Asian airlines to take the lead. Any opportunity to apply the surcharge, NZ will go for it.

1. Having received the airlines’ responses SQ then circulated a table of those responses. The entries for SQ and Air NZ respectively read ‘Planning’ and ‘No decision’. Having received further responses SQ again distributed an updated version of the table on 15 April 2002. On 18 April 2002 Mr Chew (who had by 17 April 2002 taken over Ms Goh’s responsibilities) informed his superior, Mr Gregg, that he wanted to see what SQ was going to do before imposing an FSC. He thought it would be disadvantageous for Air NZ to act immediately.
2. On 22 April 2002 SQ advised the members of the BAR CSC that it would be imposing an FSC with effect from 1 May 2002 of SGD0.10/kg. This it announced that day. On 24 April 2002 Air NZ announced the imposition of an identical FSC.
3. On 25 April 2002 there was a meeting of the BAR CSC which Mr Chew attended (see [979] above). The meeting was advised that most airlines would be implementing a fuel surcharge in May 2002. The Commission also relied on a meeting held the same day of the LIDC-C. Mr Chew attended this meeting too. At the meeting Thai Airways suggested that the airlines adopt a consistent FSC to stabilise the market but the chair felt this might lead to allegations that the BAR CSC was a price fixing cartel. Although colourful, I do not see how this advances matters.
4. The final results of the survey were distributed on 14 May 2002. They showed, inter alia, that Air NZ had implemented the same FSC as SQ.
5. About this short chain of events the Commission makes seven discrete points.
6. The *first* is the idea that SQ sought and obtained other airlines’ FSC plans prior to determining its own FSC. SQ sent out the survey on 9 April 2002. After a few rounds of receiving responses SQ advised the other airlines of its FSC on 22 April 2002.
7. Air NZ denied that this was so. It said that SQ had already made its decision on 2 April 2002. That decision was not the FSC decision but rather a separate decision to increase its freight rates by US$0.10. Air NZ also submitted that it was likely that the reason SQ had sent the survey was because Lufthansa had asked it to do so. I do not doubt that Lufthansa’s request provided the immediate impetus for the decision to circulate the survey. However, it is likely that SQ had become interested in charging an FSC by then. Its earlier professed position to Lufthansa was that it was not planning to impose an FSC. But by the time it sent the survey it was saying that it had made no decision.
8. I therefore conclude that whilst initially SQ had decided not to implement an FSC, once requested to conduct a survey by Lufthansa it became interested in the idea, at least to see what came of it.
9. Ms Goh and Mr Chew were cross examined about this. Ms Goh’s response to the survey result is set out above. Mr Halley SC for the Commission extracted this statement from Ms Goh under cross-examination.

What you were giving, Ms Goh, was a green light to Singapore Airlines that if they implemented a surcharge, Air New Zealand would follow; it’s as simple as that, isn’t it, Ms Goh? --- Yes.

1. I do not doubt that by her email Ms Goh was informing SQ that Air NZ was enthusiastic to impose an FSC if at all possible and the fact that SQ might impose one itself was a circumstance which would make it possible. I do not think that by saying that she was doing any more than stating what the likely response from Air NZ would be. In particular, she was not promising that Air NZ would do so or intending to suggest that SQ could rely upon Air NZ to do so. This is the import of the words ‘[a]ny opportunity to apply the surcharge, NZ will go for it’ which reveal not a desire to act co-operatively with SQ but instead to impose an FSC whenever this would be commercially viable. As Ms Goh pointed out during her cross-examination this could include circumstances *other* than a move by SQ. The Commission submitted that I should reject that aspect of her evidence because of the ‘green-light’ answer and, for the same reason, a portion of her affidavit where she gave evidence that she was not trying to suggest to SQ that Air NZ would invariably do what it or other airlines did. However, both of these aspects of her evidence are consistent with her email. Although the ‘green-light’ answer tends the other way I am not satisfied that Ms Goh’s command of the English language was sufficiently sophisticated to appreciate the subtle nuance in Mr Halley’s ‘green light’ question. Put another way, whilst it is certainly possible to see the answer as a concession at the end of the cross-examination that all of her preceding evidence on this topic was wrong, it is also possible to see it as an example of Ms Goh not properly understanding the question. I prefer that latter view.
2. The Commission also submitted that there was significance in the fact that during this period Ms Goh had handed over her role to Mr Chew. In her 9 April 2002 email to SQ Ms Goh had also said:

By the way, I will be going for a 3-6mths “sabbatical leave” fm 17 Apr onwards. During my absence, all cgo matters for SIN station will be taken charge by Ronnie (my Cgo Manager. Pls include him in yr email. His email address is Ronnie.chew@airnz.co.nz.

1. The Commission submitted that this email was ‘telling’ and that it was to be inferred that Ms Goh was attempting to ensure that Air NZ was kept informed of SQ’s FSC plans. I do not accept this sinister connotation. Ms Goh was about to go on leave. In an email to the BAR CSC it was natural to indicate who would be performing her function with respect to cargo when she was away.
2. Mr Chew was also cross-examined about the SQ survey. In an email to Mr Gregg he had said that at this point SQ was in the ‘planning stage’. He (Mr Chew) wished to see what SQ was going to do. He did not think it a good idea to impose an FSC before SQ did. Under cross-examination Mr Chew said that he relied on the SQ survey in this instance for the purpose of making a recommendation.
3. I do not accept that either Ms Goh or Mr Chew understood that Air NZ was committing to SQ to impose an FSC. Theirs was merely a position of market reality. Air NZ wished to impose an FSC if it could given the market conditions. A very major market condition was the position of SQ. If SQ moved Air NZ’s own commercial imperatives would make it move too.
4. The Commission’s second point about the events of April-May 2002 was that SQ notified the other airlines in writing of its intention to impose an FSC. Certainly this occurred by its email of 22 April 2002 when SQ informed the members of the BAR CSC of its intention to impose an FSC with effect from 1 May 2002 of SGD0.10/kg. The Commission submitted that this email served both as a signal to the other airlines that SQ was committed to imposing a particular FSC and evidenced an expectation that the other airlines would follow suit. What the email actually said was:

Dear all,

This is to inform everyone that SIA Cargo is imposing a fuel surcharge of S$0.10 per kg for all shipments with effect from 01 May 2002.

Thanks and rgds.

1. It is not problematic to conclude that SQ was thereby revealing its future intentions about its FSC and this, I would accept, may be characterized as a signal. However, I am quite unable to perceive in this email a commitment by SQ to the other airlines that it would, in fact, impose the FSC; still less an expectation that the other airlines would do so.
2. The Commission made much of the fact that the date from which the FSC was effective (1 May 2002) was sufficiently far from in the future from the date of the notification to the airlines (22 April 2002) that it provided the other airlines with a sufficient lead time to commence their fuel surcharges. There was no direct evidence that this was the reason SQ provided for a delay between announcement and implementation (although material about it did appear in Mr Tan’s and Mr Ros’ affidavits). Instead it was said to be something which could be inferred. I am disinclined to draw the inference. There appears to have been a widespread industry practice in Singapore (and also Hong Kong) of providing a period – usually two weeks – between an announcement and the date of its taking effect.
3. A cursory examination of the tables above set out at [750] for the 11 implementations shows that on the majority of occasions all the airlines (in the tables at least) had such a delay, usually of one to two weeks. If this was an industry practice it is difficult to embrace the Commission’s suggestion that SQ delayed giving effect to its announcements to allow other airlines to follow suit because the question then arises: why were the other airlines doing it?
4. In those circumstances, I decline to infer that SQ delayed the effective date of the FSC implementation to allow the other airlines to implement their own FSCs.
5. The Commission’s third point was that SQ announced the introduction of its FSC to its customers after it informed the other airlines. The airlines were notified at 3:56 am on 22 April 2002 and the public announcement was made at 11:22 am. In a context where the increase did not come into effect until 1 May 2012 this is of little significance.
6. The Commission’s fourth point is that the airlines imposed the same FSC from the same day that SQ did.
7. This submission is not factually correct. Most of the airlines implemented an FSC of SGD0.10/kg with effect from 1 May 2002 but this was not a universal practice. In TC1-2, Cathay Pacific, China Airlines and Eva Air implemented at SGD0.8/kg and in TC3 the same airlines only imposed an FSC of SGD0.5/kg.
8. Air NZ submitted additionally that SQ’s FSC was charged on the basis of actual weight with (in most cases) a minimum fee of SGD5.00 whereas Air NZ’s FSC was charged on chargeable weight without a minimum fee. Air NZ analysed the air waybill data for the period 1 May 2002 to 20 October 2005 provided by SQ for flights from Singapore. It then applied Air NZ’s chargeable weight/no minimum approach to the same data. This revealed that over 50% of the consignments would have been carried by Air NZ at a different actual rate. In the period 1 May 2002 to 30 September 2002 the same data showed that the charge would have been different about a third of the time. On this basis, Air NZ denied that it had implemented the same FSC as SQ in May 2002.
9. There is a critical element missing in this analysis and that is the question of how big the difference was. Pertinently for the present argument, which is about the May-September 2002 FSC, Air NZ’s air waybills show that 5536 of them would have resulted in the same charge for both airlines and 3009 should have resulted in a ‘different’ charge. But ‘different’ covers a host of sins. It might mean SGD5.00 on a 20kg load (significant) or SGD0.01 on a 100kg load (insignificant). Submitting that there is a difference does not provide a useful tool of analysis unless the difference is quantified. I therefore reject the argument. I reject more generally the proposition that there is any significance for the purposes of this litigation in the difference between actual and chargeable weight. The only numerical attempt to make good a difference is the one I have just rejected.
10. The Commission also submitted as part of this fourth point that Air NZ relied upon SQ’s announcement to make its decision to impose the FSC. This is consistent with Air NZ’s case that its practice was to follow the national carrier.
11. The Commission’s fifth point focussed on the meetings of the BAR CSC and the LIDC-C held on 25 April 2002. It submitted that at these meeting the airlines advised each other of their respective FSCs and that the meetings:
12. provided an opportunity for airlines that had not communicated their intentions to do so; and
13. provided each airline with a further assurance that the FSCs of the other airlines would be imposed.
14. There is no evidence that this occurred at the LIDC-C meeting. I am prepared to assume in the Commission’s favour that there was some discussion about the level of various airlines’ FSCs and that, hence, proposition (a) might be made good. There is no evidence for (b) and I would not be inclined to infer it. This is more so in the case of Air NZ who had announced its FSC the day before.
15. The Commission’s sixth point was that the other airlines had imposed in May 2002 an identical FSC. For reasons I have given above when dealing with the Commission’s third point this is not correct although it is in the case of Air NZ (I speak here only of the May 2002 FSC).
16. The Commission’s seventh point turned upon the survey administered by SQ. It was said that the circulation of the survey throughout April 2002 and the circulation of the results obtained back to the members of the BAR CSC in April and May 2002 operated as a process of verification to ensure that airlines did not fail to honour the obligation to impose an FSC which, on the Commission’s case, they were subject. I was not taken to any evidence that any airline was ever criticised for failing to impose an FSC in Singapore. If the survey was, in effect, a device for ensuring that the carteliers did not cheat on each other it was quite unsuccessful. I do not accept the argument.
17. I pause at the end of this, the Commission’s seventh point, to remind myself that this seventh point was in aid of the fourth proposition in its circumstantial case to establish the Overarching Understanding. Lest the reader has flagged by this point, that fourth proposition was that the communications surrounding the April-May 2002 reintroduction of an FSC in Singapore supported the Overarching Understanding.
18. The Commission summarised its view of why this was so by saying that the events of April-May 2002 showed the existence of a commitment on the part of each airline with respect to the introduction of an FSC. I do not find any such commitment by SQ or Air NZ or any other airline. The airlines (or some of them) exchanged pricing information but they did not undertake in any sense to charge the FSC each nominated. This is particularly so in the case of Air NZ. Air NZ through Ms Goh and Mr Chew was keen to impose an FSC whenever it was commercially viable to do so. Largely this would occur if SQ imposed one. However, SQ was not looking for Air NZ’s commitment before it imposed its FSC and Air NZ was not making any promises. Neither made any commitment to the other.
19. I reject this fourth aspect of the Commission’s circumstantial case on the Overarching Understanding.

#### 11.2.3.5 Communications between the airlines to settle on co-ordinated increases of FSCs

1. Here the Commission’s point related to the imposition of an FSC on 1 October 2002, 1 March 2003 and 19 March 2003. Its point was that for these three FSC increases the airlines followed the same decision-making pattern, namely:
2. informal inquiries would be made by SQ of the other airlines’ intentions;
3. SQ would then notify the other airlines of the FSC it had decided to impose and the date upon which it was proposing to do so;
4. before SQ implemented its increase the other airlines would notify SQ of the FSCs they were proposing to impose;
5. SQ would notify its customers after it notified the other members of the BAR CSC;
6. the other airlines would then announce their relevantly identical FSCs with relevantly identical timings; and
7. SQ and the other airlines then implemented the FSCs at the same time.
8. Subject to the point that none of the inquiries referred to in (a) were made of Air NZ propositions (a)-(e) may be accepted as an accurate statement of the events which occurred with respect to the FSC variations which took effect on 1 October 2002, 1 March 2003 and 19 March 2003.
9. The point of these matters, as I understood it, was to show material from which an understanding might be inferred (either in isolation or in combination with other matters). The difficulty is that the Commission’s case does not otherwise engage with the increase which occurred on 19 March 2003. It pleads the increase on 1 March 2003 as the February 2003 increase and then moves directly to the decrease on 16 April 2003. It omits any allegation about the increase to SGD0.38/kg on 19 March 2003.
10. The reason for this is probably because Air NZ did not impose an FSC of SGD0.38/kg at any stage. When this is brought to account it is difficult to accept the practice suggested. I reject the argument.

#### 11.2.3.6 The extraordinary meeting of the BAR CSC on 8 December 2003

1. I have set out the minutes of this meeting above at [837]. The Commission saw this as a very important meeting and submitted that by the time the meeting had finished the Overarching Understanding must have been reached by the airlines, including Air NZ.
2. The minutes record that SQ announced to the meeting that it was going to increase its FSC to SGD0.25/kg in TC1 and TC2 and SGD0.20/kg in TC3. The Commission submitted that SQ did this with the purpose of getting other airlines to commit to implementing identical or substantially similar FSCs.
3. It also argues that the word ‘compromise’ in para 1.1.2 indicated the presence of a consensus on FSCs. Taken together with the survey which was administered and the timing of the meeting it was clear, so it was said, that the airlines had arrived at the Overarching Understanding by this meeting.
4. I do not share this view. I accept that the urgency with which the meeting was called can lend credence to the idea that SQ at least wished to secure agreement on FSCs but I do not think that this is what happened. The minutes in fact record agreement when it occurs. Paragraph 1.1.3 expressly records agreement by ‘SQ, JL and CI’ (Singapore Airlines, Japan Airlines and China Airlines) to charge SGD0.25/kg in North Asia. Clearly the person taking the minutes (Mr Ros) was not shy about recording an agreement where one occurred. I say that despite Mr Ros’ evidence that where his minutes use the word ‘agreed’ he did not mean that an agreement had been reached. That makes the absence of any recording of the understanding alleged by the Commission more significant.
5. I do not accept that the word ‘compromise’ assists the Commission. Although that word often enough carries with it a connotation of agreement it is clear in the case of the minutes that what is being discussed is a compromise not between parties in disagreement but between the need to charge more if possible, on the one hand, and the desire not to place an excessive burden on the customers, on the other.
6. I do not see the meeting of 8 December 2003 as the natural and more formalised extension of the practice the Commission sought to make good under its fifth proposition (at [1045]) because I do not accept that proposition either. It was said that I should infer that Mr Chew communicated Air NZ’s consent to SQ’s proposal either expressly or by silence. I draw no such conclusion.
7. In short, I do not accept that any arrangement or understanding was reached at this meeting.

#### 11.2.3.7 Further BAR CSC meetings

1. The Commission submitted that its case was advanced by a consideration of four meetings:

* the 22 April 2004 LIDC-C meeting;
* the 28 April 2004 BAR CSC meeting;
* the 24 September 2004 BAR CSC meeting; and
* the 20 October 2004 BAR CSC meeting.

#### 22 April 2004 LIDC-C meeting

1. The Commission submitted that ‘it was made clear at the meeting of the LIDC-C on 22 April 2004…that the BAR CSC was the appropriate forum for *resolving* the fuel surcharge’ (emphasis in the submission). The minutes record:

3. OTHER MATTERS ARISING

3.1 The matter of the fuel surcharge was brought up in view of the rising worldwide crude oil prices and corresponding fuel indices.

3.2 Chairman advised the meeting that it will be raised in BAR (Cargo) for resolution being the appropriate forum, as there have also been enquiries from other carriers not represented in this particular meeting.

1. I am not sure the Commission’s submissions do not misquote these minutes which are somewhat more ambiguous than the Commission’s submissions suggest. In any event, I accept that this is material from which an understanding might be discerned.

#### 28 April 2004 BAR CSC meeting

1. In its submissions the Commission took me to an email of 28 April 2004 from SQ to BAR CSC members which appeared to contain a report of what transpired at the meeting. Relevantly this email said:

Members present include AF, CI, CV, KL, and LH.

Believe there has been a transmission glitch as there were a fair number of

members who were not notified

or were notified late. Therefore, this mail will serve as preliminary

notice for your information and/or action

ahead of the official minutes which will be circulated in due course.

Chairman informed those present, that in response to the sustained

increases to fuel prices, SQ will be

increasing the fuel surcharge to SGD 0.35/kg to IATA Areas TC1/2 including

North Asia. The fuel surcharge

to TC3 will be maintained. Effective date has been set for 12MAY04.

LH advised the meeting that effective 10MAY04, the fuel surcharge will be

increased to SGD 0.40/kg.

AF/KL will be seeking requisite internal clearances before any official

action and will advise in due course.

CV advised the meeting that their fuel surcharge will be increased to EUR

0.20/kg for TC1/2, while TC3

fuel surcharge will be maintained at SGD 0.20/kg.

CI will advise in due course the effective date and quantum of their

proposed increase.

As with the last round of fuel surcharge revisions, a survey will be sent

together with the minutes for the

compilation of respective carriers level of fuel surcharges for

information.

1. To complete the picture, SQ had been charging SGD0.20/kg in TC3. I fail to see that much assistance is to be obtained for the existence of the Overarching Understanding from this material. Several airlines were not committing to anything; CV (Cargolux) was charging a different surcharge; most airlines were absent. It is true that SQ distributed what occurred at the meeting to the other airlines and this, of course, promoted an efficient exchange of future pricing intentions.

#### 24 September 2004 BAR CSC meeting

1. The minutes of this meeting were (relevantly) as follows:

1.1.1 The extraordinary meeting was convened to discuss and seek feedbacks from BAR Cargo Sub-committee carriers on their plans for the fuel surcharge in view of the soaring fuel price and announcements of fuel surcharge increases in other markets.

1.1.2 Acting Chairman informed the meeting that SQ plans to increase its fuel surcharge by SGD 0.15 cents to SGD 0.50 per kg for shipments to IATA Areas TC1/TC3/North Asia, and SGD 0.5 cents to SGD 0.25 per kg for shipments to IATA Area TC3 (excluding North Asia) from 11 October 2004.

1.1.3 BAR members discussed on whether North Asia should be treated on par with IATA Areas TC1 and TC2 as the demand and the airfreight rates to North Asia may not be strong enough to absorb the fuel surcharge at the same quantum as that for IATA Areas TC1 and TC2.

1.1.4 Some BAR members showed their concerns on the increase in the fuel surcharge for shipments to IATA Area TC3 (excluding North Asia) as it is already difficult for the market to afford the airfreight rates with the current fuel surcharge. As such, some members proposed that for TC3 including North Asia, the revised fuel surcharge should be at SGD 0.35 per kg while for TC1 and TC2, it be at SGD 0.50 per kg.

1.1.5 CX mentioned that the revised fuel surcharge to IATA Area TC3 (including North Asia) should be about SGD 0.28 per kg.

1.1.6 JL informed the meeting that the Japanese government had approved the fuel surcharge to be no less than SGD 0.45 per kg.

1.1.7 Based on the feedbacks from the meeting, SQ will review its fuel surcharge adjustments.

1.1.8 The planned fuel surcharge adjustments of various BAR carriers are consolidated in Annex 1.

1. I will not set out Annex 1 but it recorded the proposed surcharges for a number of airlines not including Air NZ (for which the ‘Planned Fuel Surcharge’ column stated ‘N.A’). With two exceptions this table reflects prices of airlines present at the meeting. Nine were going to move to a range of different charges:

|  |  |  |
| --- | --- | --- |
| SQ | SGD 0.50  SGD 0.25 | TC1/2/North Asia  TC3 |
| JL | SGD 0.45 (minimum) | TC1/2/North Asia |
| CV | SGD 0.62  SGD 0.30 | TC1/2  TC3 |
| AF | SGD 0.63 | TC1/2 |
| KL | SGD 0.63 | TC1/2 |
| KZ | SGD 0.50  SGD 0.40  SGD 0.25 | TC1/2  North Asia  TC3 |
| LH (not present) | SGD 0.62 | TC1/2 |
| CI | SGD 0.50  SGD 0.25 | TC1/2/North Asia  TC3 |
| AY | SGD 0.50  SGD 0.25 | TC1/2/North Asia  TC3 |
| CX | SGD 0.50  SGD 0.20 | TC1/2  TC3 |
| PR (not present) | SGD 0.50  SGD 0.25 | TC1/2/North Asia  TC3 |

1. It is difficult to see such a disparate range of charges being announced at the meeting as evidence supporting the Overarching Understanding. The course of the meeting seems therefore to have been:

* SQ announcing its plans to increase to SGD0.50/kg in TC1, TC2 and TC3 North Asia and SGD0.25/kg in TC 3;
* unidentified airlines suggesting North Asia should be charged at SGD0.35/kg; and
* various different rates being announced by different airlines.

1. The Commission submitted that SQ had delayed the determination of its surcharge until the day after the meetings on 24 September 2004 and 20 October 2004 to consider the other airlines’ attitude to its proposal and to achieve a consensus. I accept this is a possible explanation of SQ’s behaviour. However, it is equally possible that the one day delay is explicable by internal bureaucracy.
2. I do not therefore regard this meeting as advancing the Commission’s case in general. Moreover it does not advance its case against Air NZ. At the meeting Air NZ was represented by a junior employee, Ms Yap. It is apparent from the annexure to the minutes that Ms Yap did not volunteer an FSC. I infer in light of that fact and her junior status that she was essentially just observing.

#### 20 October 2004 BAR CSC meeting

1. The minutes of this meeting record:

* an announcement by Lufthansa of its FSC increase; and
* an announcement by SQ of its different FSC increase.

1. They also record:

2.1.3 BAR members discussed on whether the current fuel surcharge level to North Asia should be increased. BAR members had the consensus that the demand and the airfreight rates to North Asia may not be strong enough to absorb higher fuel surcharges.

1. I consider that this does provide some support for the Commission’s case particularly with the use of the word ‘consensus’.

#### Conclusions on the Seventh Proposition

1. At the meetings there was certainly an abundant exchange of future pricing intentions. The minutes of the 22 April 2004 and 20 October 2004 meetings are capable of supporting a conclusion that consensus was facilitated.

#### 11.2.3.8 Fuel surcharge surveys

1. Between September 2002 and October 2004 SQ, in its capacity as the chair of the BAR CSC, sought information from the other airlines as to their FSC plans each time SQ was itself contemplating a change. The results of this process were then usually circulated back amongst the airlines. This circulation generally occurred after the relevant FSC had been imposed. As the Commission pointed out, this generally meant that the circulated survey results informed the airlines of what they were, in fact, actually already charging. The Commission submitted that this process served three purposes:
2. ensuring that the airlines had imposed any change in line with SQ’s change;
3. encouraging the airlines to continue charging an FSC; and
4. facilitating the co-ordination of future FSCs.
5. I do not regard (b) or (c) as very plausible. Whilst it is quite easy to imagine (a) could be correct and that the survey process served as a form of cartel discipline I do not, in fact, believe that this is what occurred. The reasons for this are short. Often enough the surveys would not be completed by one or more airlines but this does not appear to have had any consequence. In the same vein, the surveys quite often showed that different airlines were charging different rates, again without any apparent consequences. Whilst it is not difficult to imagine that the sharing of price information may give rise to an arrangement or understanding, it is not inevitable that it will do so. I do not think it did so here.

#### 11.2.3.9 The Singapore Competition Act 2004

1. There is no doubt that when the BAR CSC airlines became aware of the *Singapore Competition Act 2004* they largely ceased holding meetings about FSCs. Emails from Cathay Pacific indicated that the airlines were trying not to communicate about pricing issues as much as they had in the past in view of the Act. This appears to me to be common sense and I am quite content to infer that the airlines did reduce their communications inter se in light of the Act.
2. The Commission submitted that this showed that the airlines believed their conduct would contravene the new law. I do not accept this. It was obviously unwise in an anti-trust context to be having open discussions about pricing. But to say it was unwise is not to embrace the larger proposition that what they had been doing up until that stage was unlawful.

#### 11.2.3.10 Implementations of the FSCs

1. The Commission submitted that on all but two occasions Air NZ followed SQ’s FSC movements and their FSCs were relevantly identical for 38 out of 41 months. It agrees that Mr Chew decided not to follow SQ on 19 March 2003. This was done, it will be recalled, for competitive reasons, in response to an aggressive move by SQ in the New Zealand market. In relation to the second occasion, where Air NZ did not follow SQ’s 5 November 2004 increase, the Commission submitted that this was to be explained as being driven by a concern that Air NZ had about the operation of the *Singapore Competition Act 2004*. This is supported by Mr Chew’s report of 21 October 2004 which mentions the passage of that legislation although does not go as far as putting it forward as the reason for not following SQ. Under cross-examination Mr Chew was unable to give a convincing account of why Air NZ took the position that it did. Given the lapse of time it is perhaps not surprising that Mr Chew was not able to give any useful evidence about this. Although I regard his evidence as generally unreliable, I find it difficult to be clear whether I should infer from his evidence the impermissible purpose the Commission would attribute to him or a plausible inability to recall this information after a decade. I propose to approach the Commission’s circumstantial case on the basis that it is reasonably possible that the Commission’s contention is correct.
2. It should be noted that Air NZ did not follow SQ slavishly from this point on. For example, it did not adopt SQ’s North Asia rate in April 2005; in July 2005 it charged SGD0.70/kg as opposed to SQ’s SGD0.75/kg in TC1/2 and again did not charge a separate North Asia rate; in September 2005 it did not charge a separate North Asia rate. There were also other differences in the FSCs charged prior to November 2005. For example, Air NZ did not increase its FSC in TC3 North Asia in May 2004 whereas SQ did, and in October 2004 SQ increased its FSC in TC3 North Asia to SGD0.50/kg whereas Air NZ only increased to SGD0.25/kg.
3. I do not think that it is accurate to say Air NZ invariably implemented SQ’s position. The departure from SQ’s position on 19 March 2003 is a significant difficulty for the Commission. On the other hand, the actions of Air NZ after the introduction of the *Singapore Competition Act 2004* are capable of supporting the Commission’s case. A different view is also open: it charged different rates because there was no arrangement or understanding.

### 11.2.4 Was the Overarching Understanding reached?

1. Three witnesses gave evidence about Air NZ’s intentions: Ms Goh, Mr Chew and Mr Gregg.

#### 11.2.4.1 Mr Gregg

1. Mr Gregg was Ms Goh and Mr Chew’s superior. Although he gave evidence that he was responsible for FSC decisions this is not what most of the evidence showed. The FSCs were fixed by Mr Chew and Ms Goh. As I have said, if Mr Gregg had any role it was of the most limited kind. Ultimately, I did not think that Mr Gregg knew very much about the situation in Singapore. Whilst I do not conclude that he was seeking to mislead in his evidence I just do not think that he was really across the detail. I have placed little reliance upon his evidence.

#### 11.2.4.2 Mr Chew

1. Mr Chew took over from Ms Goh on 17 April 2002. The most important part of his evidence was his denial that he was aware of any arrangement or understanding with SQ.
2. I have concluded that except where Mr Chew’s evidence is corroborated by other matters I should generally place no direct weight upon it. This is because I am satisfied that he actively set out to be as unhelpful as he could be in the proceedings. It appeared to me at first that Mr Chew had a poor grasp of English and I suggested to counsel that he might be assisted by an interpreter. This Mr Chew declined, having given evidence that his English was perfectly good, that he had been using it for business ever since he left school and that he had been educated in English. This gave rise to three possibilities:
3. Mr Chew was pretending not to be able to speak English;
4. Mr Chew was lying when he said he could speak English well; or
5. Mr Chew’s self-awareness was low.
6. Having seen Mr Chew, I discount (c). I do not need to choose between (a) and (b). Mr Chew was frequently unable to recall matters (which is not surprising in itself) but when combined with a habit of taunting the cross-examiner this led me to believe that Mr Chew’s desire was that his evidence should be incoherent.
7. For example, when cross-examined Mr Chew’s frequent habit was to pause at the end of the question for a long period of time (often up to a minute) before asking for the question to be repeated. Of course, this may have had an innocent explanation and, for a time, I considered this was probably a manifestation of the language problem which Mr Chew denied having. However, at the end of the cross-examination it was put to Mr Chew that this process of delaying and asking for the question to be asked again was how he answered questions. The following exchange took place.

MR HALLEY: What I want to put to you, Mr Chew, is that you, in approaching giving evidence in the witness box, have taken this course: first, in response to questions that you find difficult you delay answering them?---Not true, sir.

Second, after a delay, you almost inevitably ask me to repeat the question.

MR SMITH: I object to the question.

HIS HONOUR: I allow the question.

MR HALLEY: What do you say to that? --- Sir, can you repeat again?

Was that meant to be funny, Mr Chew? ---No, sir. I want to be sure.

HIS HONOUR: Ask the question again, Mr Halley.

MR HALLEY: Second, after a delay, you almost inevitably ask me to repeat the question?---Sir, I do not want to delay, but I want to hear the question carefully.

What I want to suggest is that in response to my questions, you’ve come up with a number of answers that you wish to give me irrespective of the question that I put to you, and let me give you some examples. First ---

HIS HONOUR: Mr Smith is going to object to his, because you’re rolling things together.

MR HALLEY: Well, he hasn’t yet.

MR SMITH: Do you want to bet?

1. One had to be in the courtroom to appreciate the dynamic underpinning this exchange. After Mr Smith’s objection, I felt that it was inevitable that Mr Chew would respond that he wanted the question asked again and when he did so it was a moment of humour shared by all at the Bar table and in the well of the Court. Only the cross-examiner was not amused. Although I too was amused, the exchange has led me to believe that Mr Chew was taunting the cross-examiner and, in general, regarded the giving of his evidence as an opportunity to make mayhem.
2. My impression that Mr Chew was trying to throw sand in everyone’s eyes was exacerbated by Mr Smith’s re-examination where Mr Chew revealed not just an antipathy to the Commission but to Air NZ as well. Before setting this out it needs to be understood that an impression of Mr Chew’s evidence which was very much open was that he was unco-operative. An alternative view, which Mr Smith now sought to explore in re-examination, was that Mr Chew’s demeanour was to be explained by his inexperience in courtrooms. The re-examination was as follows:

MR SMITH: There is no doubt going to be a substantial attack on this man’s credit. As a matter of elementary fairness, I submit, I would be entitled to put questions to this man which may bear upon, in effect, the demeanour and conduct my learned friend will rely upon for a criticism.

HIS HONOUR: I allow the question.

MR SMITH: Had you ever, before the last two days, given evidence a court? --- Last two days?

Had you ever given evidence before coming to this court, to another?---Yes

And did that involve a lot of documents?---Yes.

MR SMITH: I won’t ask any more questions.

HIS HONOUR: Mr Chew, that concludes your evidence. You are free to go.

1. Again, one needs to grasp the atmosphere in the courtroom at this moment which was, to my mind, that having got everyone to laugh at Mr Halley, Mr Chew now got everyone to laugh at Mr Smith. I do not think this reflected well on Mr Chew.
2. Ultimately, I am not able to say whether Mr Chew was lying in his evidence or merely joking around or perhaps trying to be unhelpful. It is very slightly possible that he really had no idea of what was going on, although I doubt this. I do not need to form a concluded view on the explanation for the bizarre nature of much of his testimony because I am abundantly satisfied that whatever its cause it would be very dangerous to place any reliance upon his evidence except when what he says is obviously correct or corroborated from other sources.

#### 11.2.4.3 Ms Goh

1. There were two important aspects to Ms Goh’s evidence. The first was that she regarded Air NZ’s customers as being the freight forwarders rather than the freight forwarders’ customers. Thus, when she referred to a shipper she was referring not to a consignor but to a freight forwarder. This issue is relevant not to the present topic of whether the Overarching Understanding was reached but instead to who the customers of Air NZ were (which is relevant to the market issues). Ultimately the view I have arrived on that topic (which I deal with elsewhere) is that the situation was somewhat complex and that the airlines regarded some consignors as their customers, usually large ones, but did not regard small consignors as having that quality. Thus it seems to me that the word shipper inherently could apply to whoever Air NZ (or Ms Goh) regarded the customer as being and that in some circumstances this might be a large consignor and in others a freight forwarder.
2. In part for that reason, whilst I accept that Ms Goh’s evidence about who was a shipper, and who was not, is not altogether satisfactory, I do not think this necessarily redounds to the detriment of her credit, more so when she no longer works for Air NZ and the events in question occurred many years ago.
3. The second aspect of her evidence which was of significance was her denial of any understanding or arrangement with SQ. If this evidence were to be accepted then it would mean the Commission’s case would fail. This suggests that in assessing the veracity of Ms Goh’s evidence on this pivotal topic one needs to have regard not only to her credit but also to the (substantial) surrounding material on whether the Overarching Understanding can be established. It would, for example, be problematic to conclude that Ms Goh was telling the truth about the Overarching Understanding but then to conclude that the Commission’s circumstantial case was made good. It would be a direct contradiction.
4. In the case of Ms Goh the Commission made detailed criticisms of her credit in its submissions, which I take into account. My impression on the question of whether she was a truthful witness or not was that I had no clear view even taking into account the Commission’s criticisms. In part, this is because whilst Ms Goh’s English was quite good, much of the cross-examination was directed to what was meant in various emails and other documents and this cross-examination proceeded largely in reasonably complex English. I have made reference already to Ms Goh’s affirmative response to Mr Halley’s ‘green light’ question and here the same observations apply although this time more generally.
5. This is not to say that I am confident that her evidence was truthful either. Considered in isolation my view is that it is difficult to be clear about the matter. For that reason, I regard it as more useful to consider the veracity of Ms Goh’s evidence against the backdrop of the large canvas of the Commission’s case on the Overarching Understanding.

#### 11.2.4.4 Was Air NZ a party to the understanding?

1. With that in mind, I turn then to whether Air NZ was a party to the Overarching Understanding.
2. I have found this a difficult question to resolve. It is useful, however, to start with the case as it is formally articulated. The pleading is complicated, and omitting the particulars, is as follows:

Overarching Singapore Understanding

112. By reason of the matters alleged in paragraphs 67 to 111, at a time or times unknown to the Applicant but at least by 8 December 2003, or alternatively, a date between 8 December 2003 and 21 October 2004, Air New Zealand made an arrangement or arrived at an understanding (the “**Overarching Singapore Understanding**”) with Singapore Airlines and the other members of the Singapore BAR-CSC including but not limited to China Airlines, Thai Airways, Qantas, Emirates, Japan Airlines and Cathay Pacific, or any one or more of them, containing the following provisions or any one or more of them:

112.1A the parties would discuss or otherwise notify their intentions, including by attending meetings or otherwise, to impose or modify a fuel surcharge on the supply of air freight services from Singapore;

112.1 Singapore Airlines would advise Air New Zealand and the other international airlines party to the Overarching Singapore Understanding prior to implementing a change to the fuel surcharge which it intended to charge its customers for the supply of air freight services from Singapore with a commencement date that would allow enough lead time for the other international airlines to announce their changes before the change by Singapore Airlines was implemented;

112.2 after Singapore Airlines so advised, Air New Zealand and the other international airlines party to the Overarching Singapore Understanding would:

112.2.1 advise Singapore Airlines of their attitude to the pricing proposal, including whether they considered it would be unprofitable for the parties to implement the proposed change or certain aspects of the proposed change; and

112.2.2 advise their own intentions;

112.3 Singapore Airlines would impose the fuel surcharge referred to in paragraph 112.1 in the amount specified and from the date specified unless it advised the other international airlines party to the Overarching Singapore Understanding to the contrary;

112.4 where Singapore Airlines advised the other international airlines party to the Overarching Singapore Understanding that it intended to implement an increase in the fuel surcharge as alleged in paragraph 112.1, then each of the other international airlines, including Air New Zealand, would increase the fuel surcharge that it charged its customers:

112.4.1 at or about the time or times that Singapore Airlines stated it would increase its fuel surcharge; and

112.4.2 by an amount not substantially less than the amount of the increase advised by Singapore Airlines;

112.5 the international airlines party to the Overarching Singapore Understanding, including Air New Zealand, would not reduce the amount that they were charging their customers for the fuel surcharge to an amount substantially below the amount being charged by Singapore Airlines without advising Singapore Airlines of their intention to do so; and

112.6 where an international airline, including Air New Zealand, advised Singapore Airlines of the amount of the fuel surcharge that it intended to charge from Singapore and the date of implementation, that international airline would impose a fuel surcharge of that amount and from that date unless it advised Singapore Airlines to the contrary.

Particulars

The Overarching Singapore Understanding was comprised of or, further or alternatively to be inferred from:

(particulars omitted)

1. The first matter to note about this allegation is its extraordinary breadth. It is said to be an arrangement between Air NZ, SQ and *at least* China Airlines, Thai Airways, Qantas, Emirates, Japan Airlines and Cathay Pacific. And it is an arrangement said to have occurred by at least 8 December 2003 or some other date between 8 December 2003 and 21 October 2004.
2. The range of actions covered by the Overarching Understanding and the time of its performance are very large.
3. The scope of the Commission’s case on the Overarching Understanding was very broad and a consideration of the evidence underpinning it has taken approximately 100 pages of these reasons for judgment. As I have indicated, there are many aspects of the material I have examined which are inconsistent with the Commission’s case although I have also found that some of the evidence supports the Commission’s case.
4. Ultimately all of this evidence needs to be weighed together in light of the question: has the Commission proved on the balance of probabilities that there was an Overarching Understanding between the airlines to which Air NZ was a party?
5. In favour of the Commission’s case are these matters:
6. the practice of exchanging pricing information;
7. the reasonably parallel pricing which occurred in TC1 and TC2;
8. the existence of the BAR CSC and LIDC-C and the practice of the airlines openly discussing fuel surcharges at these meetings;
9. the publication by Lufthansa of its index and the fact that its trigger points provided occasions for the airlines to discuss fuel surcharges;
10. the fact that on a few occasions some airlines appeared explicitly to have agreed fuel surcharges; and
11. the fuel surcharge surveys.
12. This is not an exhaustive statement of the matters I have dealt with but rather merely an indication of the matters most favourable to the Commission.
13. Matters which the Commission pressed but which do not seem to me to help very much were:
14. the historical material surrounding resolution 116ss. What the Commission alleged here was the use of the Lufthansa Index not as a price fixing mechanism in itself but instead as a device such that when its trigger points were reached it permitted other airlines to engage in exchanges of pricing information. This is not what resolution 116ss was used for. It was a device for actual price fixing rather than an occasion for price discussion;
15. the delay by SQ between the announcement of its new FSC and its implementation. This appears to have been industry standard to give freight forwarders the chance to make arrangements; and
16. the *Singapore Competition Act 2004*. It does not follow that because the airlines eschewed discussions about fuel surcharges once this legislation became an issue that they were engaging in co-ordinated action beforehand. It is just as likely that they were simply being cautious.
17. There are some things which positively detract from the Commission’s case:
18. the absence of parallel pricing in TC3. As the graphs above show the pricing in TC3 was very far from parallel. Even in TC1 and TC2 the pricing was not uniform;
19. the absence of Lufthansa from the Commission’s case. The two biggest carriers were SQ and Lufthansa. The evidence suggests the distinct possibility of collusive behaviour between these two airlines (although, since neither has been heard, I make no finding about this). The point for present purposes is that it is difficult to imagine a co-ordinated arrangement being effective if Lufthansa was not a party to it; and
20. the absence of any evidence of adverse consequences for, or complaints about, airlines that did not comply with the alleged understanding.
21. Then there are particular difficulties with the Commission’s case against Air NZ:
22. the economic position of Air NZ meant that it could not charge more than SQ generally. It was also affected by fuel price fluctuations which at least in the upward direction gave it a strong incentive to follow SQ’s price initiatives. One would expect this to lead to a degree of parallelism;
23. the fact that despite the natural tendency for parallel movement to occur there were instances of competitive pricing on rates;
24. the existence of material in contemporaneous documents showing that Air NZ’s policy was to follow the national carrier. I do not consider it at all likely that these statements could have been made to conceal the true understanding. They are solid contemporaneous evidence of what Air NZ was in fact doing; and
25. the size of Air NZ. By and large SQ did not care what Air NZ was doing. It was a small player and nothing in the evidence indicates any interest on SQ’s part in the position of Air NZ or concern about its charging. Indeed the only evidence of any contact between the pricing policies of the two airlines was the occasion upon which SQ cut its rates on the Auckland/Christchurch route and Air NZ responded by not following SQ in an FSC increase.
26. Also to be considered is the evidence of the witnesses:
27. Mr Chew denied the understanding but I do not accept his evidence is reliable;
28. Ms Goh denied the understanding. Attacks were made on her credit which could lead to a rejection of her evidence, but also equally its acceptance;
29. Mr Gregg denied the understanding but I regard his role as peripheral;
30. Messrs Ros and Tan denied the understanding but neither was cross-examined and I would not wish to place much weight upon what either said in areas of controversy.
31. Ultimately, it follows that the evidence of the witnesses does not advance matters very far.
32. The question is whether the Commission has proved on the balance of probabilities that the Overarching Understanding existed and whether Air NZ was a party to it. I do not think that it has. I am simply not affirmatively satisfied of either matter.

### 11.2.5 Was the understanding a price fix under s 45A?

1. The Commission argued that the Overarching Understanding was a price fix to which s 45A applied. In light of my findings I do not need to decide whether this is so. However, if the Overarching Understanding had been established I would not have accepted that it was an arrangement or understanding to fix prices to which s 45A applied. Rather, it would have been an arrangement or understanding to exchange pricing intentions. It would have been necessary for the Commission, therefore, to have proven that it had the effect, or likely effect, of substantially lessening competition.

### 11.2.6 Substantial lessening of competition?

1. On the assumption that it was not a price fix to which s 45A applied the Commission nevertheless eschewed proving an actual substantial lessening of competition under s 45. It relied instead upon the evidence of Professor Church and Dr Williams to show that exchanging price information was likely to lead to a substantial lessening of competition. I do not accept the proposition that, in general, exchanges of future pricing intentions are likely to lessen competition substantially. If that were true every exchange of future pricing information would infringe s 45 and this would put such an arrangement on the same footing as price fixes under s 45A. Rather, something needs to be shown aligning the exchange of future pricing intentions with a likely drop in competition. This will require more than mere assertion. There were many factors at play in the Singapore market, the principal one of which was that the surcharges were merely part of an overall freight rate. The Commission did not allege that there was any co-ordinated action on those freight rates. If the freight rates remained competitive it is difficult to see how an exchange of pricing information about an element of those rates can have substantially lessened competition. Certainly, one is at best in the realm of speculation.
2. Finally, in light of my conclusions on the market issues there was no market in Australia to which s 45 could apply.

## 11.3 The remaining Understandings

1. I turn then to the December 2003 Singapore Understanding.

### 11.3.1 The December 2003 Singapore Understanding

1. I have set out the minutes of the BAR CSC meeting that took place on 8 December 2003 above at paragraph 837 and I have considered what can be gleaned from this meeting at paragraphs 1049-1055 in considering and rejecting the Commission’s case on the Overarching Understanding. The Commission now sought to use the events of that meeting to establish a separate understanding simply relating to an increase in December 2003. For the same reasons I have given for concluding that the meeting did not assist in establishing the Overarching Understanding it is also incapable of establishing this understanding. The Commission also pursued an alternative case that this understanding was an exchange of pricing information which was likely to lead to a substantial lessening of competition. On my findings, this issue does not arise. Had it done, I would have concluded for the reasons given above that the likelihood of a substantial lessening of competition was not shown.

### 11.3.2 The October 2004 Singapore Understanding

1. This understanding is alleged at paragraph 97 of the FASOC and relates to SQ’s move on 16 October 2004 to SGD0.50/kg in TC1, TC2 and North Asia and SGD0.25/kg in TC3. This arose from the BAR CSC meeting on 24 September 2004. I have already indicated that that meeting does not assist in establishing the Overarching Understanding. The Commission fails to establish this understanding either. As with the two previous understandings, the Commission also pursued a case that s 45 had been directly breached by reason of this understanding constituting an exchange of pricing information which was likely substantially to lessen competition. I reject this contention for the same reason I have rejected it in the case of those two understandings.

### 11.3.3 The Singapore ISS Understanding

1. The Commission alleges that at a meeting of the BAR CSC held on 23 January 2003 a group of airlines, including SQ and Air NZ, reached an understanding that they would each continue to charge the amount they were charging their customers for an ISS on the supply of air freight services from Singapore to Australia and would not reduce that charge.
2. I have avoided discussing the ISS in any detail until this point but it is now necessary to take a detour through it. Perhaps surprisingly, the ISS for Singapore was first raised at a meeting of the *Hong Kong* BAR CSC on 26 September 2001. At that meeting SQ indicated that it was proposing to impose a surcharge out of Singapore relating to new risk insurance expenses with effect from 1 October 2001 at the rate of USD0.10/kg. Mr Martin Ngai of Air NZ was present at this meeting. To give this some context it is worth recalling that this meeting occurred just under three weeks after the attack on the World Trade Center in New York on 11 September 2001 and just shortly before the commencement of Operation Enduring Freedom in Afghanistan. These were tense times in aviation.
3. In fact, the ISS was not implemented until 8 October 2001 and it was implemented at a rate of SGD0.18/kg.
4. On 4 October 2001 SQ called an urgent extraordinary meeting of the Singapore BAR CSC for the following day, 5 October 2001. The minutes record that most airlines had imposed an ISS of SGD0.18/kg. It seems, however, that this is incorrect and at that time most were merely planning to implement such a charge.
5. Air NZ removed its FSC ex-Singapore on or before 1 January 2002 as did most of the other carriers. An internal Air NZ email of 21 December 2001 shows that Air NZ was aware that the other major airlines were proposing to remove the FSC by 1 January 2002. The ISS remained in place.
6. On 31 January 2002 there was a meeting of the LIDC-C. At this meeting a report was given to the meeting of a survey conducted amongst BAR CSC members as to whether they proposed to impose the ISS on postal mail. Air NZ is recorded as ‘considering’ the question.
7. The next event relied upon by the Commission is the administration of a survey on 10 December 2002 by SQ as to the ISS that airlines were charging. In response many airlines indicated that they were charging an ISS of around SGD0.18/kg (including SQ and Air NZ).
8. In a Weekly Report sent by Mr Chew to Mr Gregg on 11 December 2002, Mr Chew advised that SQ was conducting a survey as to the airlines’ intentions regarding the ISS and that Air NZ in Singapore would ‘hold on to it as long as possible.’
9. The Commission’s alleged understanding relates directly to what happened next in January 2003. On 21 January 2003 SQ circulated the results of the December survey to the other airlines. On 23 January 2003 there was then a meeting of the BAR CSC at which Air NZ was represented by Mr Chew. The minutes of this meeting provide:

2.3 Insurance & Security

2.3.1 At the ACFC meeting, CAAS and SAAA have requested airlines to consider lowering their insurance and security surcharges (ISS) to insure Singapore remains a competitive hub. Chairman 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 Commission relied upon a number of circumstantial matters to establish this understanding, placing this minute only as its fifth argument for why the Court should conclude that price fixing had occurred. I need not set out those circumstantial matters because the minutes speak for themselves.
2. Against this minute Air NZ mustered three arguments. First, the meaning of ‘Member airlines agreed that there would be no reduction to the ISS charge’ was said to be unclear. The ambiguity was said to lie in the possibility that the sentence might mean the airlines were agreeing amongst themselves or it might mean that the independent position of all of the airlines was the same. I do not accept this latter interpretation as plausible.
3. Air NZ placed reliance upon what Mr Ros had said in his affidavit where he indicated that he had never been present when any airline representative had agreed a surcharge. As I have said, I am reluctant, however, to place any weight on this evidence which was not able to be tested by cross-examination and where it appears on its face to be contradicted by the minutes.
4. Mr Chew’s affidavit evidence was that he did not make any comment about the ISS during the meeting since such matters were something he had to obtain head office approval for. For reasons I have already given I do not regard it as safe to rely upon Mr Chew’s evidence. Further, I do not accept that Mr Chew did in practice need Mr Gregg’s approval.
5. Of course, to reach those conclusions about the reliability of Mr Chew’s evidence does not logically require one to affirm that Mr Chew did agree. If the minutes were to be viewed in isolation it might (perhaps) be difficult to draw a conclusion about it, although that would not be my view. However, the minutes were confirmed as correct at a meeting of the BAR CSC held on 5 August 2003. They had been circulated sometime in advance on 22 April 2003 in preparation for the April meeting which was then cancelled due to the SARS crisis. Mr Chew was at the 5 August 2003 meeting which approved the minutes. Finally, there is the fact that, entirely in line with the recorded agreement, Air NZ maintained its ISS. One has then three matters:
6. the minutes record an agreement between the airlines;
7. the minutes were confirmed as correct; and
8. Air NZ acted consistently with the agreement recorded.
9. I infer 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. For reasons I have given in relation to the fuel surcharge in Hong Kong I accept that the agreement was one to which s 45A applied.
10. For the same reasons I have already given, however, Air NZ’s conduct in arriving at this agreement with the other airlines did not occur in a market in Australia. Because the statutory definition of competition requires the presence of such a market there can have been no contravention of s 45(2). But for that matter I would have concluded that the Commission had established that Air NZ breached s 45(2)(a)(ii) by reaching the ISS Understanding and s 45(2)(b)(ii) by giving effect to it by not altering its ISS.

## 11.4 Conclusions on the facts in Singapore

1. The Commission fails on the Overarching Singapore Understanding, the December 2003 Understanding and the October 2004 Understanding but has established that the ISS Understanding was reached. However, s 45(2) did not apply due to the absence of a market in Australia. The Commission fails in Singapore.

# 12 THE COMMISSION’S CASE IN INDONESIA

## 12.1 Introduction

1. In Indonesia the Commission alleged that Garuda (but not Air NZ) had reached arrangements or understandings with a number of other airlines on 18 occasions and that each arrangement or understanding contravened s 45(2)(a)(ii). It also alleged that Garuda had implemented these understandings contrary to s 45(2)(b)(ii). The various understandings related to four different charges levied by the airlines carrying cargo out of Indonesia. The first two of these were fuel surcharges and security surcharges. Both of these were charged by weight. The former was designed to recoup to the airlines’ fluctuating expenses caused by changes in the price of aviation fuel. The security surcharge was designed to compensate the airlines for the increased costs of operating in the more perilous circumstances obtaining after the events of 11 September 2001 and was first imposed in October 2001.
2. The third impost was a customs fee which was imposed on the airlines by the Indonesian government and which the airlines then sought to pass on to their customers. It was not levied on weight but instead on the number of air waybills on the cargo manifest and the manner in which the cargo manifest was submitted (manually or electronically). Uniquely in this entire litigation the customs fee was payable on flights into Indonesia as well as out of Indonesia. So far as flights from Australia were concerned it was collected in the origin ports in Australia.
3. The fourth charge the subject of a price fixing allegation was one instance where it was said that freight rates themselves had been agreed (i.e. the overall rate and not component surcharges or fees).
4. The Commission alleged 18 separate agreements or understandings which were as follows:
5. The October 2001 Fuel Surcharge Understanding;
6. The October 2001 Security Surcharge Understanding;
7. The October 2001 Air Freight Rate Understanding;
8. The April 2002 Fuel Surcharge Understanding;
9. The June 2002 Fuel Surcharge Understanding;
10. The September 2002 Fuel Surcharge Understanding;
11. The January 2003 Fuel Surcharge Understanding;
12. The January 2003 Security Surcharge Understanding;
13. The May 2003 Fuel Surcharge Understanding;
14. The May 2003 Security Surcharge Understanding;
15. The May 2004 Customs Fee Understanding;
16. The September 2004 Fuel Surcharge Understanding;
17. The September 2004 Security Surcharge Understanding;
18. The April 2005 Fuel Surcharge Understanding;
19. The July 2005 Fuel Surcharge Understanding;
20. The July 2005 Security Surcharge Understanding;
21. The September 2005 Fuel Surcharge Understanding;
22. The Overarching Understanding.

## 12.2 Background

### 12.2.1 The Air Cargo Representative Board

1. As in Hong Kong and Singapore, the airlines conducting cargo operations into and out of Indonesia had a semi-formal committee structure to deal with industry issues, although in Indonesia it was known as the Air Cargo Representative Board rather than the BAR CSC. I will call it the ‘ACRB’. There were many members of the ACRB, the more prominent ones of which were Garuda, Air NZ, SQ, Lufthansa, Thai Airways, British Airways and Qantas. The chair of the ACRB was generally provided by the national carrier, Garuda. As a matter of practice, Garuda appointed an employee from its Jakarta office to fill this role. There was also a position of vice chairman which appears to have been filled by Lufthansa from May 2001 to June 2005. The ACRB met on a roughly monthly basis at Garuda’s cargo centre in Jakarta. At the meetings, topics of general relevance to air freight were discussed and this included discussion of freight rates, security and fuel surcharges and government taxes.
2. The very first meeting of the ACRB took place on 30 May 2001. The minutes of that meeting have attached to them the slides from a presentation given at the meeting. The Commission submits that the ACRB was established for the very purpose of reaching agreements and understandings of the collusive kind which it alleges were subsequently reached.
3. To make good that proposition it relies both upon the content of the presentation itself and a letter written by Garuda on 6 June 2001. The Commission did not rely upon the minutes of the meeting but I consider them a useful place to start in assessing the Commission’s argument. Item 1 of the minutes dealt with the structure of the ACRB and other administrative matters. Item 2 was headed ‘CASS’. It provided as follows:

2. CASS :

a. GA advised that the kick-off of the FSAG for CASS and setting-up of ICAP will be on 13 June 2001.

b. Manager IDS/JKT also advised the above programmes especially on CASS in more details. For ICAP, IATA requested all airlines to send its nomination to IATA/SIN by 01 June 2001 and to attend the meeting on 13 June 2001 at 9.00 AM at Mandarin Hotel.

c. In principle, all participants will give its support to the above programmes.

1. The FSAG was the ‘Fuel Surcharge Action Group’. It is not clear what the CASS or ICAP were (it does not appear that ‘CASS’ was a reference to the Cargo Account Settlement System). From this minute one could perhaps infer that the airlines intended to co-operate with respect to the ‘FSAC for CASS’ and the ‘setting up of ICAP’ but I would not be prepared to conclude on the basis of this material alone that either of these was proposed to be a price fixing arrangement.
2. The minutes do not indicate that the slides attached to them formed the basis of a presentation given at the meeting although I am content to assume that such a presentation was given. One slide was headed ‘Air Cargo Representative Board (ACRB)’ and the text on it read:

● 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. The Commission submitted that the words ‘a forum to consolidate view/information/effort among the Cargo Airline of the Airline’s Cargo Department which conduct Air Cargo Business in Indonesia’ permitted the inference to be drawn about the purpose it alleged the ACRB was established for. It also relied upon a letter sent by Garuda to the other members of the ACRB on 6 June 2001 which enclosed the minutes and the presentation slides. The last paragraph of this letter read:

Once again on the spirit of togetherness among The Cargo Airlines, we convey a sincere thanks for the support and we expect this forum will benefit us to develop/ cultivate the potential resource of airfreight movement in Indonesia,’

1. I do not accept the Commission’s submission about this. 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.

### 12.2.2 Witnesses

1. The Commission submitted that Garuda had called no witnesses on the issue of whether it had taken part in the 18 understandings alleged against it and had also given no evidence as to why these witnesses had not been called. For its part Garuda denied this and submitted that it had called evidence from Mr Haddad and Mr Mandala. Technically this is correct. However, in substance it is not. Garuda did call Mr Haddad, it is true, but he was based in Sydney. His evidence was limited to the position of the customs fee which, as I have noted already, was collected in Australia on flights from Australia. None of his evidence dealt with the other understandings which were concerned with fuel and security surcharges or freight rates. It is also true that Garuda did call Mr Mandala. His evidence was, however, directed at market issues. In the course of giving that evidence he gave incidental evidence of having been at an ACRB meeting on 23 June 2005. That meeting does not form part of the Commission’s case. It appears Mr Mandala also signed a fuel surcharge announcement on 14 September 2005 but this is of no moment. Although not apparently relied upon in its closing submissions, Garuda did read an affidavit of a Mr Evans (one of Garuda’s solicitors) which attempted to explain why it had not called any of these witnesses. He said he had spoken to the secretary to the general manager of Garuda who had told him that the Garuda employees with knowledge of the conduct had ceased to be employed by it over ‘different times over the last several years’. I do not accept this hearsay as having sufficient or really any detail about the people involved or their times of departure to constitute a real explanation for Garuda’s failure to call the witnesses. I find the failure unexplained. Garuda called none of the people involved in setting the surcharge, freight rates or fees, none of the people who attended the ACRB meetings on its behalf and none of the people involved in drafting the minutes of those meetings. As will be seen, the minutes of the ACRB meetings strongly suggest that agreement was reached by those present at the meetings. Of course, sometimes it can be shown that minutes are inaccurate or at least that the agreement recorded in them was not unanimous. I am not inclined to draw that inference where Garuda called no witnesses and propose to proceed on the basis that the minutes mean what they say.

## 12.3 The Understandings

### 12.3.1 The October 2001 Fuel Surcharge Understanding

1. The ACRB met on 4 October 2001 and minutes were kept. The meeting was chaired by a Garuda employee, Mr Azhar, and was held at Garuda’s Cargo Centre. A number of other airlines were present at the meeting including SQ, Cathay, Emirates, Thai, Korean Air and Lufthansa. The relevant portions of the minutes read:

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

1. Security Charge (SC) ex Indonesia:
2. Name of charge is Security Charge with the abbreviation is SC.
3. Effective as of 16 October 2001 – UFN.
4. The following amounts will be applied:

* To TC1 : USD0.10/kg
* To TC2: USD0.10/kg
* To TC3: USD0.50/kg

1. The above amounts will be based on chargeable weight.
2. The members of ACRB should report to JKTCFGA (Mr. S.M. Pulungan) for the implementation of SC above.
3. GA will report to Indonesian Government.
4. Fuel surcharge (MY) ex Indonesia:
5. 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).
6. GA will report to Indonesian Government.
7. MDP (Market Development Price) ex Indonesia:
8. 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.
9. Members of Working Group are as follows:

* GA as Chairman
* BR as Secretary
* SQ
* EK
* LH
* KE
* KL

1. 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.
2. The Commission submitted that the minutes were powerful evidence Garuda had reached an understanding with the other airlines that:
3. they would impose with effect from 16 October 2001 an FSC from Indonesia to all destinations (including within Australia) of USD0.05/kg or no less than that amount;
4. they would establish a working group of airlines, (‘the MDP’) including Garuda, to determine minimum prices to avoid undercutting among airlines.
5. The minutes were distributed to all of the ACRB members. There is no evidence to which I was taken that any airline objected that the minutes were incorrect. Indeed the minutes were adopted at the next meeting held on 29 October 2001. The minutes record that they had been prepared by Mr Azhar and approved by Mr Pulungan both of whom worked for Garuda and neither of whom gave evidence. On 8 October 2001, Mr Pulungan circulated an interoffice memorandum to all Garuda branch offices which indicated that an FSC of USD0.05/kg would be imposed with effect from 16 October 2001 ‘in accordance with joint decisions between Cargo Airlines in Indonesia.’
6. Mr Azhar wrote a letter on 5 October 2001 which referred to ‘the decision’ about FSCs having been ‘approved by all the members in the meeting.’
7. Garuda drew attention to the fact that the minutes also record that Garuda would ‘report to the Indonesian Government’ on the FSC. For reasons given in the discussion of Indonesian law and practice (above) the Indonesian government did not, in fact, require the airlines to obtain its approval for the imposition of tariffs. This statement in the minutes that Garuda would report to the Indonesian government is one of the few examples of such reporting occurring in the entire period. Whilst there are two instances in which there is evidence that Garuda informed the Indonesian government of a surcharge there is no evidence of the government ever approving a single surcharge. I am unable to infer, in those circumstances, that the agreement evidenced by the minutes must have been subject to a condition precedent that that FSC increase must have been conditional on the government’s approval. The argument fails on the facts.
8. Did Garuda reach the understanding? It is plain that it did. The inference that it did so from the minutes and the letters to which I have referred is irresistible.
9. The understanding had two aspects to it: it was an agreement to impose an FSC and also an agreement to establish the MDP Working Group to determine minimum prices. Both aspects of the understanding were implemented by Garuda. The minutes of the meeting of the ACRB held on 29 October 2001 record that most of the members of the ACRB had imposed the FSC. This does not directly identify Garuda but in light of the letters written by Mr Azhar and Mr Pulungan on 5 and 8 October 2001 it can be readily inferred that Garuda was one of the implementing airlines. Further, Garuda convened, and then chaired, several meetings dealing with the MDP in October 2001 (I discuss this in more detail below). I accept the Commission’s submission that its actions in so doing are to be seen as an implementation of the agreement to establish the working group.
10. In light of those findings there can be no doubt that Garuda was a party to this understanding. It was not in dispute that Garuda was in competition with several airlines on routes out of Indonesia for the purposes of s 45. For the reasons I have given in relation to the Commission’s case in Hong Kong, I am satisfied that the first aspect of this understanding which fixed the fuel surcharge was a price fix to which s 45A would have applied. But for the absence of a market in Australia I would have found a breach of s 45(2)(a)(ii) (the Commission did not allege that it had been implemented). Insofar as the second element is concerned – the decision to establish the MDP – I do not accept that this was itself a price fix within s 45A.

### 12.3.2 The October 2001 Air Freight Rate Understanding

1. The Commission alleged that on 29 October 2001 Garuda was party to an understanding with a number of airlines that with effect from 1 December 2001 the airlines would impose freight charges on cargo shipped to Sydney of no less than USD1.00/kg and to Perth of no less than USD0.80/kg. It is to be noted that this is an allegation about freight rates and not surcharges.
2. The evidence abundantly establishes that there was such an understanding and that Garuda was a party to it. There was a meeting of the ACRB on 29 October 2001. The meeting was chaired by the Garuda employee, Mr Azhar. Relevantly, the minutes provide:

4. MDP (Market Development Price) ex Indonesia:

1. Working Group MDP already set up the minimum rate (net rate) to various destination as attached.
2. Floor agreed to implement the above rates effective as from 01 December 2001. List of members approval as attached.
3. BA will give approval/comments soon.
4. 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).
5. I read the reference to the ‘floor’ agreeing as a reference to the airlines which were present at the meeting. It is in contradistinction to the words ‘the members not attended this meeting’ in item 4(d). To my mind this is direct evidence of the understanding alleged. The minutes were prepared and approved by Garuda staff and no objection was taken to the minutes at any subsequent ACRB meeting. There is no reason to doubt their accuracy. None of the Garuda staff involved were called and this failure was not explained.
6. Nevertheless Garuda submitted that a facsimile sent on 31 October 2001 showed that there had been no agreement reached at the 29 October 2001 meeting. The letter does not support that submission. It was by the facsimile of 31 October 2001 that Garuda distributed the minutes of 29 October 2001. Relevantly it said:

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

We still have a pending subject need approval from all 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 majority sell above the level)

Your aproval highly appreciate at the latest on 10th Nov 2001, by written letter addressed to me, as this program requested to be implemented on 01th Des 2001 by all audiences.

Thank you for your attention and cooperative, we remain.

1. Garuda submitted this permitted an inference to be drawn that agreement could not have been reached at the meeting on 29 October 2001 since it was seeking agreement to the MDP. 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.
2. As a fall back Garuda submitted it was bound to reach the agreement by Indonesian law. I have already rejected that argument in the section dealing with Indonesian law and practice.
3. I therefore accept that Garuda was a party to the October 2001 Air Freight Rate Understanding. For reasons already given, the requirements of ss 45A and 46(2)(a)(ii), save for the presence of a market in Australia were met and, but for that matter, I would have held Garuda in breach. The Commission did not allege that this understanding was implemented so no question of s 45(2)(b)(ii) arises.

### 12.3.3 The April 2002 Fuel Surcharge Understanding

1. On 9 April 2002 there was a meeting of the ACRB. It was not chaired by Garuda but Garuda was represented at the meeting. The Commission alleges that at this meeting its representatives agreed with the other airlines that, with effect from 1 May 2002, they would implement an FSC of USD0.05/kg to all destinations except Japan.
2. I did not apprehend from Garuda’s submissions that it disputed the fact of this understanding but it sought to put it in a particular context. In any event, the minutes of the meeting plainly establish that the understanding was reached. They provided:

FUEL SURCHARGE

LH will re-implement the FSC effective 25th April 2002 at USD0.05/kg, KL and AF will start on the 01st of May 2002.

Floor agreed to implement same with effective 01st May2002 except for Japan destination due to JL by the government law is not allow to implement same.

As for other members whose not attending the meeting, floor agreed to urged them to follow this implementation.

1. The Commission did not submit that this understanding had been implemented (although Garuda instructed its branch offices to do so). Garuda’s submissions about this understanding were as follows:
2. First, it was said that the understanding could not have had the purpose required by s 45A for ‘the reasons set out above’. This submission appeared at paragraph 374 of Garuda’s submissions. I have not been able to locate ‘the reasons set out above’. There is a submission about purpose at paragraph 366 but it is about the unrelated topic of the working group allegation and makes no sense in the present context. It may perhaps be a reference to the impact of the requirements of Indonesian law but that issue seems to have been explored at paragraph 375 which is below and not above paragraph 374. Whatever the submission was, it seems to me that the minutes I have set out above show plainly that the purpose was to fix the price of the FSC.
3. Secondly, it was said that it could not have been Garuda’s and the airlines’ purpose to agree to the surcharge because the airlines were obliged to agree the FSCs by Indonesian law which made mandatory Bermuda I-style rate fixing arrangements. I have found that the Indonesian law required nothing of Garuda and imposed only an obligation on the Indonesian government to approve tariffs. As a matter of fact I have also found that the Indonesian government did not approve surcharges and that the airlines were not required to submit their surcharges to it for approval. The airlines regarded themselves as free to do as they wished with surcharges in what was a regulatory vacuum. I infer Garuda did not regard itself as obliged to agree to anything by Indonesian law or by the Indonesian government. The agreement recorded by the minutes was, therefore, an agreement proceeding from its own desire and is not in any way to be seen as having resulted from some species of foreign state compulsion.
4. A variant of this argument pursued by Garuda was that once the Indonesian government fixed a tariff it remained in force and the airlines had no ability to agree amongst themselves to change it as this would be pointless until the government approved the tariff. They could not, therefore, have the prescribed purpose in s 45A.
5. To further this argument Garuda relied upon Article 6(5) of the Australia Indonesia ASA which provides:

…

Pending determination of the tariffs in accordance with the provision of this Article, the tariffs already in force shall apply.

1. An equivalent article appears in the corresponding ASA between Hong Kong and Indonesia. Garuda submitted that the effect of this was to require it to charge only the tariff which had been approved. In Section 7 I have rejected this view of the operation of Indonesian law. The balance of this submission – that the rate had been fixed in October 2001 – does not therefore arise. The point was that Garuda was bound by the pre-existing surcharge with the consequence that the April 2002 agreement could have had no effect pending the approval of the new surcharge.
2. The Commission submitted that this submission should be rejected because there was no evidence that Garuda had sought to have any of the charges approved. There is evidence that the Indonesian government was notified of some of the surcharges in the form of statements made by Garuda recorded in various minutes, which state that Garuda would notify the government of the FSC. For example, the minutes of the meeting of the ACRB held on 4 October 2001 record that Garuda would report the surcharge change to the Indonesian government and the minutes of the meeting of 29 October 2001 report that it had so reported. These are the only examples of this practice to which I was taken. In substance, therefore, the Commission is correct. I was not taken to a single instance of the Indonesian Government being asked to approve or in fact approving a surcharge. The argument fails because Garuda was not obliged by Indonesian law to seek approval of its surcharges, did not seek approval and did not receive approval.
3. It follows that I accept that the Commission has proved that on 9 April 2002 Garuda agreed with other airlines to impose an FSC of USD0.05/kg. The Commission did not submit that the understanding had been implemented.
4. Although it is not altogether clear, I believe that Garuda advanced an argument that even if it had entered into the understanding alleged nevertheless its freight rates had, on each occasion, been adjusted by more than the amount of the FSC. Consequently, the understanding could not have had the effect of fixing the freight rate since it was always offset by this competitive effect.
5. Garuda’s submissions about this (which were laid out in a manner which did not promote ease of access to the reader) were directed at many of the understandings alleged and, whilst it is perhaps not completely logical to consider this issue at this point, it is nevertheless convenient. A number of other submissions made by Garuda about this understanding at paragraphs 373-377 are also, strictly, chronologically inappropriate since they substantially postdate this particular understanding. Since Garuda’s submission was a general one applying to many understandings it is convenient to assess these submissions too. The problems of chronology arise from Garuda’s submissions.
6. In fact, the data relied upon by Garuda to make good this submission did not consist of its actual freight rates but rather ‘RSPs’ or ‘recommend selling prices’. Correspondence from Garuda’s Jakarta office suggested, and I find, that RSPs were minimum selling prices not freight rates. That does not provide a sufficient, or indeed any, evidentiary basis for concluding that the FSCs could have been subsumed by alterations in the underlying freight rates.
7. Garuda sought to buttress this submission with a number of additional points. The first of these was a memo produced in February 2002 which suggested freight rates had been adjusted with an eye on what competitors were doing. This does not assist Garuda.
8. Secondly, it relied upon two Thai Airways documents, the first of which said:

Carrier competition still the problem, National Carrier Garuda Indonesia (GA) they still overing the lowest rate to the cargo agent if compare with other airlines. GA dump JAPAN rate very low Specially for Nature products such as TUNA FISH and LIVE FISH.

1. The second document said:

Carrier competition at our-end not much different, ASIAN carrier still our major competitor such as JL/GA/SQ/MH but on some cases we still can compet by request AD-HOC rate to [Bangkok].

1. This does not establish that FSCs were absorbed by changes to freight rates.
2. Thirdly, Garuda relied upon a document it created when the FSC was discontinued in 2003 which read:

Considering the very fluctuating and dynamic market conditions including the level of competitive prices and charges in the external environment, it is regarded as necessary to review the *fuel surcharge* policy.

1. This does not support the contention for which it is advanced. I am also unpersuaded by Garuda’s submission that Qantas appears from time to time to have adjusted its freight rates to reduce the impact of an FSC. Qantas is not the airline being by the Commission. Nor do I think I should conclude that Garuda was doing what Qantas was doing. Garuda provided cross-references in the evidence to ‘price competition on cargo rates’ to Section B59 [351]. Resort to B59 took one then to Schedule A to the submissions. Schedule A contained extracts from 18 documents. I will not set them out because I do not see how the proposition they are tendered in support of can assist Garuda. The argument it is pursuing is that it reduced its freight rates to overcome the effect of the surcharge. It leads no evidence of its freight rates instead pointing to its RSPs which are *not* freight rates. It then seeks to buttress the argument by seeking to show that there was competition on freight rates in the Indonesian market. But this does not prove, even if accepted, that the surcharge was competed away by competitive forces acting on freight rates. I reject the argument.
2. In light of those conclusions it will follow that if I had been satisfied that the conduct had occurred in a market in Australia I would have concluded that Garuda had infringed s 45(2)(a)(ii) (but not s 45(2)(b)(ii) since implementation was not alleged).
3. In the section which now follows I consider the Commission’s claims in relation to a number of alleged understandings. In respect of all of these apart from the customs fee understanding, Garuda’s defences were identical to the ones I have just rejected in respect of the April 2002 Fuel Surcharge Understanding. It did not make any other separate submission about these understandings. My treatment of them will be correspondingly brief.

### 12.3.4 The June 2002 Fuel Surcharge Understanding

1. The minutes of the meeting of the ACRB held on 4 June 2002 record that ‘for fuel surcharge, members also agreed to maintain current condition except for JKT-SIN that will leave it to each airline’. These minutes were prepared and approved by Garuda staff. I find that Garuda was a party to an understanding reached that day to maintain the FSC at its current level (USD0.05/kg). For reasons already given, but for the absence of a market in Australia, I would have found a breach of s 45(2)(a)(ii). The Commission did not submit that this understanding had been implemented.

### 12.3.5 The September 2002 Fuel Surcharge Understanding

1. The minutes of an ACRB meeting held on 13 September 2002 record that the ‘floor agreed to implement new fuel surcharge effective 01 October 2002 as follows: TC1 and TC2: USD0.10/kg TC3: USD0.05/kg’. These minutes were prepared and approved by Garuda. Garuda was present at the meeting along with a number of other airlines. I have no hesitation in drawing the conclusion that it reached the understanding alleged. For the reasons I have already given in respect of the April 2002 Fuel Surcharge Understanding, but for the absence of a market in Australia, I would have concluded that contraventions of s 45(2)(a)(ii) and s 45(2)(b)(ii) were established.

### 12.3.6 The January 2003 Fuel Surcharge Understanding

1. The minutes of a meeting of the ACRB held on 29 January 2003 record that the ‘floor agreed to maintain fuel and security surcharge based on the current level’. Garuda and several other airlines were present. The minutes were prepared and approved by Garuda and circulated by it to the ACRB members who did not object to them. Garuda did in fact maintain its FSC. I have no hesitation in concluding that Garuda was a party to the understanding alleged. I reject Garuda’s defence submissions at paragraphs 373-377 for the reasons given in respect of the April 2002 Fuel Surcharge Understanding. Garuda admits that it maintained the fuel surcharge between 29 January 2003 and 30 April 2003. But for the absence of a market in Australia I would have found Garuda breached s 45(2)(a)(ii) and s 45(2)(b)(ii).

### 12.3.7 The May 2003 Fuel Surcharge Understanding

1. On 23 April 2003 Garuda decided unilaterally to stop charging the FSC altogether. So much is revealed by an inter-office memorandum of that day. Over the next few days it informed both its customers and the other members of the ACRB that it would abolish the FSC from 1 May 2003 onwards.
2. On 1 May 2003 Cathay Pacific indicated in an email to Garuda that SQ had complained about what Garuda had done and that since the FSC had been agreed collectively by the ACRB members, Garuda should call a meeting of the ACRB ‘if they want to terminate this practice/agreement.’
3. Garuda did so and the meeting was held on 8 May 2003. The minutes record that Garuda and any other carriers who had already waived the FSC were requested to reinstate the surcharge. Garuda agreed to reinstate the FSC from 12 May 2003. The same day Garuda notified its customers of this ‘joint decision’. The agreement was also referred to in an inter-office memo of 9 May 2003.
4. I do not doubt that Garuda reached an understanding on 8 May 2003 with the other airlines to reimpose its FSC with effect from 12 May 2003. Its effort in unilaterally deciding to withdraw the FSC on 23 April 2003 was a departure from the earlier understanding of the airlines to keep the FSC in place and was met with swift complaint by other annoyed members of the cartel.
5. Garuda almost immediately implemented the reintroduction of an FSC of USD0.10/kg in TC1 and TC2 and USD0.05/kg in TC3. Garuda admits, subject to some minor matters, that this occurred between 12 May 2003 and 30 June 2004. It argues that some specific routes were not subject to implementation in TC2 and TC3. These are said to be:
6. cargo carried from Indonesia to Amsterdam (TC2) from 15 August 2003 to 31 December 2003;
7. cargo carried from Indonesia to Singapore (TC3) from 12 May 2003 to 31 December 2003;
8. cargo carried from Indonesia to Singapore, Taipei, Seoul and *tuna* carried to Japan from 1 January 2004 to 31 January 2004 (TC3); and
9. cargo carried from Indonesia to Singapore, Kuala Lumpur, Saigon, Bangkok, Shanghai, Beijing, Canton and Japan (again, only tuna) from 1 February 2004 to 30 June 2004.
10. Neither party directed me to any evidence about this. Garuda said at paragraph 343 of its submissions that it did not bear the onus of proof and that the Commission had led no evidence. The Commission submitted at paragraph 323 that Garuda had led no evidence on the issue ‘other than certain inter-office and external announcements’. Garuda’s submissions do not appear to do this, however. Further, the Commission submitted that Garuda could not rely upon the (unidentified) inter-office memoranda and announcements and was bound to tender the underlying air waybills. Garuda denied this, submitting that the Commission itself had relied upon the inter-office memoranda and announcements.
11. The parties have between them omitted to refer me to the relevant evidence and I decline to undertake a trawl though the material myself. The Commission bears the onus of proving implementation. Nothing has been proved. The Commission has, therefore, the benefit only of the admission made by Garuda in the Schedule to its Further Amended Defence. It is true that Garuda has not proved the positive matters in (a) to (d) above but this failure does not fill the vacuum left by the combined effect of its limited admission and the Commission’s non-leading of any evidence on implementation (or at least any evidence to which I was taken).
12. I conclude therefore that the Commission has not proved that Garuda implemented this understanding or any other to which the periods referred to in (a) to (d) refer in respect of the routes referred to in (a) to (d).
13. I do not think this makes any substantive difference to my conclusion that this understanding (and the other understandings to which the non-admissions relate) was reached. It could be relevant to penalty but my finding that the minutes of the ACRB meetings mean what they say is not dented because the understanding is not shown to have been implemented on every route or in respect of, on some occasions, tuna.
14. In those circumstances I conclude that the May 2003 understanding was reached and implemented by Garuda. I reject Garuda’s defences in paragraphs 373-377 of its submissions for the reasons I have given in relation to the April 2002 Fuel Surcharge Understanding. But for the absence of a market in Australia I would have found that Garuda had infringed s 45(2)(a)(ii) and s 45(2)(b)(ii).

### 12.3.8 The May 2004 Customs Fee Understanding

1. This understanding was somewhat different to the other understandings alleged in this litigation. It related to what was called a ‘customs fee’. The customs fee was not originally the airlines’ idea. Rather, in late April 2004 the Indonesian government had announced that it would impose a tax on cargo manifests. The tax was in Indonesian Rupiah and was as follows:

|  |  |  |
| --- | --- | --- |
|  | 1-10 AWBs | >10 AWBs |
| Manifest electronically submitted | IDR250,000 | IDR450,000 |
| Manifest submitted non-electronically | IDR125,000 | IDR250,000 |

1. It was payable both on flights out of Indonesia and, uniquely in this case, flights into Indonesia.
2. One witness, Mr Haddad, who had worked for Garuda in Sydney gave some evidence that airlines generally sought to pass such charges through to their customers. It is easy to conclude that it was in their interests to do so. However, it seems obvious that the imposition of a fresh government expense on all carriers also carried with it opportunities for competition by those minded not to pass the tax on.
3. In any event, it is clear that the airlines were not pleased with the imposition of the tax and they lobbied to have it removed. Their efforts were in vain. Whilst those efforts were being pursued the airlines also began to consider whether, should those efforts come to nothing, they would pass on the tax, and if so, to what extent.
4. The Commission’s case was that sometime between 6 and 11 May 2004 Garuda and a collection of other airlines reached an understanding that with effect from 16 May 2004 they would each impose a ‘customs fee’ on all air waybills for exports of a minimum of USD5.00 per air waybill and for *imports* of a minimum of USD6.00 per waybill which was, so it was alleged, subsequently reduced to USD5.00.
5. The main evidence the Commission relied upon were the minutes of two meetings of the ACRB held on 6 and 11 May 2004.
6. The relevant portion of the minutes for the 6 May 2004 meeting provides:

4. 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)?

[emphasis in original]

1. 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.
2. The matter is not so clear in relation to the customs fee on imports. It is apparent from (d) that at the meeting held on 6 May 2004 no decision had been made about a fee on imports (‘A final decision on the options for imports will be made in the next meeting….’).
3. The next meeting was held on 11 May 2004. The minutes of that meeting are not available. There were, however, other documentary traces. The first was an attendance list which showed that Garuda and several other airlines were present at the meeting of 11 May 2004. The second was an email sent by a Mr Zulma of Emirates to his superiors reporting on what transpired at the meeting. Mr Zulma said:

I have just attended ACRB meeting and decide the following:

1. EXPORT – Airlines in JKT will collect USD 5.00 (minimum) per AWB. This amount will be reflected on AWB under code CG

2. IMPORT – Airlines in JKT to request their HDQ to inform all station to collect USD 6.00 (minimum) at stations of origin, and reflected on AWB under code CH.

We are now informing all our agents that charges for point 1 will be effective 16 May 2004. However, it would be not easy to implement point 2 as mentioned in your e-mail earlier. Thus, I would appreciate if you could comments so that I can further discuss with chairman of the ACRB.

Yovita – we will pay the customs for this charges monthly – I will discuss further with you soonest.

1. Of course, this confirms the position in relation to the fee on export. In my opinion, it does not prove the existence of a consensus between the airlines as to the import position. At best it was an understanding to seek to persuade persons further up each airline’s hierarchy to authorise the charging of the fee on imports. Such a concept necessarily presupposes the absence of agreement. Although it seems likely to me that an understanding was subsequently reached about imports I do not think it occurred on 11 May 2004 (which is the Commission’s case).
2. The Commission sought to buttress this material with four other matters none of which persuades me that an understanding with respect to a fee on imports was reached:
3. *The establishment of the ACRB.* I have already rejected the argument that the only purpose of the ACRB was to fix tariffs.
4. *The alleged purpose of the meetings of 6 and 11 May 2004.* The Commission pointed to a China Airlines email sent before the 6 May 2004 meeting which it submitted showed that ‘the issue of the customs fee was, by early May 2004, of concern to ACRB members’. Accepting this to be so does not assist in drawing a conclusion that an understanding on a customs fee on imports was reached on 11 May 2004 when the minutes show that it was not. The Commission also pointed to Garuda’s invitations to ACRB members (between 7 and 10 May 2004) to attend the 11 May 2004 meeting to discuss ‘PNBP – Customs Charges Data Processing (CG) fee’. This suffers from the same problem.
5. *Announcements and communications between ACRB members after the 6 and 11 May 2004 meetings.* In relation to the fee on imports the Commission relied on the fact that SQ told a number of airlines that it would be imposing a USD5.00 fee per air waybill into Indonesia with effect from 22 May 2004. Although this is a matter which is consistent with the Commission’s case it is not a sufficient basis, by itself, to conclude that agreement had been reached on 11 May 2004.
6. *Minutes of a BARINDO meeting of 28 May 2004.* BARINDO is the abbreviated name for the Board of Airline Representatives in Indonesia, effectively the equivalent of the BAR in Hong Kong and Singapore. These minutes record some interesting matters: like all good meetings the first item on the agenda was a one hour lunch; Royal Jordanian Airlines was apparently behind on its membership dues; and a Ms Robot presented the details of her next presentation on Indonesian tourism. What the minutes do not contain is any reference to the position of the customs fee in respect of imports. There is a long discussion of the customs fee and what steps were being taken to persuade the government to abandon it. From this the Commission selected these words attributed to Cathay Pacific as assisting its case:

All airlines have agreed to charge USD5 to cargo agents.

I accept this provides some support for an understanding with respect to a customs fee on imports. It does not assist in proving it occurred on 11 May 2004.

1. *The Communication with GAFESKI.* GAFESKI was the freight forwarder association. Garuda wrote a letter to it on 6 May 2004 informing it of the airlines’ decision to impose the USD5.00 customs fee on ‘every export item’. It is not therefore referring to a decision with respect to imports.
2. More generally (and in addition to (e)) the Commission faces the difficulty that (a) to (d) are matters capable quite sensibly of referring to an agreement having been reached about the customs fee on exports. They need not refer to the position with respect to the imposition of the fee on imports. Since no such agreement was made on 6 May 2004 or 11 May 2004 I am disinclined, therefore, to see these documents as establishing that such an agreement had been reached at that time.
3. That conclusion is supported by the fact that Garuda did *not* implement a USD5.00/kg fee per air waybill on imports from Australia in May 2004. What it implemented was a fee of AUD10.00/kg. Although the Commission is correct that this is consistent with the understanding it alleges (that the fee would be at least USD5.00/kg) this is not compelling when the implementation evidence is being used to show the existence of the understanding rather than giving effect to the understanding. The Commission’s point would be well made in relation to the latter (and indeed, the Commission did seek to use it in that way as well). I do not accept, however, that the imposition of any customs fee above USD5.00 by Garuda is probative that the understanding about the customs fee on imports was reached on 6 or 11 May 2004.
4. It follows that in relation to the fee imposed on exports I would have concluded that Garuda infringed s 45(2)(a)(ii) and s 45(2)(b)(ii) but for the absence of a market in Australia. I would have rejected each of the defences in paragraphs 373-377 for the reasons I have given in relation to the April 2002 Fuel Surcharge Understanding. In relation to the customs fee imposed on imports I do not find the understanding has been proved. Had it been proved I would have accepted that a breach of s 45(2)(a)(ii) and s 45(2)(b)(ii) was established in the markets for freight services from ports in Australia to ports in Indonesia. I would have concluded by parity of reasoning I have already given in Chapter 4 that those markets were located in Australia. It is to be noted in that regard that the customs fee on imports into Indonesia from Australia was collected at the origin ports in Australia.

### 12.3.9 The September 2004 Fuel Surcharge Understanding

1. There was a meeting of the ACRB on 29 September 2004 attended by many airlines including Garuda. The minutes were prepared, approved and distributed by Garuda and no airline thereafter objected to any part of them. The minutes recorded that the participants at the meeting ‘have been decided as follows’ in relation to the FSC:

For TC-1 & 2 minimum charge USD 0.20/Kg it is calculated based on gross weight chargeable weight, Fuel Surcharge for TC-3 is still maintain (USD0.05/Kg).

1. The minutes also recorded that the ‘decision’ would be valid from 16 October 2004.
2. The Commission submitted that there had been an understanding reached at the meeting to impose or maintain an FSC of no less than USD0.20/kg in TC1/2 and at USD0.05/kg in TC3 on cargo flown out of Indonesia with effect from 16 October 2004. I accept this submission. The only arguments advanced against that proposition were those at paragraphs 373-377 of Garuda’s submissions which I have already rejected for the reasons given in relation to the April 2002 Fuel Surcharge Understanding.
3. Further, apart from cargo carried from Indonesia to Singapore and Kuala Lumpur, Garuda implemented the understanding. But for the absence of a market in Australia I would have concluded that the Commission had succeeded in proving breaches of s 45(2)(a)(ii) and s 45(2)(b)(ii).

### 12.3.10 The April 2005 Fuel Surcharge Understanding

1. There was a meeting of the ACRB on 4 April 2005 attended by a number of airlines including Garuda. The minutes are not available, however, an employee of Lufthansa, Ms Mawarsari, subsequently sent an email to the other airlines in the ACRB recording what had occurred at the meeting. Lufthansa was the deputy chair of the ACRB. The email records that ‘members agreed to increase the fuel surcharge min USD0.10 from their current fuel surcharge effective 01 May 2005 for TC1/2. TC 3 remains unchanged.’
2. The Commission submitted that this was evidence that Garuda and the other airlines present had reached an understanding to impose an FSC on cargo flown out of Indonesia of no less than USD0.30/kg in TC1 and TC2 and USD0.05/kg in TC3 with effect from 1 May 2005.
3. I accept this submission. Garuda advanced no arguments against except those in paragraphs 373-377 of its submissions which I have already rejected for the reasons given in relation to the April 2002 Fuel Surcharge Understanding. I conclude that the understanding is established.
4. Garuda admitted that it imposed such an FSC from 1 May 2005 to 14 July 2005. It does not admit this in relation to cargo carried to Singapore or Kuala Lumpur. There is no evidence before me on that topic accordingly the Commission has not proved implementation on those two routes.
5. Apart therefore from the absence of a market in Australia I would have concluded that Garuda breached s 45(2)(a)(ii) by reaching this understanding and s 45(2)(b)(ii) by implementing it.

### 12.3.11 The July 2005 Fuel Surcharge Understanding

1. There was a meeting of the ACRB on 15 July 2005. Present were a number of airlines including Garuda. Minutes were kept by Garuda and an approved version of those minutes was circulated by it to the other ACRB airlines. There was no objection to those minutes. They record that the ‘ACRB members agreed that effective 01 AUG 2005 minimum (MY) Fuel Surcharge: TC1/2: USD0,40/kg TC3 USD 0,05/kg… ACRB agreed for this temporary SIN/KUL will not implemented Fuel Surcharge except KE.’
2. The Commission alleges that this proves that Garuda was a party to an understanding to impose an FSC with effect from 1 August 2005 in TC1/2 of USD0.40/kg and in TC3 (except Singapore and Kuala Lumpur) of USD0.05/kg. I accept this submission. The only matters put against that conclusion by Garuda were the matters at paragraph 373-377 which I have rejected for the reasons given with respect to the April 2002 Fuel Surcharge Understanding. Garuda admits that it imposed such a surcharge between 1 August and 15 September 2005.
3. But for the absence of a market in Australia I would have concluded that Garuda had infringed s 45(2)(a)(ii) and s 45(2)(b)(ii).

### 12.3.12 The September 2005 Fuel Surcharge Understanding

1. The Commission’s allegation is that between 29 August 2005 and 22 September 2005 Garuda and a number of other airlines agreed with effect from 1 October 2005 to impose or maintain a minimum FSC of USD0.45/kg on services from Indonesia to TC1/2 and USD0.05/kg on services to TC3. The principal evidence for this was said to be the minutes for a meeting of the ACRB held on 15 September 2005. These minutes were prepared, approved and distributed by Garuda. They show that the sole subject of the meeting was the fuel surcharge. The first item on the agenda was ‘[e]stablishing the basic value of the Fuel Surcharge price rise.’ Under this item there were reports from each of the airlines present as to their FSCs. Some of these appear to have been reports as to any current FSC being charged whilst others seem to have foreshadowed likely future price intentions. Garuda fell into the latter category. Its entry read:

Garuda Indonesia:

Fuel Surcharge will increase as of 16 September 2005, as follows:

a. TC-I & II from USD 0.40 to USD 0.45/kg, Security Charge USD 0.10/kg.

b. TCIII:

1. SIN & KUL destinations which previously did not incur a charge, now incur a Fuel Surcharge of as much as USD 0.03/kg.

2. ASC destinations (except SIN/KUL) as much as USD 0.08/kg.

3. JPK & SWP destinations from USD 0.05 to USD 0.10/kg.

4. Security Charge for all of TC III remains at USD 0.05/kg.

c. Calculation based on Chargeable Weight,

1. An example of the former was:

China Airline:

Has imposed a Fuel Surcharge for TC-I & II = USD 0.50/kg since 01 September 2005, whilst for TC-III, specifically TPE, HKG & JPN, CI still imposes a Fuel Surcharge of as little as USD 0.05/kg.

1. Some other airlines reported what they had done and what they were going to do. For a number of airlines it is impossible to tell whether what is recorded is current practice or future intention. An example of this is KLM whose entry read:

KLM:

a. Fuel Surcharge for TC-I, II, & III alike = USD 0.50/kg, except KUL = USD 0.05/kg, Security Charge = USD 0.05/kg

b. Security Charge = USD 0.13/kg.

1. A number of airlines indicated that their strategy would be to follow the national carrier. Emirates was such an airline. It also made a recommendation. The minutes read:

Emirates Air:

a. To follow the Flag Carrier (GA) policy in implementing a Fuel Surcharge and Security Charge, to come into effect from 1 October 2005.

b. Suggestions:

1. Effecting a SC & MY value that is the same for all airlines.

2. Rounding off of odd Fuel Surcharge values, e.g. USD 0.03 becomes USD 0.05 or USD 0.08 becomes USD 0.10.

3. Creating a letter of warning/appeal for airlines which do not follow the provision/decree of the ACRB.

1. The rounding proposal is of some significance, as will be seen.
2. Item 2 on the minutes was headed ‘Resolution of the Meeting’. The minutes read:

a. It has been agreed by all the attending members of the ACRB to implement a Fuel Surcharge in accordance with the Flag Carrier (GA) as of 1 October 2005.

b. GA as the Flag Carrier will send letters to the Head Office of the airlines incorporated as members in the ACRB, in particular TG, JL and Qatar Airline, and will inform BARINDO of the agreement to implement a Fuel & Security Surcharge, at a minimum of no less than that of the Flag Carrier.

c. Suggestion to implement a Fuel Surcharge with a round number value, for example USD 0.03 becomes USD 0.05, USD 0.08 becomes USD 0.10.

1. There is an ambiguity about this. It is possible that it reflects an understanding to follow what Garuda was doing. But it is also possible that the understanding was supplemented by Emirates’ rounding suggestion. Or, equally, it might have meant that Garuda would charge its surcharge but the other airlines would, or might, impose the Emirates’ rounding policy. It seems that Garuda in fact imposed USD0.45/kg in TC1 and TC2 and USD0.10/kg in TC3 (although USD0.05/kg in Singapore and Kuala Lumpur). This is not quite its announced position. In order to arrive at the Commission’s understanding one needs to ignore Garuda’s announced position at the meeting and apply Emirates’ suggested rounding procedure *and* ignore the proposed USD0.08/kg rate in TC3 apart from Singapore and Kuala Lumpur.
2. The Commission pleads an understanding to charge USD0.05/kg in TC3. The minutes suggest, and Garuda admits, that such a charge was imposed only in Singapore and Kuala Lumpur. I am not satisfied on the balance of probabilities that the understanding was reached as alleged by the Commission in TC3. I am satisfied that it was reached with respect to TC1/2.
3. The only other defences to these pursued at a factual level were those in paragraphs 373-377 of Garuda’s submissions which I have already rejected for the reasons I have given in relation to the April 2002 Fuel Surcharge Understanding. The understanding with respect to TC1/2 was admitted by Garuda to have been implemented.
4. Apart, therefore, from the absence of a market in Australia I would have found contraventions of s 45(2)(a)(ii) and s 45(2)(b)(ii) with respect to this understanding in relation only to TC1/2.

### 12.3.13 The October 2001 Security Surcharge Understanding

1. The Commission alleged this understanding was reached at the ACRB meeting on 4 October 2001. The same meeting was the subject of the Commission’s allegation about the October 2001 Indonesian Fuel Surcharge Understanding. The minutes are set out above. The minutes record as ‘discussed and agreed’ the introduction of the ISS as follows:

TC1 USD0.10/kg

TC2 USD0.10/kg

TC3 USD0.05/kg

1. These would be effective 16 October 2001.
2. The defences Garuda advanced against this understanding were the same as those it utilized with respect to the October 2001 Indonesia Fuel Surcharge Understanding. I have rejected those above. Garuda admits that it implemented the ISS outlined above (except to Taipei or Seoul or in respect of tuna carried to Japan). Accordingly, but for the absence of a market in Australia I would have found infringements of s 45(2)(a)(ii) and s45(s)(b)(ii).

### 12.3.14 The January 2003 Indonesia Security Surcharge Understanding.

1. As noted above at paragraph 1179, at the meeting held on 29 January 2003 the airlines agreed to maintain their FSCs and also the ISSs. I have dealt with above the Commission’s argument that an understanding was reached at this meeting in relation to the FSC. In this section I deal with the Commission’s argument that an understanding was reached at this meeting that the airlines would maintain (i.e. keep at its current level) the ISS. For the reasons I have given in relation to the FSC at the same meeting I find that this understanding was reached and that Garuda was a party to it. I reject the defence referred to by Garuda at paragraphs 373-377 of its written submissions for the reasons I have given in relation to the April 2002 Fuel Surcharge Understanding. Apart from the carriage of cargo from Indonesia to Taipei and Seoul and of tuna to Japan, Garuda admits that it imposed an ISS of USD0.10/kg in TC1/2 and USD0.05/kg in TC3. I reject the Commission’s suggestion that it was for Garuda to prove that it did not implement the ISS on cargo carried to Taipei or Seoul or in respect of tuna carried to Japan. Once the matter was not admitted it was for the Commission to prove its own case. In those circumstances I would have found that Garuda had infringed ss 45(2)(a)(ii) and 45(2)(b)(ii) (apart from with respect to the routes referred to in the previous paragraph) had the relevant markets been markets in Australia.

### 12.3.15 The May 2003 Security Surcharge Understanding

1. I have dealt already with the ACRB meeting on 8 May 2003 which followed rapidly upon Garuda’s unilateral decision to remove its FSC and which excited the attention of the other airlines. As will be recalled it was at that meeting that Garuda decided to reintroduce its FSC.
2. At that same meeting the Commission also alleges that Garuda reached an understanding with the airlines represented at that meeting that it would maintain its current ISS. I accept this argument. The same minutes record ‘the security surcharge will maintain, as agreed’. I accept this proves the understanding for the reasons I have already given in relation to the 8 May 2003 meeting. I reject Garuda’s written submissions at paragraph 373-377 for the reasons I have already given in relation to the April 2002 Fuel Surcharge Understanding. Apart from the position of cargo to Seoul and Taipei and of tuna to Japan, Garuda admits that it levied this ISS. I find implementation proved against it except on those routes. Apart from the absence of a market in Australia I would have found breaches of s 45(2)(a)(ii) and 45(2)(b)(ii).

### 12.3.16 The September 2004 Security Surcharge Understanding

1. I have dealt above with the Commission’s submission that at the ACRB meeting held on 29 September 2004 Garuda reached an understanding with a number of airlines in relation to an FSC. The Commission submitted that the same minutes also established an understanding to which Garuda was a party with respect to its ISS.
2. I accept this submission. In addition to the decision reached at the meeting about the FSC, the minutes also record in relation to the ISS that ‘For TC-1&2 minimum charge USD0.10/kg it is calculated based on gross weight/chargeable weight’ and that ‘Fuel Surcharge for TC-3 is still maintain (USD0.05/kg)’. I am satisfied that the reference to a fuel surcharge is erroneous and it is in fact referring to a security surcharge. This is because the quoted passage appears under the heading ‘Security Charge’. The only substantive factual matters advanced against this conclusion were those appearing at paragraphs 373-377 of Garuda’s written submissions which, for reasons already given, I reject. Garuda admits that it implemented this ISS. Apart, therefore, from the absence of a market in Australia I would have concluded that Garuda breached s 45(2)(a)(ii) and s 45(2)(b)(ii).

### 12.3.17 The July 2005 Indonesia Security Surcharge Understanding

1. The Commission submits that at the ACRB meeting held on 15 July 2005, Garuda reached an understanding with the other airlines present that it would maintain its ISS at no less than USD0.10/kg in TC1/2 and USD0.05/kg in TC3. I have already concluded that Garuda reached an understanding with the other airlines at this meeting with respect to its FSC. I am also satisfied that it reached such an understanding with respect to its ISS. The minutes record that the security surcharge would be maintained. The only submissions advanced against this were those in paragraphs 373-377 of Garuda’s submissions which, for reasons I have already given, I reject.
2. Garuda admits that it charged the ISS except in relation to cargo carried from Indonesia to Seoul and Taipei and in respect of tuna to Japan. I conclude that it implemented the understanding on the routes it admitted but not otherwise. Apart from the absence of a market in Australia I would have concluded that Garuda had infringed s 45(2)(a)(ii) and s 45(2)(b)(ii).

### 12.3.18 The Overarching Indonesia Understanding

1. I have considered above the Commission’s alleged understandings with respect to FSCs, ISSs, the customs fee and the freight rate. Ten distinct understandings were alleged with respect to the FSC. The Commission submitted that these ten FSC agreements could also be seen as the result of an overarching understanding. This understanding was said to have been reached by no later than 8 May 2003. The significance of that date is that it was the meeting at which Garuda had reinstated its FSC after unilaterally dropping it.
2. The Commission’s allegations were set out in paragraph 101 of its pleading. Leaving out the particulars the allegation was:

101 Further or alternatively to paragraphs 69 to 100A, at a time or times unknown to the ~~applicant~~Applicant but by no later than 9 May 2003, Garuda made an arrangement or arrangements or arrived at an understanding or understandings with a number of other international airlines including but not limited to Cathay Pacific, Singapore Airlines, Emirates, Thai Airways, China Airlines, EVA Air, Lufthansa, KLM, Korean Air, Malaysia Airlines and Qantas, or any of them (the “**Overarching Indonesia Understanding**”), containing the following provisions or one or more of them:

101.1 Garuda would advise the other international airlines party to the Overarching Indonesia Understanding, alternatively the parties would meet and discuss or otherwise communicate with each other concerning each airline’s ability and intention to impose fuel surcharges on its customers including the amount and timing of the surcharge, prior to implementing a change to the fuel surcharge which it charged its customers for the supply of air freight services from Indonesia that would allow enough lead time for the other parties to announce similar changes before the change was implemented;

101.2 Garuda would impose the fuel surcharge referred to in paragraph 101.1 in the amount specified and from the date specified unless it advised the other airlines party to the arrangement or understanding to the contrary;

101.3 where Garuda advised the other international airlines party to the Overarching Indonesia Understanding that it intended to implement an increase in the fuel surcharge as alleged in paragraph 101.1 then each of the other parties would maintain or increase the fuel surcharge that it charged its customers:

101.3.1 at or around the time or times that Garuda stated it would increase its fuel surcharge; and

101.3.2 by an amount not substantially less than the amount of the increase advised by Garuda;

101.4 the international airlines party to the Overarching Indonesia Understanding would not reduce the amount that they were charging their customers for the fuel surcharge to an amount below the amount being charged by Garuda without advising Garuda or the other international airlines of its intention to do so; and

101.5 where an international airline that was party to the Overarching Indonesia Understanding had advised the other parties of the amount of the fuel surcharge that it intended to charge from Indonesia and the date of implementation, that international airline was bound to impose a fuel surcharge of that amount and from that date unless it advised the other parties to the contrary.

1. It will be observed that this allegation is very nearly the same as that made against Air NZ in the case in Singapore. To my mind, the most striking aspect of this allegation is that it appears to have been drawn without reference to, or perhaps an appreciation of, what the evidence in the case shows. In Singapore the Commission relied upon the Overarching Understanding to help explain (as it transpired unsuccessfully) a complex web of price exchanging behaviour and not entirely uniform charging practices. In Indonesia, this kind of allegation was superfluous because the airlines directly reached the understandings and recorded them in writing. In such a domain it is meaningless to speak of the kind of subtle actions implicit in the alleged Overarching Understanding. I reject it.
2. The Commission submitted that the Overarching Understanding was a price fix within the meaning of s 45A. Because I have rejected the existence of the Overarching Understanding the question of whether it is a price fix does not arise. If the Commission had proved that there had been an Overarching Understanding in the terms alleged in paragraph 101 and that Garuda had been a party to it I would not have concluded that that it was an arrangement or understanding to which the deeming provision, s 45A, could be applied for the reasons I have given in respect of the same understanding in Singapore.
3. It would have been then necessary in that circumstance to consider the Commission’s alternate case that the Overarching Understanding had the likely (but not actual) effect of substantially lessening competition contrary to s 45(2).
4. To demonstrate that likelihood the Commission relied upon the evidence of Professor Church and Dr Williams. This part of the evidence was referred to by the Commission as its ‘qualitative’ methodology. It consisted of a series of propositions about circumstances in which an exchange of future pricing information might lead to a substantial lessening of competition. I found this discussion interesting but it is overstated to call it a methodology. Like the Commission’s case on market it was no more than a series of thought experiments. It is a matter for the Commission how it proves its cases but I do not think that one can readily establish the propositions for which the Commission contends without coming down from the mountain and engaging in some analysis of the market by reference to actual market participants and actual pricing data.
5. There is an additional problem in this case and it relates to the fact that the FSCs were only a component of the price. Although I am satisfied that an understanding to charge the same FSC has the effect of controlling the price of air freight for the purposes of s 45A, I have no confidence that it would have the likely effect of substantially lessening competition in the air freight market. This is because no attempt has been made by the Commission to show how the freight rates were affected by the FSCs. One can well understand that in some markets an exchange of pricing information might soon give rise to a risk of reduced competition. Obviously, this will depend on the market in issue. But where the exchange of price information relates only to a component of an overall price, one needs to keep in mind that one is gauging the competitive effects in the overall market. I do not see how I could begin to assess the effect of the surcharge on the market without knowing what had happened with the freight rates. Had it been necessary to decide this question I would have decided it adversely to the Commission.

# 13 THE AUTHORISATIONS

1. Both airlines sought to rely upon authorizations which had been issued by the Commission in the 1980’s. By s 88 of the *Trade Practices Act* the Trade Practices Commission was authorized upon application to it to grant an authorization to a corporation to make (or to give effect to) a contract or arrangement or to arrive at an understanding which would or might have had the effect of substantially lessening competition. Once granted the authorization disengaged the operation of s 45: see s 88(1)(c)-(e).
2. The provisions of many of the bilateral air service agreements to which Australia was party envisaged agreement between airlines, usually ‘designated airlines’, upon tariffs in accordance, at least loosely, with the model agreed in Bermuda in 1946 between the United States and the United Kingdom. It is unnecessary for present purposes to deal with all of these and the provisions of the Australia-Indonesia ASA (above at [163]) will serve sufficiently for now. It will be seen that Article 6(2) of that ASA contemplated the possibility of two kinds of negotiations on tariffs. The first was through the IATA rate fixing machinery, that is to say, through IATA’s tariff conference procedures. The second was by direct negotiation between the airlines if the IATA process had not produced a tariff. This might happen because one or more of the airlines were not members of IATA or because the tariff conference itself had not been able to agree upon a tariff. The bilateral agreements therefore contemplated agreement between the airlines in two distinct but complimentary situations:
3. under the IATA tariff conference machinery; or
4. outside the IATA structure but under the relevant ASA.
5. Neither of those requirements (or perhaps permissions) had domestic effect in Australia under Commonwealth law. Each did have a potential derivative effect through ANR 106A (see above at [154]) which at earlier times outlawed discounting from an approved tariff.
6. In 1981 two travel agents were successfully prosecuted under ANR 106A for discounting fares. However, the prosecution of three further agents was dropped in September 1981 in the Hobart Magistrates Court. At that time the Commonwealth made this formal statement to the Court through its counsel:

“The actions currently before this Court arose from investigations under the Air Navigation Regulations commenced in 1980. They relate to provisions of the Regulations which require that international air travel not be sold in Australia at charges which are less than those approved under the Regulations.

…

In response to strong representations made to the Government for action to be taken against illegal discounting practices, steps were taken to strengthen tariff enforcement activities by the Department of Transport. However, in the time since the actions now before this Court were initiated there have been a number of important developments. There have been recent indications of emerging uncertainty on the part of a large group of countries as to the appropriate response to the practice of discounting.

Within Australia, major relevant changes have occurred in recent months. Following a series of consultations involving Australia, the United Kingdom and the ASEAN group of countries, the ASEAN airlines were expanded access to the Australian and United Kingdom markets. This removed restrictions that were considered by some to have aggravated the problem of discounting in the Australian market.

In a related action, the Australian Government decided that Qantas should be free to set its own fares, where Australia’s bilateral arrangements with other countries allowed this approach to be followed. Qantas now has the ability, at least in relation to a number of its principal routes, to make competitive responses to market forces and the perceived needs of the travelling public. This ability is also shared by the airlines of relevant bilateral partners. In the light of these developments, both within Australia and on the broader international scene, an approach more oriented towards industry ‘self-regulation’ of marketing practices is considered desirable.”

[Draft determination of the Commission dated 31 July 1984: *International Air Transport Association* [1984] ATPR (Com) ¶ 50-083 at 55,519]

1. As I have noted above, a prohibition on discounting from an approved tariff is not the same as a permission or requirement to agree prices. However, even if that were wrong, this announcement shows that the argument was hopeless by 1981. Further, any arguable legal necessity to agree prices subsequently disappeared on the making of the *Air Navigation Amendment Regulations* *2000* (Cth) which removed, with a new reg 19, the requirement that a carrier lodge tariffs for approval.
2. In practical terms, therefore, after September 1981 and in legal terms after 2000, the two treaty obligations under the ASAs to agree tariffs under the IATA procedures or, failing that, by direct agreement between designated airlines under the ASA itself, had no real point from the perspective of Australian law. It remained possible to lodge such a tariff under reg 19 but an airline was not bound to do so. Even if it did so, it was not bound to charge that or any other tariff as the prohibition on discounting had been abolished.
3. Even though the domestic legal structure underpinning tariffs in Australia had gone, the industry nevertheless wished to continue agreeing tariffs under the ASAs. The rules of IATA provided for elaborate tariff conference procedures by which tariffs could be agreed. These were accompanied by complex voting rules and also mechanisms by which the tariffs so agreed could be enforced against those airlines which failed to charge them. On its face such conduct would breach s 45.
4. In 1984 IATA therefore sought approval from the Commission under s 88 authorizing it to conduct the process of reaching agreement between airlines on both passenger and cargo tariffs. The application also dealt with other presently irrelevant aspects of IATA’s procedures. The process of obtaining the authorizations was protracted and involved a diversion through the Trade Practices Review Tribunal which was ultimately settled. Following a number of interim determinations, the Commission issued its final determination on 23 December 1985: see *International Air Transport Association* [1986] ATPR (Com) ¶50-101 at 55-253.
5. Submissions were made to the Commission by a number of parties to the effect that permitting the airlines to fix tariffs through the tariff conferencing procedures of IATA was inherently anticompetitive. IATA sought to rebut that proposition by a number of arguments. One of these was that tariff conference pricing avoided the perils of bilateral tariff negotiations. Another was that only by fixing the tariffs could consumers be provided with ‘stable, predictable and continuous service’. Neither of these arguments commended itself to the Commission. It did nevertheless accept that there was some public benefit to the publication of industry agreed tariffs by IATA. The Commission reasoned this way:

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.

[emphasis added]

1. The Commission was talking here about passenger fares but elsewhere in the authorization it made clear (and this was not in dispute) that the same reasoning applied to cargo tariffs. Thus the Commission had in mind that IATA and its members might collectively propose tariffs but not that there should be any obligation on an individual airline to charge such a tariff.
2. The terms of the authorization reflected this reasoning. In its final determination the Commission used the form of an earlier determination the relevant parts of which show an insistence by the Commission that the IATA procedures not in any way oblige the airlines to charge the tariffs resulting from the conferencing procedures. Relevantly it was 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 authorise 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. In the present case Garuda and Air NZ sought to argue that to the extent that I had found they had engaged in conduct in breach of s 45 by agreeing fuel or insurance surcharges at BAR CSC and ACRB meetings, these meetings were to be characterized as tariff conferences under the IATA rules and hence covered by the IATA authorization.
2. I do not accept this argument for three reasons. First, the authorization was concerned with the setting of prices by airlines in Australia and not with the fixing of tariffs on inbound flights to Australia. There are a number of textual indications in the authorization to that effect.

* Paragraph 1: ‘The application seeks authorization for certain rules, regulations, agreements and resolutions of IATA *in so far as they apply to the activities of international airlines operating in Australia’*(emphasis added);
* Paragraph 6: ‘There are some 30 international carriers that operate from Australia and all but eight of them are members of IATA’;
* The discussion by the Commission of the nature of the ‘market’ (at [11]) adopted what it had earlier said in draft determination A3485: see *International Air Transport Association* [1984] ATPR (Com) ¶150-083 at 55-541. That discussion (which is at [30]-[49]) contained some references to inbound flights but taken as a whole it is quite clear that the Commission proceeded upon an assumption that the Australian market was in Australia;
* Paragraph 17 of the draft determination: ‘In summary, this draft means that collaboration by carriers through IATA can continue in all IATA activities…other than compelling of members – to charge the fares (or pay the commissions) in Australia that have been set by carriers within IATA…’;
* Clause 2 of the authorization authorized participation in IATA tariff conferencing but not the enforcement procedures whose effect was to compel members ‘to charge in Australia tariffs set in accordance with those provisions’;
* As outlined above, paragraph 15 said:

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.

1. 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.
2. Thirdly, the IATA authorization did *not* authorise IATA or its member airlines to ‘compel’ each other to charge a tariff. I do not accept that the authorization was referring only to a legal compulsion. It was referring to practices which would undermine competition. So much is clear from the Commission’s reasons at paragraph 15 (see above at [1252]). I therefore construe ‘compel’ to include the position of any airlines who have achieved a sufficient meeting of the minds and mutual undertaking to each other with respect to a price fix to engage s 45. To read the authorization otherwise would be to read it as a charter for price fixing which I do not think the Commission had in mind.
3. I do not, in those circumstances, need to resolve the somewhat technical arguments of the airlines that they had actually succeeded, through serendipity, in engaging the voting procedures under the IATA rules. Once one recalls that the participants understood themselves to be at BAR CSC meetings (in Hong Kong and Singapore) or meetings of the ACRB (in Indonesia) these arguments become unsustainable.
4. I turn then to the airlines’ contention that their conduct had been rendered lawful by an authorization granted to Qantas on 20 July 1987: *Qantas Airways Limited* [1987] ATPR (Com) ¶ 150-056. This authorization related to the second limb of the tariff fixing arrangements in the ASAs referred to above, i.e., what to do if the IATA tariff conferencing procedure had not resulted in a stipulated tariff. In that circumstance, the ASAs in issue in this case contemplated agreement between airlines on tariffs outside the IATA framework. Of course, the authorization granted to IATA could not, as a matter of definition, apply to those kinds of arrangements.
5. The Qantas authorization was relevantly in the following terms:

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. Attachment A contained a list of airlines with whom Qantas had tariff agreements which had been reached bilaterally outside the IATA tariff conferencing procedure. Some of these were with airlines who were not members of IATA such as (at that time) Cathay and who could not take part in IATA’s conferencing procedures. Others were agreements with airlines which were members of IATA but presumably in respect of situations where the IATA tariff conferencing procedure had not produced a tariff or the tariff it had produced had not been approved by the relevant national aeronautical authorities. In Attachment B there were set out in list form the actual agreements involved. So, for example, there appeared in Attachment B:

Qantas/China Airlines promotional fares between Australia and Taiwan

Air NZ and Garuda were both listed in Attachments A and B.

1. What the authorization did, therefore, was to approve the tariff agreements which, as a matter of history, had already been reached and also, relevantly for this case, to approve ‘further arrangements of a like type with those airlines’. Thus, viewed broadly, what this authorization was about was permitting Qantas to enter into arrangements to agree tariffs with the identified airlines outside IATA. Clause (ii) also permitted arrangements with airlines not identified in Attachment A but in that case only with the approval of the Commission.
2. Air NZ and Garuda now seek to characterize some (but not all) of the arrangements or understandings alleged against them as being non-IATA tariff arrangements covered by the Qantas authorization.
3. A number of objections may be put to one side. First, it does not matter that the authorization was granted to Qantas rather than Air NZ or Garuda. The fact that an authorization had been granted to Qantas had the effect that authorization was also granted to any other airline with whom Qantas had reached such an understanding. This was the effect of s 88(6). This limited nevertheless the utility of the authorization for Air NZ and Garuda to those cases where Qantas was alleged to have been a party to an understanding with them.
4. Secondly, whilst the IATA authorization did not apply to inbound flights, the Qantas authorization seems in terms of Attachment B to have contemplated bilateral tariff arrangements on both inbound and outbound flights. On the conclusions I have reached the market for inbound flights was not a market in Australia. Section 45 could not, therefore apply to them and s 86 could not be used to dispense with its operation (s 45 not having any operation in the first place). Since I am considering this issue only on the alternative hypothesis that my conclusions on the scope of the concept of a market in Australia are wrong, this point must be put aside and the assumption made, for the purposes of argument, that the Qantas authorization applied to inbound routes as well.
5. The difficulty which afflicts the airlines’ arguments based upon the Qantas authorization are, in effect, of a similar kind to some of those which required rejection of their arguments based on the IATA authorization.
6. In particular, the participants at the meetings of the BAR CSCs and ACRB did not understand themselves to be engaging in tariff agreements under the relevant ASAs outside the IATA structure. They understood themselves to be at the local collective airline body dealing with cargo related issues at the relevant airport.
7. 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. This falls outside what the Qantas authorization permitted unless it can be said that the words ‘no requirement’ in it means ‘no legal requirement’. The immediate effect of that interpretation would be to permit the airlines to engage in price fixing so long as it was not contractually enforceable price fixing. I can think of no good reason to construe the authorization in that way. In the context of s 45, it is difficult to understand why the language of contractual obligation should intrude when the focus of the provision has always been on the looser concept of a contract, arrangement or understanding. I do not think that the Commission intended to authorize conduct which would plainly breach s 45. What it had in mind was allowing rates to be agreed but not to be enforced. Accordingly, the expression ‘no requirement’ refers to a requirement of an informal nature as well as more formal arrangements.
8. Air NZ submitted that even if something less than a legal obligation was connoted by the expression ‘no requirement’ the fact was that the informal arrangements or understandings to which I have found it was a party were still not requirements within the meaning of the authorization. Why? Because sometimes Air NZ had failed to honour the alleged arrangements. As I followed the argument, the point was that even if a requirement could be less than legally binding nevertheless one could not have a requirement which was constituted by an arrangement or understanding which ultimately was shown not to have been honoured.
9. I do not accept this argument. A requirement does not lose its quality as such because of subsequent inconsistent conduct.
10. In those circumstances, I reject the arguments based on the authorizations.

# 14 TIME AND LIMITATION ISSUES

1. It will follow from the conclusions I have reached that no relief should be granted to the Commission. This makes it strictly unnecessary to consider the limitation issues which arise.
2. Substantial limitation issues did exist. The Commission sought the imposition of pecuniary penalties as well as declarations and injunctions. It was not in dispute that many of the claims for pecuniary penalties could not succeed because they were not commenced within six years of the alleged contravention: see s 77(2). By way of example, it appears that the Commission’s case against Air NZ was commenced on or around 17 May 2010. It follows that every claim for a pecuniary penalty for conduct constituting a contravention arising prior to 17 May 2004 is statute barred. This would include:

* October 2001 Hong Kong Insurance Surcharge Understanding;
* December 2002 Hong Kong Insurance Surcharge Understanding;
* 2002 Hong Kong Lufthansa Methodology Understanding;
* First Hong Kong Surcharge Extension Understanding;
* Second Hong Kong Surcharge Extension Understanding;
* April 2002 Singapore Fuel Surcharge Survey;
* October 2002 Singapore Fuel Surcharge Survey Understanding;
* February 2003 Singapore Fuel Surcharge Survey Understanding;
* December 2003 Singapore Understanding;
* Singapore Insurance and Security Surcharge Understanding; and
* Overarching Singapore Understanding.

1. It would also include any contraventions constituted by implementations of these understandings occurring before 17 May 2004. Of course, the Commission’s case about those understandings is not limited to the claims for pecuniary penalties. It also seeks declarations that the various contraventions occurred and injunctive relief to restrain further contraventions. It is common ground that the six year time bar in s 77(2) does not apply to those claims. Had these contraventions been established, Air NZ and Garuda submitted that declaratory and injunctive relief should nevertheless be declined on discretionary grounds, including the proposition that these remedies could not be used to outflank the time bar in s 77.
2. Since the question of relief was not addressed at the hearing I consider it inappropriate to express any views on the various discretionary issues which might otherwise arise.
3. Apart from arguments of that kind, Garuda made a separate argument based on s 77 which, if accepted, would lead to the Commission’s penalty case failing even when the relevant contravention was not statute barred. The argument was as follows: the Commission had filed its proceedings on 2 September 2009. This meant that large parts of the Commission’s case against it in Hong Kong and Indonesia were time-barred at least so far as the imposition of penalties was concerned. Garuda argued that the Commission’s decision to commence the proceeding was an administrative decision and that the power involved was constrained by the time limitation in s 77(2). The full text of s 77 was:

(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. On this view, the Commission lacked power to commence a proceeding which did not comply with the requirements of s 77(2). Thus, the Commission’s decision to commence a proceeding to seek a civil penalty with respect to a number of claims a single one of which was time barred was beyond power. This would, of course, entitle Garuda to judicial review of the Commission’s decision to commence the proceeding but Garuda submitted that it could proceed without such a judicial review relying instead on a collateral challenge in these proceedings. In any event, the result would be the same: not only would the Commission’s proceeding fail with respect to its claims for penalties for contraventions which were statute barred but its claims for penalties for contraventions which were not statute barred would also fail.
2. The key word here is ‘proceeding’. What may be commenced under s 77(2) is ‘[a] proceeding under subsection (1)’ and such a proceeding is for the recovery of a penalty under s 76. It follows that a proceeding under s 77(1) relates to an identified contravention in s 76. Although s 77(1) talks of ‘a proceeding in the Court’, read in the context of s 76(1) and s 77(2), it is apparent that ‘proceeding’ refers to individual claims for individual civil penalties. It does not refer to the overall originating process and pleading. If it were otherwise, it would be impossible for the Commission to institute a proceeding containing a claim for a civil penalty with any other non-penalty claim for such a claim would fall outside s 77(1) (not being a claim for a penalty). Once that is appreciated, the argument fails.

# 15 REMAINING INTERLOCUTORY ISSUES

## 15.1 The Commission’s reply to Garuda’s defence

1. On day 51 of the trial (18 April 2013) a dispute arose about paragraph 48O.3 of the Commission’s reply to Garuda’s defence. Paragraph 48O is as follows:

48O. In answer to paragraph 302R of the Further Amended Defence, the Applicant:

48O.1. repeats paragraph 48L above;

48O.2. denies, as is alleged, that the Respondent was obliged or alternatively, authorised under Indonesian law, to seek to reach agreement with other airlines on the level of the surcharges and fees alleged in the Amended Statement of Claim and the terms or conditions upon which they were to be imposed;

48O.3. says that the Respondent cannot have been so obliged or alternatively, authorised under Indonesian law as at all material times Article 5 of Law 5 of 1999 Concerning the Ban on Monopolistic Practices and Unfair Business Competition (**1999 Competition Law**) prohibited (relevantly) the Respondent from taking any action so as to bind itself with any other airline engaged in activities within the Republic of Indonesia in order to fix prices on the supply of air cargo services;

48O.4. denies that it was a condition of the Australian Licence that the Respondent seek to reach agreement with other airlines on the level of the surcharges and fees alleged in the Amended Statement of Claim and the terms or conditions upon which they were to be imposed; and

48O.5. otherwise denies the allegations in paragraph 302R. ~~The Applicant denies the allegations in the second paragraph 302Q and the un-numbered paragraph that follows.~~

[emphasis in original]

1. As will be apparent paragraph 48O.3 is responsive to paragraph 302R of Garuda’s Further Amended Defence which is as follows:

302R~~Q~~. In the premises, the Respondent was obliged, or alternatively, authorised to seek to reach agreement with other airlines on the level of the surcharges and fees alleged in the Amended Statement of Claim and the terms or conditions upon which they were to be imposed.

1. Paragraph 48O was added to the Commission’s reply only on 12 April 2013. Prior to that it had consisted of a bare denial.
2. Garuda submitted that it was by then too late for the effect of the 1999 Indonesian Competition Law to be raised at trial.
3. By this time the evidence of Dr Butt and Professor Lindsey had already been elicited and this testimony had not included any evidence about the impact of 1999 Indonesian Competition Law on Garuda’s obligations under Indonesian domestic law to engage in tariff fixing.
4. The point of Garuda’s submission was that it would not be possible to deal adequately with the issues raised by the end of the trial.
5. Having seen Dr Butt and Professor Lindsey’s evidence about Indonesian statute law I considered that this was correct. However, I was also of the view that it was unlikely, once mature consideration was given to the issue, that any further evidence or submission would be required. In those circumstances, I severed the issue of the operation of the 1999 Indonesian Competition Law from the rest of the hearing and listed it several weeks later to allow it to be properly addressed. Since that resolved any prejudice and because the Commission’s reply was a perfectly timely response to Garuda’s defence of 12 April 2003 I granted leave. As events transpired, the parties provided written submissions on this issue and did not require a further hearing.

# 16 CONCLUSIONS

1. Both applications will be dismissed. I will hear the parties on costs. Prior to delivery of judgment all parties affected by confidentiality issues were contacted about the making of orders which would lift various prior confidentiality orders sufficiently to permit the references to documents in this judgment. Only Singapore Airlines was affected. Both it and the parties to this case agreed that I should make the following orders in respect of confidentiality:
2. Order 1 of the orders of 1 May 2013 in each of the proceedings numbered NSD 955 of 2009 and NSD 534 of 2010 be vacated only with respect to:
   1. the internal SIAC email dated 19 April 2002 from Kenn Ang which is identified by the document identifier SQC.142.900000002, and that same email where it appears as part of Confidential Annexure NR-2 to the affidavit of Nazim Ros affirmed 24 May 2012;

1.2 the following sentence in an attachment to the email referred to above, which is identified by the document identifier SQC.142.900000004:

*“HDQ will monitor the movement of the [confidential] indices and trigger stations as to when to adjust your rates, and by what quantum”*

with the exception that a word in the sentence above be replaced by the text ‘[confidential]’ where indicated;

1.3 the sentence identified in paragraph 1.2 above (subject to the same exception) where it appears as part of Confidential Annexure NR-2 to the affidavit of Nazim Ros affirmed 24 May 2012; and

1.4 the fourth and fifth sentences of paragraph 21 of the affidavit of Nazim Ros affirmed 24 May 2012 (SQC.904.000000001).

|  |
| --- |
| I certify that the preceding one thousand two hundred and eighty seven (1287) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Perram. |

Associate:

Dated: 31 October 2014