FEDERAL COURT OF AUSTRALIA

Australian Competition and Consumer Commission v Yazaki Corporation (No 2) [2015] FCA 1304

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| Citation: | Australian Competition and Consumer Commission v Yazaki Corporation (No 2) [2015] FCA 1304 |
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| Parties: | **AUSTRALIAN COMPETITION AND CONSUMER COMMISSION v YAZAKI CORPORATION and AUSTRALIAN ARROW PTY LTD ACN 071 956 057** |
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| File number: | SAD 321 of 2012 |
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| Judge: | **BESANKO J** |
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| Date of judgment: | 24 November 2015 |
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| Catchwords: | **COMPETITION** – allegation of contraventions of the *Competition and Consumer Act 2010* (Cth) and the Competition Code of Victoria – where the first respondent was incorporated in Japan – where the second respondent was incorporated in Australia – where the second respondent was the wholly owned subsidiary of the first respondent – whether the first respondent was carrying on business in Australia – whether the first respondent was otherwise connected with the jurisdiction of Victoria – whether there was a market in Australia for the goods supplied by the respondents – whether the real place of competitive activity was in Australia or Japan – *Competition and Consumer Act 2010* (Cth), Competition Code of Victoria ss 4E, 5.  **COMPETITION** – allegation of an overarching cartel agreement between the first respondent and another corporation in Japan – allegation that the first respondent and the other corporation entered into two separate agreements in relation to the supply of goods – whether the overarching cartel agreement and two agreements contained exclusionary provisions – whether the overarching cartel agreement and two agreements contained provisions controlling price – whether the first respondent gave effect to the overarching cartel agreement by making the two agreements – whether the first respondent gave effect to the two agreements by discussing, agreeing and submitting prices – whether the first respondent gave effect to the two agreements by directing the second respondent to submit the agreed prices in Australia – whether the submission of prices by the second respondent was an act of giving effect by the first respondent – where the first respondent admitted discussing, agreeing and submitting prices – whether the second respondent’s continued supply of goods was an act of continuing to give effect by the first respondent – whether the first respondent continued to give effect to the two agreements by not disclosing the existence of the agreements and not competing – whether acts of omission can give effect to an agreement – *Competition and Consumer Act 2010* (Cth), Competition Code of Victoria ss 4D, 44ZZRK, 45(2), 45A.  **COMPETITION** – allegation that the second respondent and another corporation in Australia entered an agreement in relation to the supply of goods – whether the agreement contained exclusionary provisions – whether the agreement contained provisions controlling price – whether the second respondent gave effect to the agreement by discussing and agreeing prices – whether the second respondent gave effect to the two agreements made by the first respondent by submitting prices – whether the second respondent continued to give effect to the two agreements by not disclosing the existence of the agreements and not competing – whether a third party can give effect to a prohibited agreement – whether the third party is required to have knowledge of the agreement – *Competition and Consumer Act 2010* (Cth), Competition Code of Victoria ss 4D, 44ZZRK, 45(2), 45A.  **PRACTICE AND PROCEDURE** – objections to evidence – whether evidence should be excluded under the general discretion to exclude evidence – whether evidence was admissible as an opinion of conduct and discussions observed by the witness – *Evidence Act 1995* (Cth) ss 78, 135.  **Held:** First respondent contravened the *Competition and Consumer Act 2010* (Cth) and the Competition Code of Victoria by giving effect to the overarching cartel agreement, and making, and giving effect to, the two separate agreements. Second respondent contravened the *Competition and Consumer Act 2010* (Cth) and the Competition Code of Victoria by making and giving effect to the agreement in Australia. |
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| Legislation: | *Competition and Consumer Act 2010* (Cth) ss 4, 4D, 4E 4F, 5, 8, 44ZZRD, 44ZZRK, 45, 75B, 77, 84  *Competition Policy Reform (Victoria) Act 1995* (Vic) ss 5, 8  *Evidence Act 1995* (Cth) ss 78, 135, 140  *Interpretation of Legislation Act 1984* (Vic) s 38  *Trade Practices Act 1974* (Cth) s 45A, 155  *Trade Practices Amendment (Cartel Conduct and Other Measures) Act 2009* (Cth) |
|  |  |
| Cases cited: | *ACN 007 528 207 Pty Ltd (in liq) v Bird Cameron (Reg) and Others* [2005] SASC 204; (2005) 91 SASR 570  *Adams v Cape Industries plc* [1990] 1 Ch 433  *ASX Operations Pty Ltd and Another v Pont Data Australia Pty Ltd (No 1)* (1990) 27 FCR 460  *ASX Operations Pty Ltd and Another v Pont Data Australia Pty Limited (No 2)* (1991) 27 FCR 492  *Auskay International Manufacturing & Trade Pty Ltd v Qantas airways Limited (No 5)* [2009] FCA 1464  *Australian Competition and Consumer Commission v ABB Transmission and Distribution Ltd* (2001) ATPR 41-815  *Australian Competition and Consumer Commission v Admiral Mechanical Services Pty Ltd* [2007] ATPR 42-174  *Australian Competition and Consumer Commission v Air New Zealand and Another (No 1)* [2012] FCA 1355; (2012) 207 FCR 448  *Australian Competition and Consumer Commission v Air New Zealand Limited* [2014] FCA 1157; (2014) 319 ALR 388  *Australian Competition and Consumer Commission v April International Marketing Services Australia Pty Ltd (No 6)* [2010] FCA 704; (2010) 270 ALR 504  *Australian Competition and Consumer Commission v CC (NSW) Pty Ltd* (1999) 92 FCR 375  *Australian Competition and Consumer Commission v Leahy Petroleum Pty Ltd and Others* [2007] FCA 794; (2007) 160 FCR 321  *Australian Competition and Consumer Commission v Prysmian Cavi E Sistemic Energia SRL (formerly Pirelli Cavi E Sistemi Energia SPA) and Others (No 4)* [2012] FCA 1323; (2012) 298 ALR 251  *Australian Competition and Consumer Commission v TF Woollam & Son Pty Ltd and Others* [2011] FCA 973; (2011) 196 FCR 212  *Australian Competition and Consumer Commission v Visy Industries Holdings Pty Ltd and Others (No 3)* [2007] FCA 1617; (2007) 244 ALR 673  *Australian Competition and Consumer Commission v Yazaki Corporation* [2014] FCA 1316  *Australian Investments and Securities Commission v Hellicar* [2012] HCA 17; (2012) 247 CLR 345  *Bray v F Hoffman-La Roche Ltd and Others* [2002] FCA 243; (2002) 118 FCR 1  *Bray v F Hoffman-La Roche Ltd and Others* (2003) 130 FCR 317  *Chubb Insurance Company of Australia Ltd and Others v Moore and Others* [2013] NSWCA 212; (2013) 302 ALR 101  *Connex Group Australia Pty Ltd v Butt* [2004] NSWSC 379  *Consolo Ltd and Others v Bennett* (2012) 207 FCR 127  *Emirates v Australian Competition and Consumer Commission* [2009] FCA 312; (2009) 255 ALR 35  *Federal Commissioner of Taxation v Tasman Group Services Pty Ltd* [2009] FCAFC 148; (2009) 180 FCR 128  *Giorgianni v The Queen* (1985) 156 CLR 473  *Hope v The Council of the City of Bathurst* (1980) 144 CLR 1  *Hughes v Western Australian Cricket Association (Inc) and Others* (1986) 19 FCR 10  *Industrial Equity Limited and Others v Blackburn and Others* (1977) 137 CLR 567  *J McPhee & Son (Australia) Pty Ltd and Others v Australian Competition and Consumer Commission* (2000) 172 ALR 532  *Jones v Dunkel* (1959) 101 CLR 298  *La Trobe Capital & Mortgage Corporation Ltd v Hay Property Consultants Pty Ltd* [2011] FCAFC 4; (2011) 190 FCR 299  *Lipohar v The Queen* (1999) 200 CLR 485  *Lithgow City Council v Jackson* (2011) 244 CLR 352  *Mackay v Dick* (1881) 6 App Cas 251  *Meyer Heine Proprietary Limited v The China Navigation Company Limited and Another* (1966) 115 CLR 10  *Mobil Oil Australia Pty Limited v The State of Victoria and Another* [2002] HCA 27; (2002) 211 CLR 1  *Neat Holdings Pty Ltd v Karajan Holdings Pty Ltd and Others* (1992) 110 ALR 449; 67 ALJR 170  *News Limited and Others v South Sydney District Rugby League Football Club Limited and Others* (2003) 215 CLR 563  *NMFM Property Pty Ltd and Others v Citibank Ltd* (2000) 107 FCR 270  *Norcast S.ár.L v Bradken Ltd and Others (No 2)* (2013) 219 FCR 14  *Pearce v Florenca* (1976) 135 CLR 507  *R v Portus and Another; Ex parte Federated Clerks Union of Australia* (1949) 79 CLR 428  *Re Queensland Co-operative Milling Association Ltd* (1976) ATPR 40-12; (1976) 8 ALR 481  *Secured Income Real Estate (Australia) Limited v St Martins Investments Proprietary Limited* (1979) 144 CLR 596  *Seven Network Ltd and Another v News Ltd and Others* [2009] FCAFC 166; (2009) 182 FCR 160  *Smith, Stone & Knight Ltd v Lord Mayor, Alderman and Citizens of City of Birmingham* [1939] 4 All ER 116  *SPAR Licensing Pty Ltd v MIS QLD Pty Ltd (No 2)* [2012] FCA 1116  *Sydleman v Beckwith* (1875) 43 Conn 9  *Top Performance Motors Pty Ltd v Ira Berk (Queensland) Pty Ltd* (1975) 24 FLR 286  *Trade Practices Commission v TNT Management Pty Ltd* (1985) 6 FCR 1  *Tradestock Pty Ltd v TNT (Management) Pty Ltd and Others* (1978) 17 ALR 257  *Union Steamship Co of Australia Pty Ltd v King* (1988) 166 CLR 1  *Walker v Wimborne and Others* (1976) 137 CLR 1  *Walplan Pty Ltd v Wallace* (1985) 8 FCR 2  *Wright Rubbish Products Pty Ltd v Bayer AG* [2008] FCA 1510; [2008] ATRR 42-258  *Wright Rubbish Products Pty Ltd v Bayer AG* [2010] FCAFC 85  *Yorke and Another v Lucas* (1985) 158 CLR 661  Beaton-Wells C and Fisse B, *Australian Cartel Regulations Law, Policy and Practice in an International Context,* (Cambridge University Press, 2011)  Wigmore JH, *Evidence in Trials at Common Law* (Chadbourn rev, 1978) Vol 7 |
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| Dates of hearing: | 3, 4, 5, 8, 11, 12 December 2014 |
|  |  |
| Place: | Adelaide |
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| Division: | GENERAL DIVISION |
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| Category: | Catchwords |
|  |  |
| Number of paragraphs: | 399 |
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| Counsel for the Applicant: | Mr S Doyle SC with Mr D Tynan |
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| Solicitor for the Applicant: | Australian Government Solicitor |
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| Counsel for the Respondents: | Dr M Collins QC with Mr M Borsky and Ms T Spencer Bruce |
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| Solicitor for the Respondents: | King & Wood Mallesons |

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| **Table of Corrections** |  |
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| 1 December 2015 | In paragraph 41, “TMCA and its subsidiaries” has been replaced with “TMC and its subsidiaries”. |
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| 1 December 2015 | In paragraph 217, “to submit the prices to AAPL” has been replaced with “to submit the prices to TMCA”. |
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| 1 December 2015 | In paragraph 369, “should be conflated” has been replaced with “should not be conflated”. |
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| 1 December 2015 | In paragraph 395, “did apply” has been replaced with “did not apply”. |

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| IN THE FEDERAL COURT OF AUSTRALIA |  |
| SOUTH AUSTRALIA DISTRICT REGISTRY |  |
| GENERAL DIVISION | SAD 321 of 2012 |

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| BETWEEN: | AUSTRALIAN COMPETITION AND CONSUMER COMMISSION  Applicant |
| AND: | YAZAKI CORPORATION  First Respondent  AUSTRALIAN ARROW PTY LTD ACN 071 956 057  Second Respondent |

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| JUDGE: | BESANKO J |
| DATE OF ORDER: | 24 November 2015 |
| WHERE MADE: | ADELAIDE |

THE COURT ORDERS THAT:

1. The proceeding be adjourned to a date to be fixed for the making of orders and directions concerning relief.

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

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| IN THE FEDERAL COURT OF AUSTRALIA |  |
| SOUTH AUSTRALIA DISTRICT REGISTRY |  |
| GENERAL DIVISION | SAD 321 of 2012 |

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| BETWEEN: | AUSTRALIAN COMPETITION AND CONSUMER COMMISSION  Applicant |
| AND: | YAZAKI CORPORATION  First Respondent  AUSTRALIAN ARROW PTY LTD ACN 071 956 057  Second Respondent |

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| JUDGE: | BESANKO J |
| DATE: | 24 November 2015 |
| PLACE: | ADELAIDE |

**REASONS FOR JUDGMENT**

## Introduction

1. This is a proceeding brought by the Australian Competition and Consumer Commission (“the ACCC”) against Yazaki Corporation (“Yazaki”) and Australian Arrow Pty Ltd ACN 071 956 057 (“AAPL”) in which the ACCC seeks declarations, injunctions and pecuniary penalties in relation to alleged contraventions by Yazaki and AAPL of s 45(2) and s 44ZZRK(1) of the *Competition and Consumer Act 2010* (Cth) (“the Act”). Prior to 1 January 2011, the Act was cited as the *Trade Practices Act 1974* (Cth). The ACCC claims that the conduct also contravened the equivalent sections in the Competition Code of Victoria (“the Competition Code”) applied as a law of Victoria by s 5 of the *Competition Policy Reform (Victoria) Act 1995* (Vic) (“the CPRA”). The reason the ACCC relies on both the Act and the Competition Code is because part of the alleged contravening conduct in this case occurred in Japan, and arguably, the Competition Code has a wider extra-territorial application than the Act. This is an issue I will address later in these reasons.
2. The alleged contravening conduct occurred over a period commencing in early 2003 and concluding in late 2009. It seems that the anti-competitive conduct was exposed in early 2010. This proceeding was commenced on 12 December 2012. Section 77 of the Act and the Competition Code provides that a proceeding for the recovery of a pecuniary penalty must be commenced within six years after the contravention. It follows that the ACCC may only seek a pecuniary penalty for contravening conduct that occurred on and after 13 December 2006.
3. At all material times, Yazaki was a body corporate incorporated pursuant to the laws of Japan and AAPL was a company incorporated in Australia. At all material times, AAPL was a wholly owned subsidiary of Yazaki.
4. The alleged contravening conduct involved Yazaki or AAPL making and giving effect to a prohibited arrangement, or arriving at and giving effect to a prohibited understanding in relation to goods, being wire harnesses (“WHs”), supplied or to be supplied to Toyota Motor Corporation (“TMC”) or its subsidiaries or related entities, including its subsidiary in Australia, Toyota Motor Corporation Australia Limited (“TMCA”). The other party to the alleged arrangement or understanding was Sumitomo Electric Industries Ltd (“SEI”) or SEWS Australia Pty Ltd (“SEWS-A”). At all material times, SEI was a body corporate incorporated pursuant to the laws of Japan, and SEWS-A was a company incorporated in Australia. At all material times, SEWS-A was a subsidiary of SEI. Sumitomo Electric Wire & Cable Works was founded in Japan in 1911 and it changed its name to SEI in 1939. Its registered office is in Osaka, and it has a number of branch offices in Japan. It is the parent company of the Sumitomo Electric group of companies which is a global corporate group comprising more than 300 consolidated companies located in over 30 countries around the world, primarily in Asia, Europe and the United States of America.
5. SEI and SEWS-A have cooperated with the ACCC in its investigations into the alleged conduct and most of the evidence of the contravening conduct alleged in this case has come from officers or employees of those companies (see generally my reasons in *Australian Competition and Consumer Commission v Yazaki Corporation* [2014] FCA 1316 at [15]).
6. WHs are electrical distribution systems which operate to distribute power and send electrical signals to other components within a motor vehicle. There are a number of different types of WHs designed to control different functions and parts of a motor vehicle. Mr Hideyuki Shigi was a witness in this case. In February 2002, he was employed by SEI in a position described within the company as General Manager, Sales Department, 1st Electric Systems Sales Division and Branch Office Manager of the Toyota Branch Office (“TBO”). He described the different WHs in the following way:

For example, *the engine WH* is mounted on top of the engine in a motor vehicle and controls the engine; *the engine room main WH* is installed around the engine cavity, above the wheel housing and controls the headlights, the hazard lights and the indicators; *the floor WHs* control the seats of a motor vehicle; and *the door WHs* control the functions on the door of a motor vehicle.

(Emphasis added).

Each WH has a different part number. The most significant WH in terms of the facts of this case is the engine room main WH (Part Number 82111).

1. Two letters from TMCA to the ACCC were tendered in evidence in this case (“the TMCA letters”). In one of those letters, TMCA described WHs as cables that provide the means for supplying power to all electrical and electronic devices such as electronic computer units. They are also cables that allow for electronic signals to travel between sensors and electronic computer units. An example is the sensor which detects that a driver is not wearing the seat belt. TMCA also said that WHs are model specific because of different specifications, technologies and sizes. WHs cannot be interchanged between models or even between grades within the same model.
2. There are only a few major global manufacturers and suppliers of WHs. Mr Shigi said that the main global manufacturers and suppliers of WHs to the automotive industry are Yazaki, SEI, Furukawa Co Ltd, Lear Corporation and Delphi. SEI, Yazaki and Furukawa are companies based in Japan, whilst Lear and Delphi are companies based in the United States of America.
3. At all times material to this proceeding, TMC carried on the business of a motor vehicle manufacturer in Japan and it manufactured a motor vehicle known as the Toyota Camry. It manufactured a new model of the Toyota Camry every four or five years. Three models of the Toyota Camry are relevant in this case and they are the 2002 Toyota Camry, the 2006 Toyota Camry and the 2011 Toyota Camry. At all times material to this proceeding, TMCA carried on the business of a motor vehicle manufacturer in Australia manufacturing, among other motor vehicles, the Toyota Camry.
4. TMC did not manufacture WHs and it purchased them from suppliers such as Yazaki and SEI. Prior to the 1990s, TMC allocated contracts for the supply of WHs without engaging in a formal competitive process with potential suppliers. Mr Shigi said, and I accept, that TMC’s usual practice in the case of new models of existing motor vehicles was to reallocate the supply of automotive electronic components to the existing supplier. He said that from 1991 or 1992 TMC introduced a formal competitive tender process for the awarding of contracts for the supply of products, including WHs. That formal process was initiated by TMC issuing to potential suppliers a Request for Quotation (“RFQ”). In the usual case, TMC’s RFQ would seek a separate price for each automotive electronic component, including WHs. TMC would assess the responses to the RFQ submitted by each supplier and award supply for each component by component or part number. In the case of WHs, not all WHs for a particular model of motor vehicle were necessarily supplied by the same supplier.
5. The ACCC’s case against Yazaki is as follows. It alleges that from at least the mid-1990s, there was an arrangement or understanding between Yazaki and SEI which remained in existence and operative until at least late 2009. The arrangement or understanding contained a number of provisions which I will identify later in these reasons. The ACCC described the arrangement or understanding as the Overarching Cartel Agreement and, for convenience, I will use that description, although it is to be remembered that what the ACCC alleges is an arrangement or understanding.
6. The ACCC alleges that on or about 30 June 2003, Yazaki and SEI made an arrangement or arrived at an understanding in respect of the supply of WHs for the 2006 Toyota Camry by each of them and their subsidiaries to TMC and its subsidiaries. The arrangement or understanding contained a number of provisions which I will identify later in these reasons. The ACCC described the arrangement or understanding as the 2003 Agreement and, for convenience, and subject to the same qualification, I will use that description. The ACCC alleges that by making the 2003 Agreement, Yazaki gave effect to the Overarching Cartel Agreement in contravention of s 45(2)(b)(i) and s 45(2)(b)(ii) of the Act and the Competition Code. It also alleges that in making the 2003 Agreement, Yazaki contravened s 45(2)(a)(i) and s 45(2)(a)(ii) of the Act and the Competition Code. Finally, in relation to the 2003 Agreement, the ACCC alleges that by various acts and omissions, Yazaki gave effect to the 2003 Agreement and thereby contravened s 45(2)(b)(i) and s 45(2)(b)(ii) and, in relation to conduct on and after 24 July 2009, s 44ZZRK(1) of the Act and the Competition Code.
7. The ACCC alleges that in or about late April 2008, Yazaki and SEI made an arrangement or arrived at an understanding in respect of the supply of WHs for the 2011 Toyota Camry by each of them and their subsidiaries to TMC and its subsidiaries. The arrangement contained a number of provisions which I will identify later in these reasons. The ACCC described the arrangement or understanding as the 2008 Agreement and, for convenience, and again, subject to the same qualification, I will use that description. The ACCC claims that by making the 2008 Agreement, Yazaki gave effect to the Overarching Cartel Agreement in contravention of s 45(2)(b)(i) and s 45(2)(b)(ii) of the Act and the Competition Code. It further alleges that by making the 2008 Agreement, Yazaki contravened s 45(2)(a)(i) and s 45(2)(a)(ii) of the Act and the Competition Code. Finally, in relation to the 2008 Agreement, the ACCC alleges that by various acts and omissions, Yazaki gave effect to the 2008 Agreement and thereby contravened s 45(2)(b)(i) and s 45(2)(b)(ii) and, in relation to conduct on and after 24 July 2009, s 44ZZRK(1) of the Act and the Competition Code.
8. In summary, the ACCC’s case against Yazaki relates to three alleged arrangements or understandings (the Overarching Cartel Agreement, the 2003 Agreement and the 2008 Agreement). The Overarching Cartel Agreement is alleged by the ACCC to relate to motor vehicles generally, whereas the 2003 Agreement relates to the 2006 Toyota Camry, and the 2008 Agreement relates to the 2011 Toyota Camry.
9. The ACCC’s case against AAPL is as follows. It alleges that in April and May 2003, AAPL made an arrangement or arrived at an understanding with SEWS-A in respect of the supply of WHs for the 2002 Toyota Camry by them. The ACCC described the arrangement or understanding as the 2002 Toyota Camry Minor RFQ Agreement and, for convenience, I will use that description. The ACCC alleges that in making the 2002 Toyota Camry Minor RFQ Agreement, AAPL contravened s 45(2)(a)(i) and s 45(2)(a)(ii) of the Act and the Competition Code. The ACCC also alleges in relation to the 2002 Toyota Camry Minor RFQ Agreement that AAPL contravened s 45(2)(b)(i) and s 45(2)(b)(ii) of the Act and the Competition Code by giving effect to the 2002 Toyota Camry Minor RFQ Agreement. Finally, the ACCC alleges that by various acts and omissions, AAPL contravened s 45(2)(b)(i) and s 45(2)(b)(ii) of the Act and the Competition Code and, in relation to conduct on or after 24 July 2009, s 44ZZRK(1), by giving effect to the 2003 Agreement and by giving effect to the 2008 Agreement. In summary, the ACCC’s case against AAPL relates to the making and giving effect to of the 2002 Toyota Camry Minor RFQ Agreement and various acts and omissions said to have given effect to the 2003 Agreement and to the 2008 Agreement.
10. It is convenient at this point to set out the relevant legislative provisions as they were at the relevant times.
11. Section 45(2) and (3) of the Act and the Competition Code provided as follows:

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

(2) A corporation shall not:

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

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

(ii) a provision of the proposed contract, arrangement or understanding has the purpose, or would have or be likely to have the effect, of substantially lessening competition; or

(b) give effect to a provision of a contract, arrangement or understanding, whether the contract or arrangement was made, or the understanding was arrived at, before or after the commencement of this section, if that provision:

(i) is an exclusionary provision; or

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

(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. An exclusionary provision (referred to in s 45(2)(a)(i) and s 45(2)(b)(i)) was defined in s 4D in the following way:

**4D Exclusionary provisions**

(1) A provision of a contract, arrangement or understanding, or of a proposed contract, arrangement or understanding, shall be taken to be an exclusionary provision for the purposes of this Act if:

(a) the contract or arrangement was made, or the understanding was arrived at, or the proposed contract or arrangement is to be made, or the proposed understanding is to be arrived at, between persons any 2 or more of whom are competitive with each other; and

(b) the provision has the purpose of preventing, restricting or limiting:

(i) the supply of goods or services to, or the acquisition of goods or services from, particular persons or classes of persons; or

(ii) the supply of goods or services to, or the acquisition of goods or services from, particular persons or classes of persons in particular circumstances or on particular conditions;

by all or any of the parties to the contract, arrangement or understanding or of the proposed parties to the proposed contract, arrangement or understanding or, if a party or proposed party is a body corporate, by a body corporate that is related to the body corporate.

(2) A person shall be deemed to be competitive with another person for the purposes of subsection (1) if, and only if, the first‑mentioned person or a body corporate that is related to that person is, or is likely to be, or, but for the provision of any contract, arrangement or understanding or of any proposed contract, arrangement or understanding, would be, or would be likely to be, in competition with the other person, or with a body corporate that is related to the other person, in relation to the supply or acquisition of all or any of the goods or services to which the relevant provision of the contract, arrangement or understanding or of the proposed contract, arrangement or understanding relates.

The *purpose* referred to in these sections may be one of a number of purposes, but it must be a substantial purpose (s 4F).

1. Before s 45A was repealed by the *Trade Practices Amendment (Cartel Conduct and Other Measures) Act 2009* (Cth), it contained a deeming provision in relation to conduct which was taken to have the purpose, or to have or be likely to have the effect, of substantially lessening competition within s 45. It provided relevantly:

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

The phrase *give effect to* was defined in s 4 as follows:

... in relation to a provision of a contract, arrangement or understanding, includes do an act or thing in pursuance of or in accordance with or enforce or purport to enforce.

1. The definition of competition in s 45(3) referred to *market* ands 4E was in the following terms:

**4E Market**

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. The greater part of Yazaki’s alleged contravening conduct occurred in Japan and, as I have said, there is an issue as to the extra-territorial application of the Act and the Competition Code. In 2003, s 5 of the Act provided as follows, relevantly:

**5 Extended application of Parts IV, IVA, V, VB and VC**

(1) 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.

The ACCC alleges that at the relevant times, Yazaki was a body corporate carrying on business in Australia.

Section 5 was subsequently amended, but not in a way which affected the key criterion in this case of carrying on business in Australia.

1. At the relevant times, s 8(1) and (2) of the CPRA provided as follows:

**8 Application of Competition Code**

(1) The Competition Code of this jurisdiction applies to and in relation to –

(a) persons carrying on business within this jurisdiction; or

(b) bodies corporate incorporated or registered under the law of this jurisdiction; or

(c) persons ordinarily resident in this jurisdiction; or

(d) persons otherwise connected with this jurisdiction.

(2) Subject to subsection (1), the Competition Code of this jurisdiction extends to conduct, and other acts, matters and things, occurring or existing outside or partly outside this jurisdiction (whether within or outside Australia).

A “person” is defined in the *Interpretation of Legislation Act 1984* (Vic) s 38 as including a body corporate as well as an individual.

1. In relation to the Competition Code, the ACCC alleges that Yazaki carried on business within Victoria. It also alleges that Yazaki was a body corporate otherwise connected with Victoria.
2. Finally, in relation to the legislative provisions, I set out s 84(2) because of an allegation that, at one point, AAPL was acting as Yazaki’s agent.

**84 Conduct by directors, servants or agents**

...

(2) Any conduct engaged in on behalf of a body corporate:

(a) by a director, servant or agent of the body corporate within the scope of the person’s actual or apparent authority; or

(b) by any other person at the direction or with the consent or agreement (whether express or implied) of a director, servant or agent of the body corporate, where the giving of the direction, consent or agreement is within the scope of the actual or apparent authority of the director, servant or agent;

shall be deemed, for the purposes of this Act, to have been engaged in also by the body corporate.

1. The cartel provisions introduced by the Trade Practices Amendment (Cartel Conduct and Other Measures) Act 2009 (No 59 of 2009) came into effect on 24 July 2009. Section 44ZZRK provides that a corporation contravenes the section if a contract, arrangement or understanding contains a cartel provision and the corporation gives effect to the cartel provision. The section applies to contracts or arrangements made, or understandings arrived at, both before and after the commencement of the section. Cartel provisions are defined in s 44ZZRD. The ACCC alleges that both respondents in giving effect to each of the 2003 Agreement and the 2008 Agreement after 24 July 2009 until at least late 2009 contravened s 44ZZRK, and that those agreements contained cartel provisions within s 44ZZRK for the same reasons they fell within s 45(2)(a)(i) and s 45(2)(a)(ii).
2. Each party relied on documentary evidence in support of its or their case. In addition, the Court made orders before trial that each party file and serve the evidence-in-chief of its or their witnesses in the form of affidavits, and the affidavits were relied on as the evidence‑in‑chief of the deponents. The respondents made a broad admission to the effect that anti‑competitive conduct had occurred in Japan and, in addition, they made a number of admissions to specific allegations made by the ACCC in its Amended Statement of Claim concerning events in Japan. They did not call any witnesses from Yazaki about events in Japan and they did not seek to cross‑examine a number of the witnesses from SEI who gave evidence about events in Japan. The following are the witnesses who gave evidence as part of the ACCC’s case and who were not cross-examined by the respondents.

(1) Mr Shigi who I have already referred to (at [6]).

(2) Mr Akifumi Urata who was employed by SEI in a position described within the company as Manager, 1st Harness Sales Department, Toyota Branch Office.

(3) Mr Tomoaki Nagano who was employed by SEI in a position described within the company as General Manager (responsible for Toyota RFQs).

(4) Mr Naoki Shida who was employed by SEI in a position described within the company as Assistant Manager, 1st Sales Section, 1st Automotive Systems Sales.

(5) Mr Nobuaki Kazahaya who was employed by SEWS-A as a senior manager, but who originally came from SEI.

(6) Mr Sebastiano Ianzano who was a project coordinator employed by SEWS-A.

(7) Mr Raymond Borg who was employed by TMCA in its Procurement Division.

In the case of the witnesses from SEI, in particular, their formal titles within the company changed over time, but I do not think that it is necessary for me to set out the details.

1. Mr Kouichi Nagasawa who, like Mr Kazahaya, was employed by SEWS-A as a senior manager who originally came from SEI was cross-examined by the respondents.
2. The respondents tendered an affidavit of a Mr Richard Woods who was the company secretary of AAPL between 1998 and 2009. He was not required for cross-examination. The respondents also tendered affidavits affirmed by Mr Craig O’Donohue and Mr Mattthew Ward. Mr O’Donohue was employed by AAPL in a position described by the company as the Senior Manager Corporate Strategy and Quality. Mr Ward was employed by AAPL in a position described by the company as Department Manager (Sales) between 2008 and 2011, and in a position described by the company as Business Unit Manager for TMCA and Mitsubishi between 2003 and 2008. Both Mr O’Donohue and Mr Ward were cross‑examined by counsel for the ACCC.
3. The witnesses who were cross-examined gave evidence about events which occurred some considerable time before the trial and that is a matter I have taken into account in assessing their evidence. I did not detect anything adverse in the demeanour of any of the witnesses who were cross-examined. For reasons I will give, I accept the substance of the evidence given by Mr Nagasawa and Mr O’Donohue. For reasons I will give, whilst I accept a good deal of the evidence of Mr Ward, I do not think that his evidence was correct on a couple of key matters.
4. The respondents objected to a number of passages in the affidavits the ACCC sought to tender. I ruled on those objections during the course of the trial. It is convenient for me to state my reasons for my rulings in the context of the particular agreements to which the evidence relates.
5. The respondents submit that in assessing the evidence the Court must take into account the gravity of the allegations against them. They submit that the allegations against them are serious and, subject to the limitation of time plea in relation to some of the conduct, could result in the imposition of pecuniary penalties under s 76 of the Act and the Competition Code. This is a civil proceeding where the standard of proof is on the balance of probabilities, but taking into account, among other things, the gravity of the matters alleged (*Evidence Act 1995* (Cth) s 140). This does not create a third standard of proof as s 140 itself makes clear, and as was explained by the High Court in *Neat Holdings Pty Ltd v Karajan Holdings Pty Ltd and Others* (1992) 110 ALR 449; 67 ALJR 170 at 170-171:

The ordinary standard of proof required of a party who bears the onus in civil litigation in this country is proof on the balance of probabilities. That remains so even where the matter to be proved involves criminal conduct or fraud. On the other hand, the strength of the evidence necessary to establish a fact or facts on the balance of probabilities may vary according to the nature of what it is sought to prove. Thus, authoritative statements have often been made to the effect that clear or cogent or strict proof is necessary “where so serious a matter as fraud is to be found”. Statements to that effect should not, however, be understood as directed to the standard of proof. Rather, they should be understood as merely reflecting a conventional perception that members of our society do not ordinarily engage in fraudulent or criminal conduct and a judicial approach that a court should not lightly make a finding that, on the balance of probabilities, a party to civil litigation has been guilty of such conduct.

(Citations omitted).

1. I take into account the gravity of the allegations made against the respondents in assessing whether the ACCC has established its case against them. At the same time, as the ACCC pointed out, some of the matters in dispute in this case, such as whether Yazaki was carrying on business in Australia, do not raise this particular consideration.
2. Each party submitted that with respect to certain allegations, I can and should take into account the failure by the other party to call a material witness that that party might reasonably be expected to have called. For example, the ACCC relies on the respondents’ failure to call Mr Masahiro Okumura to contradict evidence given by Mr Nagasawa. Mr Okumura came from Yazaki and was for a time employed by AAPL in a position that company described as Program Manager, wire harness customer relations group and Automotives Planning Office Australasian Department. For their part, the respondents rely on the ACCC’s failure to call a witness from TMCA who might have addressed TMCA’s intention in seeking a price for the engine room main WH for the 2002 Toyota Camry in about April 2003, and who might have addressed whether TMCA was given prices by AAPL in about June 2008 in relation to the 2011 Toyota Camry. The ACCC did adduce evidence from Mr Borg from TMCA, but his evidence did not address the first matter, and it did not address directly the second matter. I will consider the *Jones v Dunkel* ((1959) 101 CLR 298) submissions in the particular factual contexts in which they arise. I note at this point that in the recent decision of *Australian Investments and Securities Commission v Hellicar* [2012] HCA 17; (2012) 247 CLR 345 (“*ASIC v* Hellicar”) at 412‑414 [164]-[170], the High Court made it clear that a *Jones v Dunkel* inference should not be drawn unless the witness was a person presumably able to put the true complexion on the facts relied on by the party who is alleged to have failed to call the witness, and that it is necessary to be satisfied before drawing an inference that the party would be expected to have called the witness.
3. Stated broadly, the issues in this case relate to the Overarching Cartel Agreement, the 2002 Toyota Camry Minor RFQ Agreement, the 2003 Agreement, the 2008 Agreement, the extra‑territorial application of the Act and the Competition Code, and the issue of market in Australia. I will address the issues in that order.

## The Overarching Cartel Agreement

1. The ACCC’s case is that from at least the mid-1990s to at least late 2009 there was an arrangement or understanding between Yazaki and SEI which contained provisions to the following effect.
2. First, there was a provision that when an RFQ was issued to Yazaki and SEI by a motor vehicle manufacturer for the supply of WHs for a particular model of motor vehicle they, by their nominated representatives, would meet and communicate in relation to that matter. Secondly, there was a provision that at such meetings and in such communications they would seek to agree upon the intended allocation between them of the WHs to be supplied to the motor vehicle manufacturer by each of them and their subsidiaries or agents in each of the countries in which the particular model of motor vehicle was manufactured. Thirdly, there was a provision that after Yazaki and SEI had reached agreement as to the allocation of WHs, they would give effect to the allocation by exchanging and agreeing on the prices for each of the WHs that they would submit, or that they would cause their subsidiaries or agents to submit, to the motor vehicle manufacturer in each of the countries in which the particular model of the motor vehicle was manufactured. Fourthly, there was a provision that the agreed prices would be such as to ensure, as far as possible, that the motor vehicle manufacturer would award supply of the WHs in accordance with the agreement reached between Yazaki and SEI as to the intended allocation of WHs. Fifthly, there was a provision that once the award of WH supply had been made, neither Yazaki nor SEI would compete against each other, and each would cause their respective subsidiaries or agents not to compete with each other, in relation to the supply of any WH where supply of that WH had been awarded to the other. Finally, there was a provision that neither Yazaki nor SEI (nor their subsidiaries or agents) would disclose the existence of the Overarching Cartel Agreement to the relevant motor vehicle manufacturer, or to any of its agents or subsidiaries, or to any regulatory authority.
3. The ACCC alleges that the Overarching Cartel Agreement contained an exclusionary provision within s 45(2)(a)(i) and s 4D of the Act and the Competition Code (and were cartel provisions within s 44ZZRD) and contained a provision which had the purpose, or would have or be likely to have the effect of substantially lessening competition within s 45(2)(a)(ii) and s 45A of the Act and the Competition Code (and were cartel provisions within s 44ZZRD).
4. The ACCC does not seek relief in relation to the *making* of the Overarching Cartel Agreement. However, it does claim relief in relation to conduct said to constitute *giving effect to* the Overarching Cartel Agreement. It claims that in making the 2003 Agreement and in making the 2008 Agreement, Yazaki gave effect to the Overarching Cartel Agreement.
5. The following points should be made at the outset.
6. First, the ACCC pleads that the Overarching Cartel Agreement related to any RFQ issued to Yazaki and SEI by a motor vehicle manufacturer for the supply of WHs for a particular model of motor vehicle. However, the evidence adduced by the ACCC did not go beyond RFQs issued from time to time by TMC or its subsidiaries or related companies. In view of the evidence, if there is to be a finding of an Overarching Cartel Agreement, then it will be restricted to RFQs issued by TMC or its subsidiaries or related companies.
7. Secondly, the ACCC’s plea as to the provisions of the Overarching Cartel Agreement is limited to the action which would be taken by Yazaki and SEI when an RFQ was issued. However, it is clear from the evidence that these supply arrangements were very significant financial arrangements from the point of view of both the supplier and the purchaser, and that TMC and its subsidiaries and related companies as purchasers were regularly seeking proposals from an existing supplier that might lead to a reduction in prices. This involved regular requests from TMC or its subsidiaries and related companies for such proposals. These requests were described in the evidence as price down requests. There was evidence of communications between Yazaki and SEI, and between AAPL and SEWS-A, at the time of these requests with a view to preventing one of them undercutting the other and price erosion. I admitted evidence of these communications because it seemed to me to be relevant to the existence of the Overarching Cartel Agreement.
8. Thirdly, the ACCC’s plea in relation to the Overarching Cartel Agreement is that from at least the mid-1990s, there existed an arrangement or an understanding between Yazaki and SEI which remained in existence and operative until at least late 2009. In other words, the ACCC pleads the existence of an arrangement or an understanding from at least the mid‑1990s, but is unable to plead when the arrangement was made or the understanding arrived at. In theory, there are two possibilities. First, an arrangement could have been made or an understanding arrived at on a particular day and thereafter implemented. Secondly, the arrangement or understanding may have developed over time and settled into a practice. The ACCC does not know which of these possibilities occurred.
9. By a request for further and better particulars of the Statement of Claim dated 25 January 2013, the respondents sought the usual particulars in relation to the alleged Overarching Cartel Agreement between Yazaki and SEI. The usual particulars were defined in the request as follows:

A Where you are asked to give the ‘usual particulars’ of any ... arrangement, understanding ... say whether it was wholly or partly in writing, oral or to be implied, and:

(a) insofar as it was in writing, identify each document constituting any part of it and say where a copy of the document(s) may be inspected, and if any such document has been lost or destroyed give the material substance of the document and say to the best of your ability when, where and in what circumstances the document was lost or destroyed;

(b) insofar as it was oral, say when, where and between what actual persons, and whether face to face or by way of telephone, each conversation constituting any part of it took place and give the material substance of each such conversation;

(c) insofar as it was to be implied, state all acts, facts, matters, circumstances or things from which the implication is to be drawn,

and if it was made, entered into, carried out or done by a person acting or purporting to act on behalf of or with the authority of another, give the usual particulars as sought above of the authority (express, implied or ostensible) of that person to act on behalf of that other .

1. The ACCC responded to the request on 22 February 2013 and with respect to the Overarching Cartel Agreement said the following:

The Overarching Cartel Agreement was, as a matter of history and as alleged in these proceedings, in the nature of an agreement or understanding that had developed over time between the parties. The relevant provisions of the Overarching Cartel Agreement are those pleaded at sub-paragraphs 23.1 to 23.6 of the SOC. Without excluding the possibility of a document or documents or a discussion or discussions evidencing the existence of the Overarching Cartel Agreement, its existence and its provisions, are to be inferred from the conduct of the Respondents (and SEI/SEWS‑A) alleged in relation to the 2002 Toyota Camry, 2006 Toyota Camry and 2011 Toyota Camry and pleaded in the SOC. Further particulars may be provided following discovery.

In a note to its response, the ACCC alleged that some of the particulars sought were not a proper request for particulars, but rather were a request for evidence. The ACCC said:

Nevertheless, in order to assist the respondents, the ACCC has referred to information and documents, to the extent that such information and documents are within the ACCC’s knowledge or in its possession.

1. The ACCC’s reference in its response to an agreement or understanding developing over time between the parties suggest that its case is that the Overarching Cartel Agreement arose in the second of the two ways referred to above.
2. The ACCC sought to establish the existence of the Overarching Cartel Agreement by evidence from SEI officers or employees. That evidence was of a practice adopted upon the receipt of an RFQ from TMC or its subsidiaries and related companies, not of the making of an arrangement or the reaching of an understanding on a particular day.
3. There was no dispute between the parties about the meaning to be attributed to the words “contract”, “arrangement” and “understanding”. In *Australian Competition and Consumer Commission v Leahy Petroleum Pty Ltd and Others* [2007] FCA 794; (2007) 160 FCR 321, Gray J described an “arrangement” and an “understanding” in the following terms (at 331‑332 [26] and [27]).

The word “arrangement” is less clearly understood, and more susceptible of elasticity as to its meaning. In general, it appears to connote a consensual dealing lacking some of the essential elements that would otherwise make it a contract. For instance, a dealing that would otherwise be a contract may be described as an “arrangement” if the parties to it intended not to create a legally binding relationship, but only to give expression to their intentions as to the obligations that each felt morally bound to adhere to in relation to what was to pass between them, or to be carried out by them. Of course, an arrangement might be a broader concept than this, because it is a term the boundaries of which have not been fixed in the traditional understanding of lawyers. The *Oxford English Dictionary* gives as the apparently appropriate meaning of the word “arrangement” “a settlement of mutual relations or claims between parties; an adjustment of disputed or debatable matters; a settlement by agreement”, or alternatively, “disposition of measures for the accomplishment of a purpose; preparations for successful performance.” The ordinary understanding of what amounts to an “arrangement” makes it difficult to envisage that an arrangement could come about without express negotiations between the parties, although there have been suggestions that an arrangement can be tacit. See *Federal Commissioner of Taxation v Cooper Brookes (Wollongong) Pty Ltd* (1979) 10 ATR 128 at 146 per Fisher J, with whom Brennan and Deane JJ agreed, referred to by Franki J in *Trade Practices Commission v TNT Management Pty Ltd* (1985) 6 FCR 1 at 24 in the context of s 45(2) of the *Trade Practices Act.* At the very least, there must be some express communication between the parties, although what is said may not amount to offer and acceptance for the purposes of the law of contract. The need for express communication is also suggested by the use of the verb “make” in conjunction with both “contract” and “arrangement” in s 45(2)(a) of the *Trade Practices Act*. It is hard to see how two parties could “make” an “arrangement” without doing so expressly, at least as to the substance of the arrangement, even if the acceptance by one party of what the other has communicated is implicit in some act, rather than expressed in words.

The word “understanding” is obviously intended to connote a less precise dealing than either a contract or arrangement. This is so because of the meaning of the word “understanding” itself, and because, in the terms of s 45(2)(a), the parties to it may “arrive at” it instead of making it. Once again, the *Oxford English Dictionary* supplies an appropriate definition: “a mutual arrangement or agreement of an informal but more or less explicit nature.” It is the informal and less explicit nature of an understanding that led Smithers J to describe the concept of an understanding as “broad and flexible” in *L Grollo & Co Pty Ltd v Nu-Statt Decorating Pty Ltd* (1978) 34 FLR 81 at 89.

1. His Honour went on to say that there cannot be an understanding without a consensual dealing between parties, and a consensual dealing must involve a meeting of minds. The consent may be tacit, but it must be clear that there is consent. Justice Gray cited the following passage from the reasons for judgment of Smithers J (with whom Evatt J agreed) in *Top Performance Motors Pty Ltd v Ira Berk (Queensland) Pty Ltd* (1975) 24 FLR 286 at 291:

... by parity of reasoning it would follow that the existence of an arrangement of the kind contemplated in s 45 is conditional upon a meeting of the minds of the parties to the arrangement in which one of them is understood, by the other or others, and intends to be so understood, as undertaking, in the role of a reasonable and conscientious man, to regard himself as being in some degree under a duty, moral or legal, to conduct himself in some particular way, at any rate so long as the other party or parties conducted themselves in the way contemplated by the arrangement.

It seems to me also that an understanding must involve the meeting of two or more minds. Where the minds of the parties are at one that a proposed transaction between them proceeds on the basis of the maintenance of a particular state of affairs, or the adoption of a particular course of conduct, it would seem that there would be an understanding within the meaning of the Act.

(See also *Norcast S.ár.L v Bradken Ltd and Others (No 2)* (2013) 219 FCR 14 (“*Norcast v Bradken*”) at 78-79 [263] per Gordon J.)

1. In addition, the following observations of Perram J in *Australian Competition and Consumer Commission v Air New Zealand Limited* [2014] FCA 1157; (2014) 319 ALR 388 (“*ACCC v Air New Zealand*”) are relevant (at 486-487):

(1) …

... 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].

...

(4) 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.

(5) 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].

1. I should also make the point that there is nothing conceptually wrong in having a general arrangement or understanding followed by a specific arrangement or understanding in a particular case. Nor is there anything conceptually wrong with the parties having an arrangement or understanding as to how they will deal with RFQs issued by TMC or its subsidiaries or related companies in the future, and then a specific arrangement or understanding when an RFQ is issued in relation to a particular model of motor vehicle: *Australian Competition and Consumer Commission v Visy Industries Holdings Pty Ltd and Others (No 3)* [2007] FCA 1617; (2007) 244 ALR 673 per Heerey J at 681-682 [41]‑[47]; *Australian Competition and Consumer Commission v April International Marketing Services Australia Pty Ltd (No 6)* [2010] FCA 704; (2010) 270 ALR 504 (“*April International Marketing*”) at 529 [92] per Bennett J. Ultimately, whether it is appropriate to infer from a series of specific agreements an overarching cartel agreement is a question of evidence and relevant matters include, but are not limited to, similarities between the specific agreements and the circumstances in which the parties entered into the specific agreements.
2. As I have said, in order to establish the Overarching Cartel Agreement, the ACCC relies on evidence from SEI officers or employees. The respondents objected to evidence from SEI officers or employees which was not directed to the conduct alleged in relation to the 2002 Toyota Camry, the 2006 Toyota Camry, and the 2008 Toyota Camry on the ground that, by reason of its further and better particulars, the ACCC was restricted to that conduct insofar as it sought to prove the existence of the Overarching Cartel Agreement. The respondents had other objections to the evidence and they included objections based on the form of the evidence, hearsay objections, and objections based on a contention that the evidence is unfairly prejudicial or otherwise within s 135 of the Evidence Act.
3. It is true that in its further and better particulars the ACCC refers to the conduct of the respondents in relation to the 2002 Toyota Camry, the 2006 Toyota Camry and the 2011 Toyota Camry and not to conduct in relation to any other models of motor vehicles manufactured by TMC or its subsidiaries and related companies. However, I do not think that this precludes the ACCC from leading evidence of arrangements or understandings with respect to such other models. I say that for two reasons. First, the ACCC’s “further and better particulars” expressly state that the ACCC does not exclude the possibility of a document or documents, or a discussion or discussions evidencing the existence of the Overarching Cartel Agreement. This is a significant qualification on what follows in its “further and better particulars”. Secondly, I doubt that the reference to the respondents’ conduct in relation to the 2002 Toyota Camry, the 2006 Toyota Camry and the 2011 Toyota Camry is, in fact, a further and better particular. Rather, it seems to me to be a matter of evidence from which the Court is asked to infer the existence of the Overarching Cartel Agreement and its provisions. It is not part of the usual particulars which were the subject of the request, and it is to be borne in mind that there is a difference between an implied arrangement or understanding, and the evidence from which an arrangement or understanding should be inferred. In addition, I note that had it been necessary to consider an amendment, the ACCC would have had a good case for leave. The respondents had the evidence from the SEI witnesses for approximately 10 months before trial. For these reasons, I did not uphold any of the respondents’ objections on the ground that the ACCC was limited by its “further and better particulars” in the manner the respondents alleged.
4. As I have said, there were other objections to the evidence from SEI officers or employees based on the evidence not being in a proper form or hearsay or within s 135 of the Evidence Act. Rather than going through each objection, I will illustrate my reasons for ruling as I did by reference to the “strongest” objections raised by the respondents.
5. I start with the evidence of Mr Urata as set out in his affidavit affirmed on 24 January 2014. In three paragraphs (paras 6 to 9 inclusive), Mr Urata gives evidence of conduct by SEI and Yazaki between 1983 and 1993 concerning price down requests made by TMC. In paragraph 7, he states that from time to time TMC required its suppliers to provide it with information about matters such as the supplier’s total sales volume (including projected sales) and its financial position. Having received this information, TMC would assess it and provide the supplier with a percentage price reduction target it expected the supplier to achieve. Mr Urata states in paragraph 6 of his affidavit that within a few years of commencing his role in SEI’s Toyota sales team in 1983, he became aware that representatives from SEI periodically met with competing WH manufacturers (including Yazaki) to exchange information and engage in pricing discussions in respect of the business that each of them conducted with Toyota. Mr Urata attended and participated in such meetings. In paragraph 8, Mr Urata states that representatives of SEI and representatives of Yazaki met to discuss the information to be provided to TMC and met again to discuss their respective responses to TMC’s price down request. Mr Urata states that at the meetings he attended, the representatives of SEI and Yazaki exchanged and discussed information, including their respective sales volumes, financial positions and percentage price reduction requests, and that he participated in these discussions. He states that if representatives of either party believed that the other party was providing inaccurate information, then that would be debated. The respondents submitted that this evidence should be excluded because it falls within s 135 of the Evidence Act. I overruled this objection and I will explain my reasons when I come to deal with another paragraph in Mr Urata’s affidavit which was said by the respondents to be the “strongest” example of a paragraph which fell within s 135 of the Evidence Act.
6. Mr Urata states that based in part on his participation in the discussions at the meetings, he understood that the process adopted by SEI and Yazaki in relation to TMC’s price down requests was intended to avoid the companies submitting information which would lead to excessive price reduction requests, and that it was aimed at allowing the companies to monitor each other’s shares in an effort to avoid TMC awarding one company an excessive share in the Toyota WH business. It was not entirely clear that this particular evidence was objected to on the basis that it infringed the opinion rule, but evidence of a similar nature was objected to on that basis, and it is convenient to deal with that matter now.
7. I think the evidence is evidence expressed as an opinion of conduct and discussions at meetings at which the witness was present. I infer that Mr Urata had exhausted his recollection of these meetings. In my opinion, the evidence was admissible under s 78 of the Evidence Act which is in the following terms:

**78 Exceptions: lay opinions**

The opinion rule does not apply to evidence of an opinion expressed by a person if:

(a) the opinion is based on what the person saw, heard or otherwise perceived about a matter or event; and

(b) evidence of the opinion is necessary to obtain an adequate account or understanding of the person’s perception of the matter or event.

1. In *Lithgow City Council v Jackson* (2011) 244 CLR 352, French CJ, Heydon and Bell JJ discussed the reasons for the common law rule which permitted the reception of non-expert opinion evidence in certain cases (at 370‑371 [45]) and then said at 376-377 [57]:

... The common law rule does not require a full statement by witnesses of perceptions and observations – though gaps of this kind may well go to weight. Indeed the whole point of the common law rule is that it cures the difficulty that an observer may be confident about a conclusion reached from observations without being able to perceive, remember or state the primary materials which led to it. There is nothing in s 78(b) to suggest any different position. It is possible to conclude – not in this case, but in other cases – that a person’s opinion is based on what that person perceived without the person providing an exhaustive list of what the person perceived. It is true, though, that the less the witness or other observer states his or her primary perceptions, the harder will it be for the tendering party to establish the condition of admissibility in s 78(a) (because of the difficulty of establishing that the opinion is “based” on the perceptions) and the condition of admissibility in s 78(b) (because of the difficulty of establishing that the opinion is necessary to obtain an adequate account or understanding of the person’s perceptions).

1. French CJ, Heydon and Bell JJ also referred with approval to the following passage cited by Wigmore (Wigmore JH, *Evidence in Trials at Common Law* (Chadbourn rev 1978) Vol 7 p 13) from *Sydleman v Beckwith* (1875) 43 Conn 9 at 12-14:

[O]n the ground of necessity, where the subject of the inquiry is so indefinite and general as not to be susceptible of direct proof, or where the facts on which the witness bases his opinion are so numerous and so evanescent that they cannot be held in the memory and detailed to the jury precisely as they appeared to the witness at the time.

(See *Australian Competition and Consumer Commission v Air New Zealand and Another (No 1)* [2012] FCA 1355; (2012) 207 FCR 448 at 464 [71]-[72] per Perram J.)

1. The scope of s 78 of the Evidence Act was discussed by White J in *Connex Group Australia Pty Ltd v Butt* [2004] NSWSC 379. In the course of his reasons, his Honour said (at [22] and [27]):

... In my view the combined effect of ss 76 and 78 is to exclude non-expert opinion evidence if it is not based on personal perception (ss 76 and 78 (a)), or, if it is superfluous because all of the facts can be told to the tribunal so as to put it in as good a position to draw the inference as the person expressing the opinion (ss 76 and 78 (b)).

... In my view if the person giving the opinion had the opportunity to form a correct understanding of the effect or outcome of the discussion so that there is a rational basis for his or her understanding to satisfy the test of relevancy under s 55, and provided the witness has exhausted his or her recollection of what was said so that s 78 (b) is satisfied, s 78 operates so that the witness’s opinion about the effect or outcome of a conversation is not excluded by s 76.

1. I should say in case I am wrong about the admission of the evidence summarised in paragraph 55 above under s 78 of the Evidence Act, that I think the evidence summarised in paragraph 54 of two suppliers who would ordinarily be competitive with each other, meeting after a purchaser has initiated a process and exchanging what would otherwise be highly confidential pricing information in the context of information to be provided to the purchaser would lead as a matter of inference to the matters summarised in paragraph 55.
2. In eight paragraphs (paras 11 to 18), Mr Urata gives evidence of discussions between representatives of SEI and representatives of Yazaki concerning the responses of those companies to RFQs issued by Toyota with respect to the Toyota Avalon and the Toyota Solara in North America. At the heart of this evidence is evidence by Mr Urata of a meeting between representatives of SEI, being Mr Ehara and himself, and representatives of Yazaki, being Mr Asakawa, Mr Iwaki and possibly another person. He states that he does not have a clear recollection of the precise discussions which occurred at the meeting in about 1990. However, he recalls that the substance of the discussions was that SEI representatives proposed to Yazaki that each company should exchange information and coordinate regarding the upcoming Solara and Avalon. In my opinion, that evidence was admissible and, if it is opinion evidence, it falls within the terms of s 78 of the Evidence Act.
3. Mr Urata states that by participating in the meeting and subsequent discussions, his understanding was that the aim of the discussions was to allocate each company’s share in the Toyota WH business and, at the same time, to avoid excessive price competition. That evidence is admissible under s 78 of the Evidence Act for the same reasons the evidence identified in paragraph 55 is admissible.
4. Mr Urata states that at the meeting the representatives of the two companies agreed as to which company should “win” the supply of WHs and that they agreed as to which company would submit lower quotes. Mr Urata states that the representatives of the two companies said that they would continue to cooperate and work together regarding future Toyota models. In my opinion, that evidence was admissible and, if it is opinion evidence, it falls within the terms of s 78 of the Evidence Act. Mr Urata states that he understood that there was an agreement between SEI and Yazaki to the effect that once supply was allocated by TMC, the unsuccessful party would respect that allocation, although that was not expressly discussed in his presence. I will not use that evidence beyond evidence of what Mr Urata understood the agreement to require.
5. The respondents’ “strongest” example of evidence which fell within s 135 of the Evidence Act was the evidence Mr Urata gave in paragraph 23 of his affidavit which was in the following terms:

During this period Toyota released numerous RFQs to supply WHs both for new vehicles and for new models of vehicles that were currently being manufactured. To the best of my recollection, Toyota conducted a major competitive RFQ process for WHs on average about yearly. Throughout the period from 1995 to 2002, I estimate that I was involved in responding to around 10 Toyota WH RFQs for major models. In respect of many of these RFQs, representatives of SEI, including me, met with representatives from Yazaki and discussed and agreed to submit prices designed to influence the manner in which Toyota allocated the supply of WHs to each company. I do not now recall all of these meetings but I do recall that they generally included discussions about how to allocate WH supply and what prices should be submitted by each company similar to the Avalon and Solara discussions referred to above.

1. Section 135 of the Evidence Act is in the following terms:

**135 General discretion to exclude evidence**

The court may refuse to admit evidence if its probative value is substantially outweighed by the danger that the evidence might:

(a) be unfairly prejudicial to a party; or

(b) be misleading or confusing; or

(c) cause or result in undue waste of time.

1. I accept that Mr Urata’s evidence in paragraph 23 of his affidavit is very general in its terms. The major models are not identified and the parties to the conversations, the dates of the conversations and the substance of the conversations are not provided. On the other hand, the precise content of the conversations are not the critical aspect of the evidence in the sense that the case does not turn on what prices were provided or market allocations made during these meetings. Furthermore, I am not satisfied that the respondents could not obtain instructions so as to be able to cross-examine Mr Urata. This is not the type of case which might fall within s 135 of the Evidence Act as identified by the Full Court in *La Trobe Capital & Mortgage Corporation Ltd v Hay Property Consultants Pty Ltd* [2011] FCAFC 4; (2011) 190 FCR 299 at 312-316 [61]-[73]. I did not consider that the evidence fell within any of the paragraphs in s 135 of the Evidence Act.
2. Finally, by way of example, I refer to eight paragraphs in Mr Nagasawa’s affidavit (paragraphs 9 to 16 inclusive) where he gives evidence of his understanding of meetings or discussions between representatives of SEI and Yazaki. I ruled that those paragraphs should not be admitted. It is clear from these paragraphs that Mr Nagasawa did not attend meetings between the representatives of the two companies. In addition, in some passages Mr Nagasawa said that his evidence was based on his general understanding without explaining what he meant by that. In my opinion, the evidence was inadmissible because it was evidence of his understanding alone and was not based on any conduct of Yazaki which he saw, heard or otherwise perceived.
3. I turn to the other evidence (other than the conduct in relation to the 2002 Toyota Camry, the 2006 Toyota Camry, and the 2011 Toyota Camry) relied on by the ACCC in support of the existence of the Overarching Cartel Agreement.
4. Mr Nagano commenced employment with SEI in 1985 and from that date until September 1995 he was a member of SEI sales staff and he specialised in the sale of WHs to TMC. From 1986 he noticed that Yazaki and SEI would contact each other when TMC sought price-related information or was conducting a “semi-annual” price review. Representatives of the companies would meet and discuss prices and Mr Nagano was involved in these discussions. Generally, Yazaki and SEI would try to agree on a common approach to the response to be provided to TMC. In the case of the “semi-annual” price review, the discussions were directed towards minimising differences between Yazaki and SEI in the price reduction proposals to be submitted to TMC. Mr Nagano formed the view that the purpose of the discussions was to preserve market share for each company and to prevent the erosion of price.
5. Mr Nagano described a practice involving Yazaki and SEI that was followed whenever TMC issued an RFQ. That practice (broadly expressed) involved representatives of the two companies meeting when TMC issued RFQs and agreeing upon an allocation of the supply of WHs with the guiding principle being the retention by each company of existing market shares. The representatives of the two companies would then coordinate their prices with a view to influencing TMC to allocate the supply of the WHs in accordance with the agreed allocation. The price differential was generally in the order of 2% to 3%. The prices provided to TMC included the prices of component parts and Mr Nagano said that it was important that the prices had a rational basis and could be justified. The base prices were coordinated. Although there were discussions between the companies about VE proposals, there was less coordination about these proposals. I describe what is meant by VE proposals below (at [182]). Mr Nagano’s involvement in this practice began in about 1999 when he held the position of Manager responsible for WH sales to Toyota in the 1st Automotive Electronics Systems Sales Department, in SEI’s Toyota office in Toyota City, Japan. He was involved in the practice in the case of the following models of motor vehicles manufactured by TMC: Harrier, Sienna, Corolla and Vitz (Yaris) and a further RFQ for the Vitz (Yaris) between late 2007 and early 2008. Mr Nagano said that to the best of his recollection in relation to the RFQs referred to above, TMC awarded supply in accordance with the allocations agreed between Yazaki and SEI.
6. Mr Shigi said that in July 1990, he was the Deputy Group Manager of the 1st Harness Section of SEI’s Automotive Sales Division and that, from about that time, he participated in meetings with representatives of Yazaki where Yazaki and SEI discussed prices. These meetings generally took place after TMC had made a price down request, and the discussions at the meetings were directed towards reaching agreement between Yazaki and SEI as to the appropriate level of price reductions. Mr Shigi also described a practice adopted whenever TMC issued an RFQ. The practice he described was similar to that described by Mr Nagano, although his description was less detailed. It began with the RFQ for the 1994 Toyota Celica. Mr Shigi’s view was that the practice was designed to ensure that Yazaki and SEI maintained their existing market shares and that prices were not eroded.
7. Mr Urata commenced employment with SEI in November 1983. From then until August 1993, he worked as a member of SEI’s sales staff in the Harness Section of the Automotive Sales Department of the Chubu Branch. Within a few years after he commenced employment, he observed and then himself was involved in price exchange and coordination meetings with representatives of Yazaki after TMC had issued a price down request. Mr Urata said that there was an agreement between Yazaki and SEI in about 1990 as to the allocation of the supply of WHs to TMC in relation to the Toyota Avalon and Toyota Solara in North America. Yazaki and SEI agreed that Yazaki would win the supply of WHs for the Toyota Solara and SEI would win the supply of WHs for the Toyota Avalon. The proposed “winner” would issue lower quotes with a view to achieving this result. TMC awarded supply in accordance with the allocation agreed between Yazaki and SEI. Mr Urata could not remember the precise details, but he said that the practice he identified of Yazaki and SEI agreeing market allocation and the prices to be submitted with a view to TMC making that allocation was adopted in relation to many of the 10 Toyota WH RFQs for major models issued between 1995 and 2002. He gave evidence of the practice being adopted in respect of the period from 2004 to 2008.
8. Mr Shida gave evidence that he was involved in price coordination discussions with representatives of Yazaki in 1999 regarding the Toyota Harrier and that, between July 2000 and May 2007 while he was employed at Sumitomo Electric Wiring Systems, Inc (North America), he was involved in price coordination discussions with Yazaki personnel in North America relating to the sale of WHs to Toyota Motor Manufacturing North America, Inc.
9. Mr Kazahaya was a member of SEI’s Toyota Business Office from January 2003 to the beginning of 2008. Over this period, he accompanied Mr Nagano to meetings with representatives of Yazaki. The pricing of electrical wires, WH protective covering and WH tapes was discussed at these meetings. Mr Kazahaya said that he had discussions with Mr Kiyotaka Kawatake of AAPL in April or May 2008 when price information was exchanged in relation to annual price down requests by TMCA.
10. Mr Nagasawa gave evidence about his contact with representatives of Yazaki following price down requests from TMCA. In late 2001 or early 2002, he had a telephone conversation with Mr Hitoshi Ukita of AAPL where the later said “... we should respect each other’s territories”. He had discussions with Mr Okumura and Mr Kawatake of AAPL in 2007 concerning a TMCA price down request and AAPL and SEWS-A exchanged information about the extent of the price reductions each of them was considering.
11. In addition to the evidence I have summarised above, the ACCC relies on the conduct of Yazaki and AAPL on the one hand, and SEI and SEWS-A on the other, in relation to the 2002 Toyota Camry, the 2006 Toyota Camry and the 2011 Toyota Camry. My findings in relation to that conduct are set out later in these reasons.
12. The respondents submit that the evidence is too general to support a finding of an Overarching Cartel Agreement. It is true that some of the evidence is very general, but then other parts of the evidence are quite specific, and it is the evidence as a whole which must be considered. The respondents submit that the three agreements (i.e., the 2002 Toyota Camry Minor RFQ Agreement, the 2003 Agreement and the 2008 Agreement) are free-standing agreements and that the evidence of them does not necessarily lead to an inference of an Overarching Cartel Agreement. It is true the agreements are free-standing agreements. However, to stop at that point would be to ignore that, not only are the agreements consistent with an Overarching Cartel Agreement, but one can go further and say that the parties’ conduct in assuming how they would behave implies the existence of the Overarching Cartel Agreement. Furthermore, there is, by way of example, Mr Shigi’s evidence of his reference to the “dominant principle” during the discussions in 2003 (at [155]). The respondents submit that there was evidence suggesting that the parties did not adopt the practice on every occasion or, at least evidence throwing doubt on whether it happened on every occasion, and that it followed from that that there could not have been an Overarching Cartel Agreement in the terms pleaded. For example, Mr Nagano said the practice “usually” involved the stages he described and Mr Urata said that the practice was followed “[i]n responding to a number of these RFQs”. I do not accept this submission. It seems to me that I have to consider the evidence as a whole and, in doing that, there is a strong body of evidence in support of an Overarching Cartel Agreement.
13. I am satisfied that there was an Overarching Cartel Agreement. As to the particular provisions alleged by the ACCC, as I have already said, the evidence supports a finding in relation to TMC, but not motor vehicle manufacturers generally. As to the second and third provisions and, contrary to the respondents’ submission, I think there is evidence that the RFQs which were the subject of the Overarching Cartel Agreement related to all countries and not just Japan (e.g., see Mr Nagano’s evidence) and that subsidiaries or agents were from time to time required to submit prices to support the conclusion that these were provisions of the Overarching Cartel Agreement.
14. As to the fifth and sixth provisions (i.e., no competition and no disclosure), I accept the respondents’ submission that the evidence does not support a conclusion that these were provisions of the Overarching Cartel Agreement. In one sense, one might readily infer that the parties must have had these type of commitments in mind. However, I am not satisfied I should make such a finding having regard to the following. First, none of the witnesses from SEI gave evidence of such provisions. As I understood it, the ACCC accepted that there was nothing express. Secondly, and more importantly, I cannot be satisfied that if asked the parties might not proffer some qualifications or exceptions to such broad obligations and it follows, I think, that there was not the required meeting of minds and commitment. I do not think that the fact that they might be considered as “necessary and sensible” (as the ACCC put it) is sufficient.
15. I find that there was an overarching cartel agreement with the first four provisions pleaded by the ACCC but limited to RFQs issued by TMC.
16. For similar reasons to those reasons I give for concluding that the 2003 Agreement was within the terms of s 45(2)(a)(i) and (ii) and s 44ZZRD of the Act and the Competition Code (at [168]-[179] below), I conclude that the Overarching Cartel Agreement falls within the terms of these sections.

## 2002 Toyota Camry Minor RFQ Agreement

1. The ACCC alleges that, on 28 April 2003, AAPL and SEWS-A made an arrangement or arrived at an understanding in respect of the supply of the engine room main WH to TMCA for the 2002 Toyota Camry and, as I have said, it described that arrangement or understanding as the 2002 Toyota Camry Minor RFQ Agreement. The ACCC alleges that the arrangement or understanding contained provisions to the following effect.
2. First, there was a provision that as AAPL was the incumbent supplier to TMCA of the engine room main WH for the 2002 Toyota Camry, SEWS-A would not attempt to win supply of the engine room main WH through the 2002 Toyota Camry Minor RFQ. Secondly, there was a provision that AAPL would provide SEWS-A with the price at which AAPL then supplied the engine room main WH to TMCA. Thirdly, there was a provision that following the provision of AAPL’s engine room main WH price, SEWS-A would then determine, either by itself or in conjunction with AAPL, a price that SEWS-A would submit to TMCA which was sufficiently higher than AAPL’s price so as to ensure, as far as possible, that TMCA did not award supply of the engine room main WH for the 2002 Toyota Camry to SEWS-A. Finally, there was a provision that SEWS-A would submit its price for the engine room main WH to TMCA in response to the 2002 Toyota Camry Minor RFQ.
3. The ACCC alleges that the 2002 Toyota Camry Minor RFQ Agreement was reached following the issue by TMCA on or about 17 April 2003 of an RFQ in respect of a minor model change to the 2002 Toyota Camry (“2002 Toyota Camry Minor RFQ”). The Toyota Camry Minor RFQ sought the supply of the engine room main WH to TMCA in Australia.
4. The ACCC alleges that the provisions of the 2002 Toyota Camry Minor RFQ Agreement individually and collectively had the purpose of preventing, restricting or limiting the supply of the engine room main WH for the 2002 Toyota Camry to particular persons, namely TMCA, by AAPL and SEWS-A, or by either of them, in competition with each other, within the meaning of s 4D of the Act and the Competition Code and thereby constituted exclusionary provisions within s 4D and s 45(2)(a)(i) of the Act and the Competition Code, and cartel provisions within the meaning of s 44ZZRD of the Act and the Competition Code. The ACCC also alleges that further, or in the alternative, the 2002 Toyota Camry Minor RFQ Agreement had the purpose, effect or likely effect of fixing, controlling or maintaining, or providing for the fixing, controlling or maintaining of, prices for the engine room main WH for the 2002 Toyota Camry supplied or to be supplied, by AAPL or SEWS-A, or by either of them, in competition with each other, within s 45A(1) (as in force at the time) of the Act and the Competition Code and, therefore, was deemed to have the purpose, effect or likely effect of substantially lessening competition within the Australian Toyota Camry WH market within s 45(2)(a)(ii) of the Act and the Competition Code, and constituted cartel provisions within the meaning of s 44ZZRD of the Act and the Competition Code.
5. The ACCC alleges that AAPL gave effect to the 2002 Toyota Camry Minor RFQ Agreement on 1 May 2003 when it provided SEWS-A with its engine room main WH price and discussed with SEWS-A the extent to which SEWS-A proposed engine room main WH price should exceed AAPL’s engine room main WH price.
6. The above is the legal framework of the ACCC’s case. I turn now to describe briefly the key factual allegations of its case.
7. First, and this fact is not in dispute, from at least August 2002 AAPL supplied at least nine WH parts to TMCA to be used in the manufacture of the 2002 Toyota Camry, including the engine room main WH. Secondly, the ACCC alleges that on or about 17 April 2003, TMCA issued an RFQ to SEWS-A in respect of a minor model change to the 2002 Toyota Camry. Thirdly, the ACCC alleges that the arrangement or understanding was made or arrived at on 28 April 2013 at the Carlton Crest Hotel in Melbourne, Victoria during a meeting involving Mr Hiroshi (Kan) Ito (“Mr Ito”) and Mr Okumura representing AAPL on the one hand, and Mr Kazuhiko Yokoyama and Mr Nagasawa representing SEWS-A on the other. Fourthly, the ACCC alleges that on 1 May 2003 at a second meeting at the Carlton Crest Hotel, AAPL, represented by Mr Okumura, provided SEWS-A, represented by Mr Nagasawa, with its engine room main WH price and there was a discussion between these persons about the extent to which SEWS-A’s proposed price for the engine room main WH should exceed AAPL’s engine room main WH price. Fifthly, the ACCC alleges that on 12 May 2003, SEWS-A submitted a response to the 2002 Toyota Camry Minor RFQ to TMCA which included SEWS-A’s proposed engine room main WH price. The price submitted to TMCA by SEWS-A was higher than AAPL’s engine room main WH price. In support of this allegation, the ACCC relied on a letter from SEWS-A to TMCA dated 9 May 2003 enclosing the response to the 2002 Toyota Camry Minor RFQ which letter and enclosure were given to TMCA at a meeting on 12 May 2003.
8. Before turning to consider the evidence the ACCC relied on in support of its case, it is necessary to say something more about the key participants, the positions they held and the relationship between SEWS-A and SEI.
9. In early 2003, Mr John Male was employed by TMCA as a senior buyer in its operating purchasing department or section, and Mr Yasuhiko Sakamoto was employed by TMCA in its purchasing department. In late 2001, TMCA manufactured two models of motor vehicles in Australia, the Toyota Camry and the Toyota Avalon. In April 2003, Toyota was manufacturing the 2002 Toyota Camry and that model continued to be manufactured until June 2005. AAPL supplied the engine room main WH for the four cylinder 2002 Toyota Camry, and SEWS-A supplied the WHs for the Toyota Avalon.
10. SEWS-A was established in August 1999 to deal with the sale of WHs to TMCA after SEI had secured a contract to supply WHs for the manufacture of the Toyota Avalon in Australia. SEWS-A imported the WHs it supplied to TMCA from an overseas company within the SEI group of companies.
11. Mr Nagasawa has been employed by SEI or its subsidiaries since 1986. He has spent most of his career working in sales, and that included the sale of WHs to TMC and the Mitsubishi Motor Corporation. In October 2001, he was transferred to Australia to work as a senior manager for SEWS-A. He was involved in the sale of WHs to TMCA. In January 2008, he left Australia and returned to work in the Toyota Branch Office of SEI in Japan.
12. In October 2001, the two directors of SEWS-A were Mr Yokoyama and Mr Osamu Inoue. Mr Yokoyama was based in Australia, whilst Mr Inoue was based in Japan. Mr Nagasawa reported to both directors. Mr David Frost was employed by SEWS-A as a project coordinator. SEI’s sales department in Japan was known as the Toyota Branch Office and it was responsible for the sale of automotive electronic components, including WHs to Toyota. The TBO retained ultimate oversight and supervision of all sales of automotive electronic components that the Sumitomo Electronic Group conducted with TMC and its affiliates throughout the world, including TMCA. Mr Nagasawa identified persons in the TBO with whom he had contact between 2001 and 2008, and the positions each of them held. At a senior level, there was Mr Shigi, the general manager and branch office manager, and Mr Urata, manager, with whom Mr Nagasawa consulted from time to time. At the next level down, there was Mr Masaharu Nakamura and Mr Tsutomu Kato, staff in the TBO with general responsibility for sales of WHs for the Toyota Camry and other models, with whom Mr Nagasawa regularly consulted.
13. Mr Tadahisa Tsuda was the managing director of AAPL when Mr Nagasawa arrived in Australia in October 2001. Mr Ukita was in charge of WH sales at AAPL. By April 2003, Mr Tsuda had been replaced as managing director by Mr Ito, and Mr Nagasawa said that Mr Okumura had replaced Mr Ukita. Mr Nagasawa described Mr Okumura as his “counterpart” at AAPL.
14. I turn now to describe the substance of the evidence given by Mr Nagasawa.
15. Mr Nagasawa’s understanding shortly after he joined SEWS-A was that the company had an understanding with AAPL that the companies would respect each other’s territory in terms of the supply of WHs to TMCA during the production cycle of a particular model of vehicle. That meant that neither company would attempt to win the business of the other during the production cycle of a particular model, including any minor model changes. Mr Nagasawa said that the same understanding did not necessarily apply when the companies were invited to provide prices for a new model.
16. Mr Nagasawa said that the companies also exchanged information whenever TMCA sought price reductions from their suppliers. TMCA did this annually with a productivity or price down request.
17. Mr Nagasawa said that in or around mid-April 2003, SEWS-A received an RFQ in relation to a minor model change for the 2002 Toyota Camry and that the RFQ related to the engine room main WH. In cross-examination, it became clear that Mr Male sent an email dated 17 April 2003 with attachments to Mr Frost which was copied to Mr Nagasawa. The email was in the following terms:

David,

Further to our recent phone conversations and brief meeting this morning.

To confirm the main points discussed:

1. SEWS-A is requested to provide a bench marking quotation for 82121-YC330 at the earliest possible date, refer enclosed parameters.

(See attached file: Quote parameters.xls)

1. Copies of TMCA drawings provided to SEWS-A 17/4/03.
2. SEWS-A request for Togo Cad data:

I have conveyed this request formally to PDD (Paul Tsironis) today.

1. SEWS-A request for a sample of 82121-YC330:

I have asked Steve Gaylard to provide this sample to Derek Carlisle ASAP.

1. TMCA RFQ document to be used, electronic copy enclosed.

(See attached file: RFQ Electronic.xls)

Please let me know if you require any further clarification.

Regards,

John Male

Senior Buyer

Operations Purchasing

Toyota Motor Corporation Australia Limited

There were three documents attached to Mr Male’s email and they were as follows:

(1) Quotation parameters for 82111-YC600 Engine Room Main WH;

(2) Quotation parameters for 82121-YC330 Engine WH; and

(3) Blank TMCA RFQ

1. The effect of Mr Nagasawa’s evidence when he was cross-examined about the email and attached documents was as follows. First, TMCA requested a price from SEWS-A for the engine WH (part number 82121) as part of a benchmarking exercise and SEWS-A was to provide its price and associated information in a “TMCA RFQ”. Secondly, the documents were not an RFQ from TMCA to SEWS-A for the engine room main WH (part number 82111), although the quotation parameters for this part was an attachment to the email. Thirdly, the RFQ from TMCA to SEWS-A for the engine room main WH must have preceded the document and was verbal or otherwise.
2. Mr Nagasawa said that AAPL was the incumbent supplier of the engine room main WH for the 2002 Toyota Camry, and that he had no experience of “Toyota” changing supplier in respect of any WH in the middle of a vehicle production cycle. He said that a change of supplier in the middle of a production cycle was “highly unlikely unless something exceptional occurred”. I note at this point that both Mr O’Donohue and Mr Ward of AAPL gave evidence to similar effect. Even in the absence of direct evidence, the considerable investment in tooling and other commercial considerations suggest that that would be the case.
3. Mr Nagasawa identified two circumstances which might explain TMCA’s request to SEWS‑A for a quotation for the engine room main WH for the 2002 Toyota Camry after supply had been awarded to AAPL. First, he had been told by Mr Sakamoto of TMCA that TMCA had experienced quality problems with the engine room main WHs supplied by AAPL, and that TMCA was looking to punish AAPL by issuing the Toyota Camry Minor RFQ thereby “reopening supply to competitive tender”. The respondents admitted in their Amended Defence that TMC had expressed concerns to Yazaki about the quality of the WHs that it and its subsidiaries supplied to TMC and its subsidiaries for the 2002 Toyota Camry. Secondly, the sales of the Toyota Avalon had been much lower than the volume projected by TMCA, and SEWS-A had asked TMCA for price increases to compensate for this circumstance. Mr Sakamoto had agreed to a price increase, but he had also indicated that TMCA preferred to assist SEWS-A by supplying it with additional business.
4. Mr Nagasawa gave evidence that, in connection with the engine WH, TMCA was seeking a *benchmarking quotation* and it seems to me that the proper inference from one of his answers was that such a quotation was not a quotation that would lead to a change of supplier.
5. It is convenient to note at this point that the ACCC did not call a witness from TMCA who could give evidence about the alleged RFQ issued to SEWS-A in relation to the engine room main WH. Mr Borg from TMCA swore an affidavit which was tendered by the ACCC as part of its case, but his evidence did not deal with this matter.
6. On receiving the 2002 Toyota Camry Minor RFQ, Mr Nagasawa contacted the TBO in Japan and spoke with either Mr Nakamura or Mr Kato. He told them that SEWS-A had received the 2002 Toyota Camry Minor RFQ and that he would consult with the TBO about SEWS‑A’s response.
7. Mr Nagasawa also contacted Mr Okumura by telephone and he told him that SEWS-A had received the 2002 Toyota Camry Minor RFQ. Mr Okumura seemed surprised by this and Mr Nagasawa inferred from Mr Okumura’s reaction that AAPL had not received a similar RFQ. Mr Nagasawa told Mr Okumura what Mr Sakamoto had told him about the quality problems with the engine room main WHs being supplied by AAPL. Mr Nagasawa suggested to Mr Okumura that they meet at a place where they were unlikely to be seen by TMCA representatives or their family members. They arranged to meet at the Carlton Crest Hotel on 28 April 2003.
8. Between this conversation with Mr Okumura and his meeting with Mr Okumura on 28 April 2003, Mr Nagasawa spoke to Mr Urata by telephone on a number of occasions. He needed to do that because he did not have the authority to make decisions about prices to be offered by SEWS‑A. Any provisional decision had to be approved by his superiors in Japan. Mr Nagasawa said that Mr Urata was aware of the Minor Camry RFQ and he asked him whether SEWS-A could possibly win the business. Mr Nagasawa considered that a change of supplier was unlikely, but in view of the two matters identified by Mr Sakamoto, there was some chance that SEWS-A could win the right to supply the engine room main WH to TMCA for the 2002 Toyota Camry. He informed Mr Urata to this effect. Mr Urata told him that SEWS-A was to quote a higher price than AAPL so that AAPL kept the business in accordance with the understanding between the companies. SEWS-A’s price was not to be too much higher than AAPL’s price otherwise TMCA might view SEWS-A as uncompetitive. Mr Nagasawa suggested a price 2% to 3% higher than AAPL’s price, and Mr Urata did not disagree with that suggestion. Mr Urata said that the TBO wanted an approval request form which would provide a formal written record justifying the quoted price.
9. In his affidavit, Mr Urata said that he did not have an independent recollection of events surrounding an RFQ issued by TMCA in April 2003 and he did not give any evidence about these events.
10. At about this time, Mr Yokoyama told Mr Nagasawa that instructions from Japan were to be followed.
11. Mr Yokoyama and Mr Nagasawa met with Mr Ito and Mr Okumura at the Carlton Crest Hotel on 28 April 2003. Mr Nagasawa told Mr Okumura that SEWS-A intended to abide by the existing understanding with AAPL that it would not undercut AAPL in submitting a price for the engine room main WH in response to the 2002 Toyota Camry Minor RFQ. He told those at the meeting that SEI in Japan agreed with this approach. Mr Nagasawa asked Mr Okumura to provide him with AAPL’s prices so that he could ensure that SEWS-A’s prices were higher. Mr Okumura agreed to obtain this information and provide it to Mr Nagasawa.
12. Mr Nagasawa and Mr Okumura met again at the Carlton Crest Hotel on 1 May 2003. Mr Okumura gave Mr Nagasawa a breakdown of AAPL’s price for the engine room main WH, and Mr Nagasawa noted the figures in his diary. The critical figure was the mass production price which was $156.84. Mr Nagasawa and Mr Okumura discussed how much higher SEWS-A’s price should be than that of AAPL. Mr Nagasawa suggested a figure of between 2% to 3%. Mr Okumura wanted a figure closer to 3%.
13. It seems that at or about the same time as TMCA asked SEWS-A to provide its price for supplying the engine WH to it, Mr Okumura provided AAPL’s price, including component prices for the engine WH to Mr Nagasawa which the latter noted in his diary. Mr Nagasawa did some analysis on the figures, but at some point, TMCA indicated that it no longer needed a price for the engine WH from SEWS-A.
14. After his meeting with Mr Okumura on 1 May 2003, Mr Nagasawa set about preparing an approval request form in relation to the engine room main WH for submission to the TBO in Japan. That involved the preparation of various drafts which he sent to the TBO. Mr Urata made suggestions and amendments to the drafts. Their purpose was to formulate a price which was higher than AAPL’s price so that they did not disturb existing arrangements, but not so much higher as to make SEWS-A appear uncompetitive, particularly as it was known at the time that TMC would soon be releasing a global RFQ for the 2006 Toyota Camry. Mr Nagasawa explained how he prepared the various drafts in which he reached a price of approximately $161 and showed a breakdown of the prices of AAPL, and a breakdown of the price SEWS-A was charging for the equivalent part for the Toyota Avalon. The price of $161 was approximately 3% higher than AAPL’s price.
15. The final version of the approval request form is dated 10 May 2003. The approval request form, like previous drafts, contained details of AAPL’s prices for components of the engine room main WH and a similar analysis of SEI’s prices for the components of the engine room main it supplied to TMCA for the Toyota Avalon. It also set out prices of the components for the engine room WH which Mr Nagasawa was recommending should be the subject of the quote. Mr Nagasawa adjusted down “Processing costs” in the proposed quote (and made an equivalent increase in the “Parts costs”) to avoid drawing attention to the difference between the “Processing costs” in the proposed quote and the “Processing costs” in relation to the Toyota Avalon.
16. Two other aspects of the approval request form prepared by Mr Nagasawa should be noted. First, in a section entitled “Background to Quotation Request”, Mr Nagasawa refers to the two matters he discussed with Mr Sakamoto (see [101] above). Secondly, in a section entitled “Background to setting of price”, Mr Nagasawa states that it was expected that “the next [2006 Toyota Camry] competition will be a true showdown”. This was originally written in Japanese and there were different translations of the Japanese words. For example, an alternative translation was that the Japanese words mean “a true win/loss competition” rather than “a true showdown”. However, neither party suggested that the difference in the translations was material.
17. Mr Urata instructed Mr Nagasawa to submit a price for the engine room main WH of $161.37. On 12 May 2003, Mr Nagasawa and Mr Frost met with Mr Male and they gave him a covering letter dated 9 May 2003 and a completed Toyota Request for Quotation form in relation to the engine room main WH which SEWS-A had completed. SEWS-A’s price was approximately 3% higher than AAPL’s price.
18. TMCA was slow to announce “the results” of the Minor Camry RFQ. TMCA decided that there was to be no change in the supplier of the engine room main WH. Mr Nagasawa advised Mr Okumura of the result and the latter appeared glad to hear the news.
19. The value to SEWS-A of the business of supplying the engine room main WH to TMCA in relation to the 2002 Toyota Camry would have been approximately $18 million per annum.
20. It seems to me that the principal difference between the parties in relation to the 2002 Toyota Camry Minor RFQ Agreement may be summarised as follows. It cannot be disputed that TMCA sought a price for the engine room main WH from SEWS-A. The dispute relates to TMCA’s purpose in seeking the price. The ACCC’s case is that although, as Mr Nagasawa informed Mr Urata, a change in supplier was unlikely, it was possible, particularly in view of the matters identified by Mr Sakamato. The respondents’ case is that TMCA was conducting a benchmarking exercise meaning a change of supplier would not occur, or at least the ACCC has not proved (the onus being on it) that a change of supplier was possible.
21. The respondents submit that, bearing in mind the gravity of the allegations, I should find that Mr Nagasawa’s evidence was unsatisfactory. They submit that even if I was minded to accept the substance of Mr Nagasawa’s evidence, the ACCC’s case remained unsatisfactory. As to the latter submission, the respondents submit that on any view there is no satisfactory evidence of the so-called 2002 Toyota Camry Minor RFQ. If it was in writing the document has not been produced, and if it was verbal Mr Nagasawa’s evidence as to its nature is vague and general. There is no evidence from TMCA as to its intentions. The evidence is that TMCA did not provide a formal written response to SEWS-A’s submission of its price for the engine room main WH. I will return to consider the significance of these matters.
22. The respondents relied on a number of matters in support of their submission that Mr Nagasawa was an unsatisfactory witness.
23. First, they submit that I should reject his evidence that in or around mid-April 2003, SEWS-A received an RFQ for the engine room main WH for a minor model change for the 2002 Toyota Camry. As I have said, a written RFQ was not produced and I think Mr Nagasawa accepted in his cross-examination that what the ACCC had particularised as the RFQ (i.e., the email and attachments from Mr Male dated 17 April 2003) was not the RFQ. He also seemed to accept in his cross-examination that the request might have been verbal. Mr Nagasawa’s recollection in relation to the RFQ was not particularly clear. This is but one example of a more general criticism the respondents made of Mr Nagasawa’s evidence, that is to say, that far from his evidence of conversations being in direct speech, it was general and conclusory. To a point, this observation is correct.
24. Secondly, the respondents submit that Mr Nagasawa’s evidence differed from the further and better particulars which the ACCC provided in relation to the meeting which took place on 28 April 2003. They ask me to assume that the particulars were based on information given to the ACCC by Mr Nagasawa and, for the purposes of the submission, I will make that assumption. The particulars of the meeting given by the ACCC are as follows:
25. Mr Nagasawa told Mr Okumura that SEWS-A would not attempt to “win” supply of the engine room main WH through the 2002 Toyota Camry Minor RFQ;

ii) Mr Nagasawa asked Mr Okumura to provide SEWS-A with AAPL’s engine room main WH price so that SEWS-A could ensure that the price that it submitted to TMCA for the engine room main WH was higher than AAPL’s engine room main WH price; and

iii) Mr Okumura agreed to do so.

The respondents submit that these particulars are to be contrasted with Mr Nagasawa’s evidence that he told Mr Okumura that SEWS-A intended to abide by the existing understanding with AAPL in submitting a price for the engine room main WH in response to the Toyata Camry Minor RFQ, and that SEI in Japan agreed with this. Mr Nagasawa asked Mr Okumura to provide him with AAPL’s prices so that SEWS-A could ensure it submitted a higher price. Whilst there are differences between the two accounts, I do not think that they are of such a nature as to reflect adversely on the credit and reliability of Mr Nagasawa.

1. Thirdly, the respondents submit that there was no meeting of minds on 28 April 2003 because Mr Nagasawa referred to an existing understanding and yet there is no evidence that Mr Okumura or Mr Ito were aware of the understanding. I reject this submission. I infer from their conduct before, at and after the meeting, that Mr Okumura and Mr Ito were aware of an existing understanding that each company would respect the other’s territory during the production cycle of a particular model.
2. Fourthly, the respondents submit that Mr Nagasawa’s evidence as to when he first met Mr Okumura and as to the reasons they met at the Carlton Crest Hotel was confusing or unconvincing. Mr Nagasawa was being asked to recall events that occurred some 11 years earlier and, although his recollection was not always perfectly clear, I do not think it reflected adversely on his credit or reliability.
3. Fifthly, the respondents submit that Mr Nagasawa’s explanation for crossing out the words “Carlton Crest” in the entry in his diary for 1 May 2003 to the effect that he knew meeting with another supplier was wrong was unsatisfactory because it did not explain:

* the reasons he needed to cross out the words when there was no reference to the proposed attendees at the meeting or the proposed subject matter of the meeting;
* the reasons he crossed the words out and did not obliterate them so that they could not be read;
* the reasons he did not cross out the same words in the entry in his diary for 28 April 2003 which appeared on the same page of his diary.

I did find the logic of Mr Nagasawa’s explanation difficult to follow, but I do not think it affects the substance of what Mr Nagasawa said which I think is corroborated by other evidence.

1. Finally, I make a similar observation as the immediately preceding one concerning Mr Nagasawa’s explanation about “the minor model change” which was involved.
2. Although there were imperfections in Mr Nagasawa’s evidence, the substance of his evidence is largely corroborated by contemporaneous documents and other evidence. Mr Nagasawa’s evidence of the meetings and arrangement or understanding is corroborated by his own diary entries and contemporaneous documentation, such as his drafts of the approval request form. Mr Nagasawa’s evidence that he had a number of conversations with Mr Okumura in April and May 2003 is corroborated by the telephone records produced by Mr Nagasawa, which records show, for example, lengthy telephone calls between the two men on 17 April 2003 and again, on 2 May 2003. The accuracy of the figure which Mr Nagasawa said that Mr Okumura gave him as AAPL’s price of supplying the engine room main WH of $156.84 is supported by an almost contemporaneous TMCA scheduling agreement, and the figures for a number of the components are supported by a schedule produced by AAPL in response to a notice issued by the ACCC under s 155 of the Trade Practices Act. A similar point can be made about Mr Nagasawa’s evidence that Mr Okumura gave him details of AAPL’s price for supplying the engine WH, and the fact that Mr Nagasawa noted these figures in his diary.
3. The ACCC tendered paragraph 19 of Mr Okumura’s affidavit sworn on 23 May 2014. This paragraph corroborates Mr Nagasawa’s evidence to some extent. In the paragraph, Mr Okumura states that, in response to a request from Nr Nagasawa, he provided him with some information about some of AAPL’s prices on one occasion in about 2003. He could not remember the detail, but he does remember Mr Nagasawa’s request and he remembers speaking to Mr Ito who directed him as to how he was to respond.
4. The price put forward by SEWS-A at its meeting with TMCA on 12 May 2003 was consistent with the price referred to in Mr Nagasawa’s report to SEI TBO and, when the cost of Yazaki “special parts” is added, is consistent with the price discussed with Mr Okumura and a price approximately 3% greater than AAPL’s existing price for the engine room main WH.
5. Mr Okumura’s affidavit to which I have previously referred contained the evidence-in-chief he would have given at the trial had he been called as a witness. He came to Adelaide, South Australia during the trial. However, he was not called by the respondents to give evidence. It may be inferred that on those matters where he might have contradicted Mr Nagasawa’s evidence, his evidence would not have assisted the respondents’ case. The same may be said of the respondents’ failure to call Mr Ito, who Mr Nagasawa said was at the meeting on 28 April 2003 (*Jones v Dunkel*; *ASIC v Hellicar* at 412-414, [164]-[170]). I should add that I accept Mr Nagasawa’s evidence even in the absence of the matters referred to in this paragraph. His evidence, although imprecise in certain areas, was cogent and convincing.
6. Even accepting as I do the substance of Mr Nagasawa’s evidence, that still leaves the question of whether, in seeking a price for the engine room WH from SEWS‑A in April 2003, there was some chance TMCA would change supplier from AAPL to SEWS-A.
7. On the respondents’ side, there are the matters they identified and which I have summarised in paragraph 119 above. I would not draw an adverse inference from the fact the ACCC did not call a witness from TMCA. The fact is I do not have any evidence from a witness from TMCA as to its intentions. Nevertheless, I think the evidence clearly supports the finding I make about that matter (at [134]). In addition, there is Mr Nagasawa’s reference to the process not being a “true showdown” or “win/loss’. I think that those references are somewhat equivocal because they may reflect no more than Mr Nagasawa’s belief that the process for the supply of WHs for the 2006 Toyota Camry would involve open competition. The respondents also submit that if there was a true RFQ then, consistent with the RFQs in 2003 and 2008, it would be another three years before supply commenced and by then TMCA would no longer be manufacturing the 2002 Toyota Camry. I reject this submission. I think TMCA wanted SEWS-A’s price for the engine room main WH, not a price for the purposes of supply selection for a new model. The respondents submit that there was no evidence that SEWS-A was in a position to produce engine room main WHs for the Toyota Camry. I reject this submission because I am prepared to infer that SEWS-A would have had both the incentive and resources to produce the engine room main WH for the 2002 Toyota Camry had TMCA decided to change supplier.
8. SEWS-A put in a substantial amount of work in preparing the price it would submit to TMCA for the engine room main WH, and the actual submission dated 9 May 2003 has the hallmarks of a quote for potential supply. Furthermore, SEWS-A and AAPL acted in a way that suggests they considered a change of supplier was possible. Finally, it is clear on the evidence that TMCA had experienced quality problems with the WHs being supplied by Yazaki thereby providing it with a reason to consider changing suppliers.
9. I am satisfied that, whilst unlikely, there was some chance TMCA would have changed the supplier of the engine room WH for the 2002 Toyota Camry.
10. The respondents submit that there was no arrangement or understanding between AAPL and SEWS-A because there was no meeting of minds between them. Mr Nagasawa told Mr Okumura what SEWS-A was going to do. I reject this submission because it is not a correct characterisation of the facts. Mr Okumura agreed to attend the meeting and he and Mr Ito subsequently attended the meeting. At the meeting, Mr Nagasawa stated what SEWS‑A intended to do and Mr Okumura agreed to provide AAPL’s prices for the engine room main WH so that SEWS‑A could formulate its quote and ensure it was higher than AAPL’s prices. There was a meeting of minds.
11. I find that there was an arrangement or understanding between AAPL and SEWS-A containing the provisions identified by the ACCC in its Amended Statement of Claim. The next question is whether that arrangement or understanding contravened s 45(2)(a)(i) or s 45(2)(a)(ii) or both.
12. AAPL and SEWS-A were competitive with each other within the terms of s 4D(1)(a) and (2) and, if it be necessary (see the discussion below at [380]-[383]), they were competitive with each other in a market in Australia (s 45(2) and (3), and s 4E). The fact that SEWS-A did not want to win the supply contract does not mean they were not in competition with each other (*J McPhee & Son (Australia) Pty Ltd and Others v Australian Competition and Consumer Commission* (2000) 172 ALR 532 at 564-565 [110]-[112]; *Australian Competition and Consumer Commission v TF Woollam & Son Pty Ltd and Others* [2011] FCA 973; (2011) 196 FCR 212 (“*ACCC v TF Woollam*”) at 231-232 [70]-[72] per Logan J).
13. Under s 4D, the provision must have a particular *purpose* and purpose means the subjective purpose of the parties or their actual mental states. Frequently the subjective purpose will be inferred from the surrounding circumstances and conduct of the parties. Purpose is the end sought to be achieved and is to be distinguished from motive (*News Limited and Others v South Sydney District Rugby League Football Club Limited and Others* (2003) 215 CLR 563 at 573 [18] per Gleeson CJ; 581 [46] per McHugh J; 587 [65] per Gummow J; 638 [216] per Callinan J; *ASX Operations Pty Ltd and Another v Pont Data Australia Pty Ltd (No 1)* (1990) 27 FCR 460). As I have said, where a person engages in conduct for a number of purposes it is sufficient if the prohibited purpose is a substantial purpose (s 4F).
14. In my opinion, the provisions of the arrangement or understanding had the purpose of restricting or limiting the supply of engine room main WHs to TMCA for the 2002 Toyota Camry to AAPL. In making the arrangement or arriving at the understanding, AAPL contravened s 45(2)(a)(i) of the Act and the Competition Code.
15. The ACCC submits that the provisions of the arrangement or understanding also had the purpose or effect or likely effect of fixing, controlling or maintaining the prices of engine room main WHs supplied or to be supplied to TMCA. The words, “has ... the effect” requires the Court to consider the matter against the established facts, whilst the words “is likely to have the effect”, although referring to the time the arrangement was made or the understanding arrived at, allows any reasonable inference to be drawn (*Trade Practices Commission v TNT Management Pty Ltd* (1985) 6 FCR 1 (“*Trade Practices Commission v TNT Management*”)at 50 per Franki J).
16. In *ACCC v TF Woollam*, two builders adopted a practice in relation to various building projects whereby builder A would communicate a “cover price” to builder B so that builder B’s tender price would be higher than builder A’s tender price. Logan J found that the purpose of the provisions of the arrangement or understanding between the builders was to put a ceiling on the price at which builder A tendered, and a floor on the price at which builder B tendered. Logan J referred to Lindgren J’s discussion of the phrase “fixing, controlling or maintaining” in s 45A(1) in *Australian Competition and Consumer Commission v CC (NSW) Pty Ltd* (1999) 92 FCR 375 (“*CC (NSW)*”).
17. In *CC (NSW)*, Lindgren J said (at [168] and [176]):

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

I do not think that some specificity as to price is a necessary element of the notion of “controlling” price within s 45A. To insist on such a requirement would be to introduce an unauthorised general limitation on the notion and would allow the statutory prohibition to be easily circumvented — a result that cannot have been intended and should not be lightly accepted.

1. In *ACCC v TF Woollam*, Logan J said that there was controlling of prices at which the services were to be supplied by reason of the arrangement or understanding because there was a ceiling on the price at which builder A tendered and a floor on the price at which builder B tendered. It did not matter that there was not greater specificity of the price; there was a control on the price.
2. Logan J also dealt with a submission that there was a difference between a “bid” and a “price”, and that the former was not caught by s 45A. It was also submitted that s 45A was not directed to the price at which services might be supplied. His Honour rejected the submission. He said (at 238 [90]):

There is no merit in this submission. Each tender specified a price at which services were “to be supplied”. The presence of that expression in s 45A(1) means that, to this extent, the section looks to the future. Reference to s 44ZZRD is but an irrelevant distraction.

1. I think that the arrangement or understanding that SEWS-A would submit a higher price in circumstances where, had competitive behaviour prevailed, SEWS-A is likely to have submitted a lower price, had the purpose or effect of controlling prices. The matter can be tested in this way. Had there been no arrangement or understanding and SEWS-A had, as I think likely, submitted a lower price, then there was at least some chance that SEWS-A would have secured the contract to supply the engine room main WH to TMCA at the lower price. Even if there was no chance of SEWS-A securing the contract of supply, TMCA, armed with the lower price from SEWS-A, would have been in a strong position to negotiate a lower price from AAPL.
2. In making the arrangement or arriving at the understanding, AAPL contravened s 45(2)(a)(ii) of the Act and the Competition Code.
3. In addition, when Mr Okumura gave Mr Nagasawa AAPL’s price on 1 May 2003 and discussed prices with him, AAPL gave effect to a provision in an arrangement or understanding that is an exclusionary provision or has the purpose or has or is likely to have the effect of substantially lessening competition in contravention of s 45(2)(b)(i) and (ii) of the Act and the Competition Code.

## 2003 Agreement

1. As I have said, I will deal with the extra-territorial application of the Act and the Competition Code and the issue of a market in Australia later in these reasons. For the purposes of the analysis which follows, I will assume those issues are resolved in favour of the ACCC.
2. With respect to the facts surrounding the 2003 Agreement, there is a good deal of common ground between the parties as to what occurred in Japan and, in those circumstances, it is not necessary for me to descend to the same level of detail that might otherwise be necessary had all matters been in dispute.
3. The ACCC’s witnesses who gave direct evidence in relation to the 2003 Agreement were Mr  Shigi and Mr Urata with respect to events in Japan, and Mr Nagasawa with respect to events in Australia. As I have said, only Mr Nagasawa was required for cross-examination.
4. At the relevant time, Mr Shigi was employed by SEI as Branch Office Manager of the Toyota Branch Office and he was responsible for managing sales of automotive electronic components to TMC and other motor vehicle manufacturers in Western Japan. Mr Urata was his subordinate and he held a position in the 1st Harness Sales Department within SEI’s Toyota Branch Office.
5. On 14 May 2003, representatives of SEI, being Mr Urata, Mr Nakamura, Mr Kato and Mr Takeharu Ito, attended a meeting in Japan with representatives of TMC. The meeting was the start of a tender process for the supply of WHs to TMC for the new model of the Toyota Camry to be introduced in 2006. The life of the model was to be five years. TMC gave SEI a written document entitled “Selection of Suppliers for [the 2006 Toyota Camry]”. The ACCC referred to the document as an RFQ and, subject to the observations I make below (at [163]), I will adopt that description. In the RFQ, TMC sought bids for the supply of WHs for the 2006 Toyota Camry to it in relation to four manufacturing locations namely, Japan, the United States of America, Australia and Thailand. TMC later added Taiwan as an additional manufacturing location. The bids had to be lodged by 7 July 2003.
6. In early to mid-May 2003, Mr Shigi had a discussion with a senior representative of TMC’s Design Group and he learnt from that discussion that TMC was angry with Yazaki because of what were said to be frequent quality problems experienced by TMC with the WHs supplied by Yazaki. Mr Urata was also aware that TMC had concerns about the quality of WHs which were being supplied by Yazaki.
7. By the time the RFQ dated 14 May 2003 was issued, SEI had been selected by TMC to supply the power distributor and relay block for two other Toyota models, being the Toyota Avalon and the Toyota Harrier. The power distributor and relay block is closely related to the engine room main WH as it connects to it, or is incorporated into it. In the RFQ for the 2006 Toyota Camry, TMC indicated that it proposed to use the power distributor and relay block that SEI supplied for use in the Toyota Avalon in the 2006 Toyota Camry. This gave SEI a competitive advantage because it would be desirable from TMC’s perspective to have the same designer and supplier for both the power distributor and relay block, and the engine room main WH. The RFQ dated 14 May 2003 made it clear that some of the WHs were not to be the subject of competitive tender. For example, SEI was supplying the engine WH and that was to remain the case.
8. On 10 June 2003, there was a meeting at SEI’s offices in Toyota City between representatives of SEI and representatives of Yazaki to discuss the RFQ for the 2006 Toyota Camry. The persons present at the meeting were Mr Shigi and Mr Urata representing SEI, and Mr Tetsuro Suzuki, Mr Nobutake Osada and Mr Nagao representing Yazaki. Mr Suzuki told the representatives of SEI that Yazaki, as the existing supplier, wanted to win the supply of all WHs that were up for competition in the RFQ dated 14 May 2003. Mr Shigi of SEI referred to the “dominant principle” by which he was referring to the basic understanding or principle between SEI and Yazaki that each company should maintain its respective share of the supply of WHs for new models of existing motor vehicles and prevent price erosion. Mr Shigi told the representatives of Yazaki that TMC had certain expectations of SEI in relation to the engine room main WH and that SEI would find it difficult not to attempt to meet those expectations. There was an admission by the representatives of Yazaki during the meeting that there had been quality problems with the WHs it supplied in 2002. There was also a discussion about TMC’s wish to increase significantly its total global production target to nine million motor vehicles annually across its range. The meeting concluded with the representatives of each of SEI and Yazaki agreeing to give further consideration to the various matters which had been discussed at the meeting.
9. On 17 June 2003, there was a second meeting between representatives of SEI and representatives of Yazaki at SEI’s offices in Toyota City. Again, Mr Shigi and Mr Urata represented SEI, and Mr Suzuki, Mr Osada and Mr Nagao represented Yazaki. The discussions centred on the prices to be submitted to TMC for the engine room main WH. Yazaki was desperate to retain the business and for SEI to submit a much higher price for the engine room main WH than its price.
10. Before a third meeting which was planned to take place on 28 June 2003, Mr Shigi and Mr Urata of SEI undertook an analysis “as to SEI’s and Yazaki’s positions in relation to the 2006 Toyota Camry RFQ”. That analysis was supplied to Mr Shigi’s superior, Mr Yoshio Ebihara. In addition, Mr Urata met with two of his subordinates, Mr Nakamura and Mr Kato, to discuss an appropriate strategy in terms of SEI’s dealings with Yazaki. Mr Urata prepared a document setting out his views as to the appropriate strategy.
11. At the third meeting on 28 June 2003, Mr Shigi and Mr Urata again represented SEI, and Mr Suzuki, Mr Osada and Mr Nagao represented Yazaki. By reference to notes on a whiteboard, the parties discussed the party which would “win” supply of a particular part in a region by submitting a lower bid, and the party which would “lose” by submitting a higher bid. Although the parties made substantial progress towards a final agreement, they did not finally agree at that meeting.
12. SEI and Yazaki reached final agreement on 30 June 2003 during a telephone conversation between Mr Shigi of SEI and Mr Suzuki of Yazaki. With respect to the engine room main WH to be supplied to Toyota they agreed to the following:
13. with respect to supply in Australia, SEI was to “win” by around 1% including customs duty;
14. with respect to supply in North America, Yazaki was to “win” by 2 – 3% approximately;
15. with respect to supply in Japan, Yazaki was to “win” by 1 – 2% approximately; and
16. with respect to supply in Thailand, Yazaki was to “win” by 2 – 3% approximately.
17. The critical issue was agreement on the engine room main WH and Mr Shigi said, and I accept, that it was implicit in the agreement as to that part, that SEI had also agreed that it would respect Yazaki’s position as the incumbent supplier of the other WHs that were subject to the competitive tender process.
18. Mr Shigi advised Mr Urata and Mr Nakamura of the details of the agreement he had reached with Mr Suzuki and he instructed them to move straight into the “co-ordination phase”, that is to say, the phase involving the formulation of prices that would give effect to the agreement. It was necessary to ensure that the prices reflected the percentage differences referred to above and that involved a considerable amount of work because there were nine parts and four regions to be addressed.
19. I interrupt the narrative to identify the areas of dispute between the parties with respect to the facts stated to this point.
20. The ACCC alleges in its Amended Statement of Claim that, on 30 June 2003, Yazaki and SEI made an arrangement or arrived at an understanding in respect of the supply of the 2006 Toyota Camry WHs by each of them and their subsidiaries to TMC and its subsidiaries during a telephone conversation between Mr Suzuki of Yazaki and Mr Shigi of SEI and it describes this as the 2003 Agreement. In their Amended Defence, the respondents “admit” that Yazaki and SEI made an arrangement or arrived at an understanding in Japan in respect of the “Drawing Prices” to be submitted by Yazaki and SEI as part of the “2003 Supplier Selection Process”. The respondents describe this as the “2003 Supplier Selection Agreement”. It is not entirely clear to me what the respondents mean by Drawing Prices, but I assume they mean prices based on, or linked to, drawings and they use the description to make clear their point that because of what occurred thereafter, the Drawing Prices were most unlikely to be the prices actually paid for the WHs. I will return to consider the significance of this point. For similar reasons, the respondents refer to a “Supplier Selection Process” and “Supplier Selection Agreement” and, in one sense, that is correct because that is precisely what was occurring. I will use the ACCC’s terminology for convenience, but these points should be borne in mind.
21. The ACCC alleges that the 2003 Agreement contained provisions to the following effect:
22. Yazaki and SEI would discuss and attempt to agree, in respect of each 2006 Toyota Camry manufacturing location, the prices for the 2006 Toyota Camry WHs that they would submit in response to the 2006 Toyota Camry RFQ dated 14 May 2003;
23. Yazaki and SEI would determine the 2006 Toyota Camry agreed prices with a view to ensuring, as far as possible, that TMC awarded supply of the 2006 Toyota Camry WHs in each 2006 Toyota Camry manufacturing location to the party that was the incumbent supplier of equivalent WHs for the 2002 Toyota Camry, in this case Yazaki; and
24. Yazaki and SEI would submit the Toyota Camry agreed prices to TMC in Japan.

In their Amended Defence, the respondents “admit” that the 2003 Supplier Selection Agreement contained three provisions substantially to the effect of the provisions alleged by the ACCC. There is a slight qualification to this statement, but I did not understand either party to treat it as material. Yazaki was the incumbent supplier of the engine room main WH in Australia, but according to the arrangement or understanding, SEI was to win this part in Australia.

The ACCC alleges that the 2003 Agreement contained two further provisions to the following effect:

(4) for each 2006 Toyota Camry manufacturing location other than Japan, Yazaki and SEI would submit, or would cause their subsidiaries or agents to submit, to the relevant TMC subsidiary located in or responsible for that manufacturing location, the 2006 Toyota Camry agreed prices, or alternatively, the 2006 Toyota Camry agreed prices for each of the WHs of which TMC awarded supply in that manufacturing location; and

(5) Yazaki and SEI would do all things necessary to ensure that they each received the benefit of any WH supply awarded to them by TMC in response to the RFQ dated 14 May 2003, and not do anything which would or might deprive them of that benefit.

The respondents deny that there were provisions to this effect.

1. With respect to the fourth alleged provision, there is no evidence that it was the subject of a particular discussion between representatives of Yazaki and representatives of SEI. However, that is not fatal. Yazaki and SEI would have been aware of their own and each other’s subsidiaries and those of TMC in each manufacturing location. Their arrangement or understanding involved an allocation of the market having regard to various manufacturing locations. It seems that it was common practice for a local subsidiary to submit prices to the local subsidiary of TMC. Even if, as the respondents submit, the global decision could not be overturned and the submission of prices locally was a mere formality, it is at least implicit in the arrangement or understanding that when a TMC subsidiary outside Japan called for a price or prices, then Yazaki and SEI would cause their respective subsidiaries or agents to submit the same price or prices. The concept of an understanding is broad enough to include such a provision.
2. With respect to the fifth alleged provision, the provision is redolent of the type of implied obligation identified in *Mackay v Dick* (1881) 6 App Cas 251 at 263 per Lord Blackburn and discussed by Mason J (as his Honour then was) in *Secured Income Real Estate (Australia) Limited v St Martins Investments Proprietary Limited* (1979) 144 CLR 596. It is convenient to consider first, how the ACCC seeks to deploy this provision. The ACCC submits that a person can give effect to a provision of an arrangement or understanding by conduct pursuant to a term or provision of the arrangement or understanding or more generally. Even though it does not restrict its argument to the former case, it has pleaded such a case. The fifth alleged provision gives rise to a subset of obligations, including an obligation to supply in accordance with the award of supply by TMC, an obligation not to inform TMC or any regulatory authority of the arrangement or understanding, and an obligation not to compete with SEI so as to acquire any of SEI’s share contrary to the arrangement or understanding.
3. There is nothing in the evidence of the discussions leading up to and comprising the 2003 Agreement to the effect that the parties directed their minds to the matters in the fifth alleged provision. Whilst the parties may have had an expectation of secrecy and that neither of them would turn around and act contrary to their arrangement or understanding, that does not amount to a commitment in terms of the fifth alleged provision. I reach this conclusion with more confidence when I consider the specific obligations said to emanate from the general obligation. I am not satisfied that if asked, one of the parties would not say, in relation to the specified obligations, yes in general terms but with this qualification. I am not satisfied that the fifth alleged provision was a provision of the arrangement or understanding.
4. Leaving aside the market in Australia issue, I do not think that there is any doubt that Yazaki and SEI and their respective subsidiaries were competitive with each other within s 4D of the Act and the Competition Code. I think the provisions of the 2003 Agreement had the purpose of “restricting or limiting” the supply of WHs to TMC or its subsidiaries to the incumbent supplier. The fact that the party designated as the losing party would still submit a price does not take the facts outside the scope of s 4D (*Australian Competition and Consumer Commission v Admiral Mechanical Services Pty Ltd* [2007] ATPR 42-174; *Australian Competition and Consumer Commission v ABB Transmission and Distribution Ltd* (2001) ATPR 41-815). The 2003 Agreement fell within the terms of s 45(2)(a)(i) and the definition of a cartel provision in s 44ZZRD of the Act and the Competition Code.
5. The issue of whether the provisions of the arrangement or understanding had the purpose, or had or were likely to have the effect, of controlling or maintaining, or providing for the controlling or maintaining of prices for WHs supplied or to be supplied by Yazaki and SEI and their respective subsidiaries to TMC and its subsidiaries is more difficult. The respondents did not make detailed written submissions about this point and that needs to be borne in mind in terms of the discussion which follows.
6. The evidence of Mr Matthew Ward is relevant to the issue, and I will summarise it at this point. After the global allocation by TMC and the determination of the local RFQ by the relevant subsidiary of TMC there were, as a matter of course, further negotiations about prices between, in the case of Australia, AAPL and TMCA which took place over the months and years that followed. In his first affidavit, Mr Ward details those negotiations in the case of the 2006 Toyota Camry (paragraphs 41-117), and in the case of the 2011 Toyota Camry (paragraphs 151-218), and in each case he identifies the total price at particular stages of the negotiations (paragraphs 117 and 218). It is not necessary for me to set out all the details. The negotiations concerned, or were influenced by, among other things, exchange rates, VE/VA proposals and other costs downs, as they were referred to in the evidence. A similar process occurred between Yazaki and TMC. As I have already said, both before and after supply commenced, TMC and TMCA were continually pressing suppliers to achieve price reductions. Mr Ward identified the negotiations and discussions, including further negotiations as to prices, at various stages: SE level drawings (November 2004), authority to incur tooling costs (March 2005), Production level drawing prices (July 2005), 1A Production (first major build of the vehicles), 2A level (second trial build of the Toyota Camry model) supply of WHs by AAPL (June 2006). It is clear that the “price” for the WHs to be supplied by AAPL to TMCA varied at different stages of the process. I also refer to the evidence of Mr O’Donohue which is to similar effect and which is summarised below (at [330]-[332]).
7. Mr Ward admitted that, to a “fair degree”, Yazaki’s Toyota Business Unit (“TBU”) in Japan was kept informed of the discussions between AAPL and TMCA between, for example, 2003 and 2006, and that the TBU had input into various matters, particularly if they had or were likely to have an impact on the global design for the vehicle. For example, the TBU vetoed a proposal by AAPL to combine two floor WHs into one.
8. The issue is whether the 2003 Agreement did not fix, control or maintain or provide for the fixing, controlling or maintaining of *the price for goods* supplied or *to be supplied* because the prices submitted or to be submitted in the middle of 2003 were not (and were never going to be) the prices for the goods to be supplied.
9. The issue raised in this case is different from that which was before Lindgren J in *CC (NSW)* and Logan J in *ACCC v TF Woollam.* In *CC (NSW)* Lindgren J was required to determine whether an arrangement or understanding about an amount to be paid by the successful tenderer (referred to as an unsuccessful tenderer’s fee) and likely to find its way into the tender had the effect of “controlling” the price. Lindgren J held that it is not necessary to specify the price in order for an arrangement or understanding to fall within s 45A. His Honour also said that “controlling” a price meant restraining a freedom that would otherwise exist as to the price to be charged (at 413 [168]) and, with respect, perhaps more controversially, that any degree of control apart from that considered to be de minimus was sufficient at the contravention stage (at 415 [178]). His Honour said that the degree of control was relevant at the penalty stage. The “price” in issue before Lindgren J was the tender price for building services. The commercial context before Logan J in *ACCC v TF Woollam* was similar (i.e., tenders for building services) although the contravening conduct was different in that it involved the controlling of prices by means of the provision of cover prices between the parties to the arrangement or understanding. One argument put to Logan J was that there was a difference between tender prices and prices. His Honour rejected that argument noting that s 45A referred to services *to be supplied* (at 238 [90]).
10. In this case, “prices” were submitted in 2003 followed by negotiations between the winning party or its relevant subsidiary, and TMC or its relevant subsidiary, and then a different price paid on the commencement of supply some three years later. The ACCC accepted that the price upon which supply was allocated, that is to say the quoted prices, were not the prices at which supply was likely ultimately to occur, given the extensive negotiations that often took place during the design and engineering phase.
11. On the evidence, it would seem that the “price” went through a number of changes from the quoted price, in say 2003, to the last stage price in 2006, and that the last price was generally lower than the quoted price.
12. None of the following matters provide a direct answer to the issue: (1) the price does not need to be specified for the case to fall within s 45A; in this case, the price differentials were specified, (2) a tender price may fall within s 45A because it is a price at which services were to be supplied, (3) the “price” can be quite transitory and still fall within s 45A such as a case where there is a price which is followed shortly thereafter by variations which alter the price.
13. The ACCC submits that the agreed prices determined or influenced the allocation of supply and that meant that there was a controlling of prices. If that argument is that the removal of potential competitor leads to a controlling of price, then I do not accept the argument. It would mean that almost all market sharing arrangements would also involve a controlling of price. To say that a reason for market sharing is to prevent the erosion of price is not to say that a provision of an understanding has the purpose, effect or likely effect, of controlling a price.
14. The other way the ACCC put its submission was to say that the agreed prices “set the starting price or ceiling price, for the negotiations which ensued as to the final price”. I doubt whether on the facts in this case one could call the price a ceiling price. To my mind, the evidence does not extend to the point of being able to say that the final price would never exceed the quoted price. The quoted price might be characterised as the “starting price” or “first price”, but is that sufficient? With some hesitation, I have reached the conclusion that it is sufficient. Although there were many iterations to the price between the allocation of supply and the fixing of the final price, and many and varied circumstances that might lead to those changes, I think the starting price still operated as a restraint in terms of the final price. Yazaki and its subsidiaries, and SEI and its subsidiaries, and TMC and its subsidiaries would all have been aware of the process. To ask the question posed by the section, I think it can be said that a substantial purpose of Yazaki and SEI was to control the price at which WHs were to be supplied. In terms of the effect or likely effect of the arrangement or understanding, that issue is to be assessed at the date of the arrangement or understanding (*CC (NSW)* at 406 [132]). “Likely” means a real chance or possibility rather than “more likely than not” (*Seven Network Ltd and Another v News Ltd and Others* [2009] FCAFC 166; (2009) 182 FCR 160). I think that there was a sufficient relationship between starting or first price and the final price to reach the conclusion that the provisions of the arrangement or understanding were likely to control the price of the WHs. As the ACCC pointed out, the starting or first prices and the final prices were not significantly different.
15. In my opinion, the 2003 Agreement contravened s 45(2)(a)(ii) of the Act and the Competition Code, and was a cartel provision within s 44ZZRD.
16. I resume the narrative.
17. Between 30 June 2003 and 7 July 2003, those representatives of SEI and Yazaki respectively who were responsible for implementing the agreement made on 30 June 2003 met and discussed prices. There was a meeting on 2 July 2003 at which SEI was represented by Mr Urata, Mr Nakamura and Mr Kato, and Yazaki was represented by Mr Nagao and two other persons. The parties exchanged base prices for the various WHs, including the engine room main WH. A base price is the price determined on the basis of the design drawings and specifications provided by TMC usually based upon an existing model. In addition to a base price, TMC usually required a potential supplier to provide a “value engineering” or VE price.
18. A VE price is a price intended to reflect a future price which incorporates the supplier’s cost reduction proposals by part number. The cost reduction proposals are usually based upon anticipated technological developments or improvements. In one of the TMCA letters, it described “VE” as a change or modification in the engineering design of a component which reduced the cost of the manufacturing process without altering the component’s design intent. TMCA gave a simple example of a change from painting a lock on an internal door handle in a way which indicated whether the door was locked or not to applying a sticker. TMCA said that the component’s design intent had not been changed in that the lock identification mechanism worked as intended, but the cost of the manufacturing process had been reduced. A VE price could be within conditions or outside conditions.
19. At the meeting on 2 July 2003, the parties exchanged information about the cost of each component of a part because TMC required component pricing, and the prices advanced needed to be, as Mr Urata put it, supported by logical calculations. Mr Nakamura sent Mr Nagao a list of SEI’s prices, and Mr Nagao added Yazaki’s price and sent the document back to Mr Nakamura.
20. There were two further meetings between the same representatives of SEI and Yazaki respectively on 3 July 2003 and 4 July 2003 at which prices were discussed.
21. There was a final meeting on 6 July 2003. Mr Shigi does not recall whether he attended that meeting, but Mr Urata says that Mr Shigi was there representing SEI together with himself and Mr Nakamura. Mr Suzuki and Mr Nagao were at the meeting representing Yazaki. The meeting was at Yazaki’s office. Its purpose was to confirm the final prices that SEI and Yazaki would submit to TMC.
22. On 7 July 2003, SEI submitted prices to TMC in response to the RFQ dated 14 May 2003. Those prices reflected the agreement reached on 30 June 2003.
23. In its Amended Defence Yazaki “admits” that the meetings between representatives of Yazaki and representatives of SEI took place on 2, 4 and 6 July 2003 and that at those meetings the parties discussed and agreed the Drawing Prices to be submitted by Yazaki and SEI as part of the 2003 Supplier Selection Process and that the meetings *gave effect* to the 2003 Supplier Selection Agreement. It further admits that it submitted Drawing Prices to TMC which had been agreed with SEI in furtherance of the 2003 Supplier Selection Agreement. Plainly, the submission by Yazaki of the Drawing Prices to TMC *gave effect* to the prior arrangement or understanding.
24. The concept of “give effect to” includes to do an act or thing in pursuance of or in accordance with or enforce or purport to enforce (s 4(1)). I am satisfied that between 30 June 2003 and 7 July 2003 Yazaki gave effect to the provisions of the 2003 Agreement within s 45(2)(b)(i) and s 45(2)(b)(ii) of the Act and the Competition Code by discussing and agreeing the prices submitted to TMC, and on 7 July 2003 by submitting the prices to TMC.
25. Despite the arrangement or understanding between Yazaki and SEI, TMC in fact awarded the supply of the engine room main WH to SEI in all countries. With respect to the other WHs, TMC awarded supply in accordance with the agreement between SEI and Yazaki. When this became known, Mr Suzuki contacted Mr Shigi by telephone and accused SEI of double‑crossing Yazaki. Mr Shigi told Mr Suzuki that SEI had submitted prices in accordance with the agreement between the two companies.
26. The ACCC alleges that Yazaki gave effect to the 2003 Agreement by three further acts or omissions and that AAPL gave effect to the 2003 agreement by two acts or omissions.
27. It is convenient at this point to turn to events in or involving Australia. As to these events, there is the evidence of Mr Nagasawa which, as I have said, I substantially accept, the documentary evidence and the evidence of Mr Ward.
28. I start with the evidence of Mr Nagasawa which dealt with the actions of SEWS-A and his communications with Mr Okumura of AAPL.
29. On 14 February 2003, Mr Nagasawa and Mr Urata, and perhaps others, gave a presentation on behalf of SEI and SEWS-A to TMCA in relation to the design, quality improvement and global production ideas for the 2006 Toyota Camry. This presentation was given in anticipation of a competitive RFQ process to select global suppliers for the 2006 Toyota Camry which would include the supply of WHs to TMCA in Australia.
30. Mr Urata asked Mr Nagasawa in Australia to provide him with information to enable him to prepare SEI’s response to the 2006 Toyota Camry RFQ, including an analysis of the labour rate for the supply of WHs in Australia, including repackaging, the shipping costs associated with transporting the WHs to Australia for supply to TMCA, and advice as to the effect of import duties on SEI’s quote. Mr Nagasawa provided information to SEI in late June and early July 2003.
31. In early October 2003, SEWS-A received an RFQ from TMCA. Mr Nagasawa was unsure about the reasons for an RFQ from TMCA in view of the decision which been made by TMC in Japan. He spoke to Mr Okumura on the telephone and Mr Okumura said that AAPL had also received an RFQ and that he too was unsure of the reasons for this. Both men agreed to consult their respective superiors in Japan. Mr Nagasawa spoke to Mr Urata and Mr Nakamura in Japan. He then spoke to Mr Okumura and they “confirmed” between themselves that each company would respect the decision made in Japan by only quoting in Australia for the business they had won, quoting the same prices as had been quoted in the 2006 Toyota Camry RFQ, and proposing the same VE proposals with the same pricing effect that SEI and Yazaki submitted in Japan. It is not clear on Mr Nagasawa’s evidence when these conversations took place. However, it is clear that on 9 October 2003 Mr Male wrote to Mr Frost and advised him that he had received a formal direction that SEWS-A was asked to quote for the engine room main WH only and that the other drawings should be returned. Mr Nagasawa needed approval from SEI’s TBO in Japan before lodging a quote for the engine room main WH with TMCA. He prepared a report for SEI in Japan and he had discussions with Mr Shigi and Mr Urata.
32. I do not accept the respondents criticism of Mr Nagasawa’s evidence that he conveyed a false impression that SEWS-A only quoted for the engine room main WH because of an agreement with Mr Okumura, rather than because TMCA asked that SEWS-A do this.
33. SEWS-A submitted a quote for the engine room main WH of $141.15 before import duties. That was equivalent to a price of $155.26 after import duties had been added. This latter price was the price SEI quoted for the engine room main WH in its submission to TMC. The VE proposals in the SEWS-A quote were the same as they were in SEI’s submission to TMC.
34. At some point between November 2003 and November 2004, Mr Male advised Mr Frost that SEWS-A had been successful in winning a considerable volume of business. By letter dated 15 November 2004, TMCA advised SEWS-A that it had been selected as the supplier of the engine room main WH, the engine WH and the battery cable or wire engine no. 2.
35. In one of the TMCA letters, it states that it did not issue competitive requests for quotes or RFQs in respect of the 2006 Toyota Camry. TMCA issued a request to AAPL on or about 9 October 2003 to quote for body WHs and, on or about the same day, a request to SEWS-A to quote for the engine room main WH. TMCA received the respective responses to these requests on or about 28 October 2003.
36. The ACCC issued notices to AAPL under s 155 and in its responses which were put in evidence, AAPL provided information about its relationship with Yazaki. AAPL said that Yazaki’s TBU is responsible for bids for Toyota WH tenders for the Toyota Camry vehicle manufactured in Australia. Australian aspects of the global tender, such as providing local cost information to Yazaki, are managed by the sales and marketing department of AAPL. AAPL said that Yazaki’s TBU is responsible for setting global prices for the Toyota WH business for the Toyota Camry. AAPL said that once the global tender is awarded, its sales and marketing department is responsible for preparing quotations to TMCA “which are based on the global tender but may have price adjustments due to local design requirements, exchange rate adjustments, import price variations etc.,”. AAPL also said that the local RFQ issued by TMCA was an opportunity for it to confirm the unit prices which had been submitted as part of a global business quotation or submit a revised price if necessary due to local TMCA requirements. AAPL described the general process whereby it formulates its response to a request for tender from TMCA as follows. An initial quotation is prepared at a global level by Yazaki’s TBU with AAPL providing data to the TBU detailing its factory costs and overhead requirements. The negotiating party for the initial quote is Yazaki. TMC awards the business and then TMCA or TMAP (Toyota Motor Asia Pacific) issues a separate RFQ to formalise the process at a local level.
37. In addition to the evidence from TMCA (by way of letter) and AAPL’s response to the notice issued under s 155, the other documents put before the Court reveal the following.
38. On 28 July 2003, Mr Okumura sent the prices Yazaki had submitted to TMC in Japan to Mr Ward and another person at AAPL. On 1 October 2003, Mr Male sent an email to Mr Jim Frazer, who was employed by AAPL in its commercial division, seeking AAPL’s prices for WHs. On 9 October 2003, Mr Male sent an email to Mr Frazer stating that he had received a formal direction that AAPL was requested to quote for nine WHs, but excluding the engine room main WH. Eight of the nine WHs were WHs which had been allocated to Yazaki by TMC. The engine room main WH had been allocated to SEI by TMC. On 28 October 2003, AAPL submitted prices to TMCA in relation to the nine WHs by an email from Mr Frazer to Mr Provost. For reasons I will give, I find that the prices submitted by AAPL to TMCA were, in the case of seven of the nine WHs (i.e., excluding parts numbered 82161 and 82171), the same (subject to minor rounding differences) as the prices agreed by Yazaki and submitted by Yazaki to TMC. That conclusion is reached by adding the VE reductions to arrive at the implicit base price for the Yazaki submission. The prices were the same except for the inclusion of a figure for tooling in the AAPL submission. Yazaki supplied WHs for the 2006 Toyota Camry throughout the period from at least 2006 to October 2011.
39. I turn now to consider the evidence of Mr Ward with respect to the 2003 Agreement. Mr Ward was employed by AAPL and, between 2003 and 2008, he was employed in a position described by the company as Business Unit Manager for TMCA and Mitsubishi and, between 2008 and 2011, he was the Department Manager for Sales. He gave evidence which was relevant to the local RFQ issued by TMCA in 2003.
40. Mr Ward said that he had always regarded SEWS-A as AAPL’s biggest competitor for supply to TMCA. He had no knowledge of any collusive dealing between Yazaki and SEI, or between AAPL and SEWS-A until the ACCC issued a notice under s 155 in February 2010.
41. Mr Ward said that TMC issued the 2006 Toyota Camry RFQ to Yazaki on 14 May 2003. He said that Yazaki gave a presentation to TMC in respect of the 2006 Toyota Camry on 7 July 2003. The design drawings for the 2006 Toyota Camry were based on the 770 Toyota Avalon. Yazaki submitted its initial quotation for the WHs for the 2006 Toyota Camry on 7 July 2003. Mr Ward said that that was done by Yazaki without any consultation with AAPL. On 23 July 2003, Mr Okumura sent an email to Mr Ward and Mr Johnson setting out the “submit price” of Yazaki in July 2003 for various WHs. The total price of 11 WH parts was $465.7978 or $416 when VE reductions are taken into account. Mr Ward agreed in cross‑examination that Mr Okumura was the primary channel of communication to Yazaki’s TBU in Japan in relation to pricing matters for Toyota WHs.
42. Mr Ward said that AAPL needed a better understanding of how the global design of the 2006 Toyota Camry would affect TMCA and itself. The 2006 Toyota Camry was the first model of the Toyota Camry which was to be based on a global design which was to apply with modifications to each region in which Toyota manufactured vehicles. Mr Ward and Mr Steve Dormer who was the general manager, WH engineering at AAPL, travelled to Japan with TMCA representatives on 19 August 2003 for this purpose. While in Japan, Mr Ward and Mr Dormer were told that Yazaki was likely to lose the engine room main WH and the engine WH to SEI. They were also told this unofficially by a person at TMCA. Mr Ward was concerned about AAPL not securing the engine WH and, more importantly, the engine room main WH.
43. On 17 September 2003, AAPL received a note from Yazaki’s TBU which Mr Okumura had translated from Japanese to English advising Yazaki’s related affiliates that TMC had unofficially advised that as far as the global 2006 Toyota Camry was concerned, the supply of the engine room WH would be awarded to SEI, and the supply of the instrument panel/floor, door and roof WHs would be awarded to Yazaki.
44. On or about 30 September 2003, TMCA issued an RFQ to AAPL for the 2006 Toyota Camry. On or about 1 October 2003, representatives of AAPL met with representatives of TMCA, and the representatives of TMCA issued target prices for the following WHs: engine room main, wire instrumental panel no. 1 and no. 2, wire floor no. 1 and no. 2, wire front door RH, wire front door LH, wire rear door no. 1 and wire rear door no. 2, and roof. The target prices were less than the prices Yazaki submitted to TMC for the WHs to be provided in Australia.
45. On 9 October 2003, TMCA withdrew its request for AAPL to provide a quotation for the supply of the engine room main WH. Mr Male wrote to Mr Frazer advising him that he had received a “formal direction” that AAPL was requested to quote for various parts, not including the engine room main, and that the drawings for the engine room main should be returned.
46. On 28 October 2003, AAPL submitted its quotation to TMCA. Mr Ward said that the prices submitted by AAPL to TMCA were greater than those submitted by Yazaki to TMC on 7 July 2003. By way of example, Mr Ward referred to the fact that Yazaki submitted a price of $123.2409 for the wire instrument panel no. 1 WH, whereas AAPL submitted a price of $139.60. However, it became clear during Mr Ward’s cross-examination that the base prices in the case of both Yazaki and AAPL were the same, and the difference in the figures could be explained by the fact that AAPL was not prepared to submit to VE proposals to the same extent as Yazaki, and by a small allowance for tooling costs. As Mr Ward said, AAPL used the data provided by Yazaki, but “restacked it in a different way”. Mr Ward agreed in cross‑examination that AAPL would not submit prices to TMCA which were inconsistent with information provided by Yazaki’s TBU in Japan without seeking authority from the TBU.
47. I did not think Mr Ward had a particularly good recollection of events. For example, I found it surprising that he could not remember much about his state of mind as at 30 July 2003. I take into account that it was a long time ago, but I would have expected that the email itself, when put to him in cross-examination, would have given him a clue. Furthermore, I do not think his statement that the prices submitted by AAPL to TMCA were greater than those submitted by Yazaki to TMC on or about 7 July 2003 tells the full story. The fact is that AAPL used the Yazaki prices but was more cautious about VE proposals and added a small amount for tooling costs. I find that the prices submitted by AAPL to TMCA were essentially the prices agreed under the 2003 Agreement (“the 2006 Toyota Camry agreed prices”). The contrary was not seriously argued by the respondents.
48. The ACCC’s case is that between 17 September 2003 and 28 October 2003 Yazaki directed AAPL to submit the 2006 Toyota Camry agreed prices to TMCA and that that constituted a “giving effect to” of the 2003 Agreement. The respondents submit that there is no evidence of an express written or oral direction. They further submit that AAPL submitted the prices because of TMCA’s RFQ as later qualified by Mr Male’s email of 9 October 2003. They further submit that there was no competitive process in Australia and, as they said in the context of whether there was a market in Australia, the submission of prices at a local level was by way of formality only.
49. The reasons for the issuing of a local RFQ by TMCA are not clear. If, as appears to be the case, the supply decision for Australia was made by TMC in Japan, it is not clear why TMCA issued a local RFQ to the local subsidiaries of Yazaki and SEI. There is nothing in the evidence to suggest the reasons for the actions of TMC/TMCA. There can be no doubt that Yazaki expected AAPL to submit the 2006 Toyota Camry agreed prices to TMCA (albeit “restacked” in the way identified by Mr Ward), and that AAPL understood that it was to proceed in this way. I think at all times AAPL understood that the decision as to the allocation of supply was made as part of a process involving Yazaki and TMC in Japan.
50. A direction may be express or implied. It may be a general direction of a longstanding nature. The fact of a direction may be inferred from all the circumstances. The fact that a customer, in this case TMCA, wanted prices submitted to it does not mean that there was no direction from AAPL’s holding company. The situation is not an either/or one in this sense.
51. Although there is no direct evidence of an express direction, I am satisfied that, in this case, Yazaki gave a direction to AAPL to submit the 2006 Toyota Camry agreed prices to TMCA. AAPL was sent those prices and it effectively submitted them to TMCA. There was no question of AAPL submitting any other prices. It was not going to act independently in the matter and, in fact, both Yazaki and AAPL submit in another context that AAPL submitted the prices to TMCA by way of formality only. In my opinion, it is likely Yazaki TBU gave Mr Okumura a direction when he spoke to the TBU after his conversation with Mr Nagasawa (see [195] above). In my opinion, an inference that a direction by Yazaki was given to AAPL is irresistible.
52. I am satisfied that the third alleged act by Yazaki of giving effect to the 2003 Agreement is made out. That act occurred in Australia (*Bray v F Hoffman-La Roche Ltd and Others* [2002] FCA 243; (2002) 118 FCR 1 (“*Bray v Hoffman-La Roche*”) at 45-46 [145]-[147] per Merkel J).
53. The above analysis is relevant to the fourth alleged act by Yazaki of giving effect to the 2003 Agreement, that is, the submission of prices by its alleged agent, AAPL to TMCA. I think that AAPL was acting on behalf of and as an agent of Yazaki within s 84(2) of the Act and the Competition Code in submitting the prices to TMCA. The phrase “on behalf of” is not one which has a strict legal meaning (*R v Portus and Another; Ex parte Federated Clerks Union of Australia* (1949) 79 CLR 428 at 435 per Latham CJ). It covers a wide range of relationships (*Walplan Pty Ltd v Wallace* (1985) 8 FCR 27 at 37 per Lockhart J; *NMFM Property Pty Ltd and Others v Citibank Ltd* (2000) 107 FCR 270 at 550 [1243]-[1244] per Lindgren J). As the respondents themselves submit (albeit in another context), the resubmission of prices at the local level was “by way of formality only”. AAPL exercised no independent decision-making in deciding whether to submit the prices to TMCA. In those circumstances, it was an agent and the case relied on by the respondents of *Consolo Ltd and Others v Bennett* (2012) 207 FCR 127 (“*Consolo v Bennett*”) is distinguishable. The fourth alleged act by Yazaki of giving effect to the 2003 Agreement is made out.
54. The fifth alleged act by Yazaki in giving effect to the 2003 Agreement was, in fact, a group of acts and omissions comprising the following: it continued from mid-2003 to at least late 2009 to supply the 2006 Toyota Camry WHs in accordance with the award of supply made by TMC, it did not inform TMC of the 2003 Agreement, it did not inform any regulatory authority of the 2003 Agreement and it did not attempt to compete with SEI to acquire all or part of SEI’s market share of the 2006 Toyota Camry WHs. In response, the respondents plead that any operation of, or giving effect to, the 2003 Supplier Selection Agreement concluded when Yazaki and SEI submitted Drawing Prices to TMC on or about 7 July 2003. They “admit” that from in or about July 2006, AAPL supplied WHs to TMCA in respect of the 2006 Toyota Camry in accordance with the award of supply made by TMC, that from mid-2003 to at least late 2009, Yazaki did not inform any regulatory authority of the 2003 Supplier Selection Agreement, and that from mid-2003 to at least late 2009, Yazaki did not acquire all or part of SEI’s market share of the 2006 Toyota Camry WHs.
55. I divide these allegations into two classes. The first class is that of one positive act, being that of continuing to supply, and the second class is that of failures, being a failure to inform and a failure to compete.
56. The problem for the ACCC in relation to the continuing to supply allegation is that the only evidence of continued supply related to supply in Australia, and the supplier in Australia was AAPL, not Yazaki. I do not think Yazaki’s position as AAPL’s shareholder means that it was the supplier (*Consolo v Bennett* at 143 [91]).
57. As to the alleged failures, I do not think that the fact that the various matters were not provisions of the 2003 Agreement (as I have previously found) is fatal to the ACCC’s submission. I think a corporation or person could give effect to an arrangement or understanding by carrying out an act even though the carrying out of the act was not a specific term of the agreement or a provision of the arrangement or understanding. The real issue is whether *the failures to act* amounted to giving effect to the 2003 Agreement.
58. The definition of “give effect to” in s 4(1) is subject to any contrary intention, but there is no suggestion that there is a contrary intention in s 45. The definition itself is an inclusive one. On the face of it, the definition requires the performance of an act or thing, and it would not include an omission or failure to act such as failure to report the arrangement or understanding or a failure to compete in a way not contemplated by the arrangement or understanding.
59. In *Hughes v Western Australian Cricket Association (Inc) and Others* (1986) 19 FCR 10 at 47, Toohey J said that the words “give effect to” are not technical words and should be given their ordinary meaning. In *Tradestock Pty Ltd v TNT (Management) Pty Ltd and Others* (1978) 17 ALR 257, Smithers J addressed an argument that “in accordance with” required proof of the reason the actor acted as he or she did. His Honour rejected this submission. He said (at 269-270):

Since the Trade Practices Act 1974 has been operative it has been the will of Parliament that contracts arrangements or understandings such as that now alleged should not be made and if made should not be given effect to. And Parliament has said that in relation to a provision of a contract arrangement or understanding the words “give effect to” are to include “do an act or thing in pursuance of or in accordance with or enforce or purport to enforce” (s 4(1)). It is to be observed that an act done by way of implementation of a contract arrangement or understanding would necessarily be done “in pursuance thereof”. If the only acts struck at by the Act are those done by way of implementation of the contract arrangement or understanding then there is no work left to be done by the words “or in accordance with”. And there is good reason for thinking that those words are intended to cover the situation where what is done is or may be done for reasons other than to implement the understanding. In such circumstances proof of the real or dominant motive or reason actuating the actor is likely to be a matter of great difficulty and may in many cases be impossible. To adopt the view submitted by Mr Rogers would be to conclude that Parliament which has stated its disapproval of the relevant contract arrangement or understanding and the kind of action for which it provides was content to allow such action to proceed as though it were lawful in circumstances where the evidence was insufficient to prove the precise motive for or actuating reason of the conduct in question.

Franki J accepted this proposition in *Trade Practices Commission v TNT* at 68, although he suggested that a failure to report was probably not sufficient (at 69).

1. The ACCC also referred to the following passage from the work of Beaton-Wells C and Fisse B, *Australian Cartel Regulations Law, Policy and Practice in an International Context,* (Cambridge University Press, 2011) at 69:

The words ‘give effect to’ in the cartel prohibitions are not technical words and bear their ordinary meaning. Conduct that ‘gives effect to’ a provision includes:

* a single act or omission or a series of acts or omissions
* unilateral conduct or conduct in concert
* conduct by persons who are not parties to the contract, arrangement or understanding but who implement the provision.

...

In terms of physical elements, ‘give effect to’ is defined in the TPA in relation to a provision of a contract, arrangement or understanding as including ‘to do an act or thing in pursuance of or in accordance with or enforce or purport to enforce’. These various options for interpretation can be construed as follows:

* ‘in pursuance of’ the provision in the sense of implementation of the provision
* ‘in accordance with’ the provision in the sense of conduct that is in conformity with the provision and which may be actuated by an intention or motive other than to implement the provision
* ‘to enforce or purport to enforce’ the provision in the sense of conduct that seeks to achieve compliance with the provision.

Thus, giving effect to a price-fixing provision would appear to include:

* discussion of prices and upcoming tenders pursuant to a price-fixing provision in an initial cartel arrangement
* submission of inflated tenders (or deciding not to submit a tender) pursuant to price-fixing provision in an initial cartel arrangement
* entry into contractual arrangements pursuant to a price-fixing or exclusionary provision in an initial cartel arrangement.

Significantly also, giving effect to a price-fixing provision would seem to include the performance of and the receiving of a benefit from a supply contract to which the provision relates. Performance of the contract of supply and the receipt of payment for the items are ‘in accordance’ with the price fixing provision.

...

An omission may give effect to a price-fixing provision, as in the situation where there is a refusal to deal at a price level lower than that controlled by a price-fixing provision. However, it is far from clear that a failure to intervene to stop effect being given to a price-fixing provision amounts in itself to a giving effect to the provision.

1. Whilst I think a continuation of supply may constitute a giving effect to of a contravening arrangement or understanding, I do not think that a failure to report or a failure to compete does so. The authorities are sparse, but I think that that is the effect of such authority as there is.
2. The fifth alleged act (comprising of a group of acts and omissions) by Yazaki of giving effect to the 2003 Agreement has not been made out.
3. In making the arrangement or arriving at the understanding constituting the 2003 Agreement, Yazaki gave effect to the Overarching Cartel Agreement in contravention of s 45(2)(b)(i) and s 45(2)(b)(ii) of the Act and the Competition Code.
4. The ACCC alleges that AAPL gave effect to the 2003 Agreement by submitting the 2006 Toyota Camry agreed prices to TMCA on 28 October 2003. AAPL was not a party to the 2003 Agreement. Although a wholly owned subsidiary of Yazaki, AAPL was a third party in terms of the 2003 Agreement.
5. On the face of s 45(2), there is no reason why a third party cannot give effect to a prohibited arrangement or understanding so as to contravene the section. The respondents do not dispute that a third party can give effect to a prohibited arrangement or understanding, but they submit that knowledge of the arrangement or understanding is an essential element of a third party’s liability. They point to the following matters. First, the ACCC has assumed the obligation of proving knowledge by pleading it in its Amended Statement of Claim. I do not accept this proposition. If knowledge is not necessary as a matter of law, I do not think a party is required to prove it simply because it has pleaded it. Secondly, the respondents referred to the analogous contravention of aiding and abetting where proof of knowledge would be necessary (s 75B of the Act; *Yorke and Another v Lucas* (1985) 158 CLR 661 at 667). There is force in the submission. Thirdly, the respondents submit that it could not have been the intention of Parliament to make liable the courier driver or typist who unwittingly does an act which gives effect to a prohibited arrangement or understanding. There is force in this submission.
6. The ACCC submits that knowledge is not required and that it is sufficient if there is a connection between the party and the “third party”. There is a connection in this case, not only because AAPL is a wholly owned subsidiary of Yazaki, but also by reason of the matters I identify later in these reasons in relation to the extra-territorial application of the Act and the Competition Code.
7. I was not referred to any authorities on this point. The two considerations identified by the respondents, the vagueness of a test involving a connection, and the fact that pecuniary penalties attend a contravention of s 45(2), lead me to conclude that knowledge of the prohibited arrangement or understanding is an essential element.
8. The ACCC submits that if, contrary to its principal submission, knowledge is necessary, it is established by not only knowledge of all the essential elements, but also by a combination of knowledge of suspicious circumstances and a failure to inquire. I think the test is more accurately expressed in terms of the following being sufficient: wilful blindness, deliberately shutting one’s eyes to a relevant fact or deliberately abstaining from obtaining knowledge by making an inquiry for fear of learning the truth. Recklessness is not sufficient (*Giorgianni v The Queen* (1985) 156 CLR 473 at 487 per Gibbs CJ; at 495 per Mason J (as his Honour then was); at 508‑509 per Wilson, Deane and Dawson JJ).
9. The ACCC started by making a general submission that the practice of collusion between Yazaki and SEI was so widespread that it must have been known by many persons within Yazaki. I accept that the practice of collusion was widespread and must have been known to a number of persons within Yazaki. However, I think it is going too far to infer from that fact that one or more of AAPL’s four Japanese directors knew of the practice and then to infer from that that they knew of the 2003 Agreement and the 2008 Agreement.
10. The ACCC then sought to attribute knowledge to particular individuals employed by AAPL. It must be remembered that there is knowledge of different matters, including knowledge of a practice to discuss and coordinate prices in response to Price Down Requests, or of a practice not to compete during the production cycle of a particular model of motor vehicle, or of a practice to discuss and agree prices when a new model is to be produced, and knowledge of the 2003 Agreement and of the 2008 Agreement. Of course, a person might know of all of these things, but equally they may know of only one of them.
11. Mr Ukita could not have known of the 2003 Agreement and the 2008 Agreement such that his knowledge could be attributed to AAPL. He commenced his employment with AAPL on 5 October 1997 and finished on 19 September 2002.
12. The ACCC relies on the knowledge of Mr Okumura. The position Mr Okumura occupied in AAPL is not entirely clear on the evidence. It seems to have been as a translator and liaison officer between Yazaki’s TBU and AAPL’s Australian employees. Mr O’Donohue gave a description of his role (see [324] below). I think it is reasonable to infer from the evidence concerning the 2002 Toyota Camry Minor RFQ Agreement that Mr Okumura knew something of an arrangement or understanding between Yazaki and SEI about not competing during the production cycle of a current model and liaising when price down requests were issued, but the evidence falls short of establishing that he knew of the 2003 Agreement. I should add that Mr O’Donohue, Mr Woods and Mr Ward all gave unchallenged evidence that they were unaware of any anti-competitive conduct until the ACCC commenced its investigation. In the circumstances, I do not need to consider the issue of whether Mr Okumura’s knowledge could be attributed to the company. That issue is far from clear.
13. Mr Ito knew no more than Mr Okumura, and on the evidence probably less, and I have already found that Mr Okumura’s knowledge was not sufficient.
14. The ACCC submits that I can infer knowledge in AAPL from the fact that, for the most part, Yazaki submitted prices, including prices for the supply of WHs for Australia to TMC without consulting AAPL. I do not think that is sufficient basis to draw the inference of knowledge. It seems very likely that Yazaki kept a close eye on prices in all TMC manufacturing locations, the prices it did submit do not seem to have been far off the mark and, in any event, there was always the possibility of adjustments for local conditions.
15. Although AAPL submitted the 2006 Toyota Camry agreed prices to TMCA, it did not have knowledge of the 2003 Agreement and, therefore, did not give effect to the agreement in doing so.
16. For the same reason, AAPL did not give effect to the 2003 Agreement by continuing to supply WHs to TMCA, by failing to inform or by failing to compete. In the case of the failure to inform and failure to compete, the ACCC’s case fails for the additional reason that I do not think that these are matters which can constitute giving effect to an arrangement or understanding.

## 2008 Agreement

1. The ACCC’s case in relation to the 2008 Agreement follows a similar pattern to its case in relation to the 2003 Agreement.
2. The respondents’ pleaded response in relation to the 2008 Agreement is similar to its pleaded response in relation to the 2003 Agreement. Again, I put to one side for present purposes the issues of the extra-territorial application of the Act and the Competition Code and the issue of market in Australia. The reasons which follow assume those issues are decided in favour of the ACCC.
3. On 28 March 2008, TMC issued an RFQ for the global supply of WHs to be used in the manufacture of the 2011 Toyota Camry. The respondents allege that this was the commencement of the “Supplier Selection Process”. The RFQ referred to nine manufacturing locations, including Australia, and 15 WH parts.
4. Nine of the 15 WH parts had been the subject of the 2006 Toyota Camry RFQ. At the time of the RFQ, four of the WHs parts, including the engine room main, were being supplied by SEI, and six were being supplied by Yazaki.
5. The ACCC’s case is that representatives of Yazaki and representatives of SEI met and discussed and agreed upon an allocation between them and their respective subsidiaries of the supply of WHs for the 2011 Toyota Camry to TMC and its subsidiaries. The respondents admit that there were meetings to discuss and agree upon the intended allocation between Yazaki and SEI, and their respective subsidiaries of the supply of WHs for the 2011 Toyota Camry to TMC and its subsidiaries.
6. The ACCC alleges that after the 2008 Agreement, representatives of Yazaki and representatives of SEI met and discussed and agreed between them the 2011 Toyota Camry agreed prices. Again, the respondents “admit” that there were meetings in Japan and that at those meetings the parties agreed the Drawing Prices to be submitted by them as part of the 2008 Supplier Selection Process.
7. On 29 May 2008, each of Yazaki and SEI submitted agreed prices to TMC.
8. The ACCC alleges that in mid-2008, AAPL submitted the 2011 Toyota Camry agreed prices to TMCA. The respondents deny that allegation and they claim that in or about mid-2009, YIC Asia Pacific Corporation Limited (“YICAP”) (a Thai subsidiary of Yazaki) submitted Drawing Prices to Toyota Motor Asia Pacific in or about mid-2009 which included prices for the supply of WHs for the 2011 Toyota Camry to TMCA.
9. The ACCC alleges that Yazaki gave effect to the 2008 Agreement in various ways which mirror its allegations in relation to the 2003 Agreement. It is alleged that Yazaki gave effect to the 2008 Agreement:
10. by meeting with representatives of SEI and discussing and agreeing to the 2011 Toyota Camry agreed prices;
11. by submitting the 2011 Toyota Camry agreed prices to TMC;
12. by directing AAPL at some time between late May and mid-2008 to submit the 2011 Toyota Camry agreed prices to TMCA;
13. by submitting the 2011 Toyota Camry agreed prices to TMCA through its agent, AAPL, being conduct in Australia; and
14. between mid-2008 and at least late 2009 by failing to disclose the 2008 Agreement to TMC or any regulatory authority and not attempting to compete with SEI in a way which was inconsistent with the 2008 Agreement.
15. The ACCC alleges that AAPL gave effect to the 2008 Agreement in various ways which mirror its allegations in relation to the 2003 Agreement. It is alleged that AAPL gave effect to the 2008 Agreement:
16. by submitting the 2011 Toyota Camry agreed prices to TMCA in or about mid-2008; and
17. between mid-2008 and at least late 2009 by failing to disclose the 2008 Agreement to TMC or TMCA or any regulatory authority and not attempting to compete with SEWS-A in a way which was inconsistent with the 2008 Agreement.
18. In relation to the 2008 Agreement, the ACCC put forward evidence from Mr Nagano and Mr Shida with respect to events in Japan, and Mr Kazahaya, Mr Ianzano and Mr Borg with respect to events in Australia. As I have said, none of these witnesses were required for cross-examination.
19. Between June 2007 and January 2008, Mr Nagano was a manager in SEI’s 1st Sales Section of the 2nd Sales Department of the Sales Division (Western Japan), and between January 2008 and April 2010, he was General Manager of the Sales Planning and Marketing Division.
20. In early 2007, Mr Nagano considered that it was likely that TMC would issue an RFQ for the 2011 Toyota Camry in early 2008. During 2007, he had discussions with Mr Kazuhiro Aoki from TMC’s Design Department, and he learnt that TMC proposed to use a power distributor with semiconductor fuses in the 2011 Toyota Camry. SEI did not have a power distributor with semiconductor fuses and Mr Nagano knew that Yazaki would be supplying such a power distributor to TMC for the Toyota Prius. He was concerned because SEI wanted to retain supply of the engine room main WH for the 2011 Toyota Camry, and the power distributor was critical because it connected directly with the engine room main WH. That circumstance gave the supplier of the power distributor with semiconductor fuses a significant advantage in terms of winning supply of the engine room main WH. Mr Nagano formed the view that it was essential that SEI develop a power distributor with semiconductor fuses, and Mr Shida was assigned to address the issue. Mr Shida was Mr Nagano’s subordinate and one of his roles in special projects was to assist teams led by Mr Nagano. Mr Shida, design engineers from Sumitomo Wiring Systems Ltd, and a specialist engineer “borrowed” from SEI set about developing a power distributor with semiconductor fuses.
21. In the second half of 2007, Mr Nagano and Mr Shida met with Mr Toshio Sudo and Mr Nobuyoshi Niimi of Yazaki at Yazaki’s premises to discuss the price of Yazaki’s power distributor. The result of these discussions was that Mr Sudo provided Mr Nagano and Mr Shida with a price range that Yazaki had provided to TMC for the Toyota Prius power distributor. The provision of this information meant that SEI could provide a price to TMC for the power distributor for the 2011 Toyota Camry that would be relatively competitive with Yazaki’s price thus (according to Mr Nagano) “avoiding a situation where SEI would be at a competitive disadvantage in relation to the engine room main WH business on the 2011 Toyota Camry”.
22. On 5 March 2008, Mr Nagano spoke to Mr Ryoji Kawai of Yazaki on the telephone. They discussed the anticipated RFQ from TMC in relation to the 2011 Toyota Camry. Mr Nagano suggested to Mr Kawai that they meet. He asked Mr Kawai to consider an allocation of WHs for the 2011 Toyota Camry based on their existing shares for the 2006 Toyota Camry. At that stage, Mr Kawai was non-committal about that proposal. Mr Kawai said that the agreement that Yazaki would “win” the supply of the engine room main WH for the 2006 Toyota Camry meant that there was a feeling by some persons at Yazaki that the supply of the engine room main WH for the Camry was rightfully Yazaki’s even though TMC had awarded supply of that part for the 2006 Toyota Camry to SEI.
23. TMC issued an RFQ for the 2011 Toyota Camry dated 26 March 2008 (2011 Toyota Camry RFQ). On 28 March 2008, TMC provided the 2011 Toyota Camry RFQ to Mr Kazuyoshi Nakai, Mr Nagano and Mr Shida of SEI at a meeting at TMC’s headquarters in Japan.
24. In early April 2008, Mr Nagano met with Mr Sudo and Mr Kawaii of Yazaki to discuss whether SEI and Yazaki could reach agreement as to the allocation of the WHs for the 2011 Toyota Camry RFQ. Mr Nagano was particularly concerned that Yazaki agree to the allocation of the engine room main WH to SEI. He asked Mr Kawai whether Yazaki would agree that SEI and Yazaki should maintain their existing shares of the Camry business. Mr Kawai told Mr Nagano that there were people within Yazaki who considered that the engine room main WH was Yazaki’s and that he needed time to persuade them to agree to allow SEI to keep the engine room main WH for the Toyota Camry.
25. Between late April and early May 2008, Mr Nagano spoke to Mr Kawai on the telephone and they agreed that SEI would be allocated the supply of the engine room main WH and the engine WH, and that Yazaki would be allocated all other WHs for all countries in which the Toyota Camry was to be manufactured. That allocation was in accordance with the existing allocation of the Toyota Camry business.
26. I interrupt the narrative to describe the areas of dispute between the parties with respect to the facts stated to this point.
27. First, the ACCC alleges that in late April 2008, Yazaki and SEI made an arrangement or arrived at an understanding in respect of the supply of WHs for the 2011 Toyota Camry by each of them and their subsidiaries to TMC and its subsidiaries and it describes this as the 2008 Agreement. The respondents admit that Yazaki and SEI made an arrangement or arrived at an understanding, but submit that it was in respect of the Drawing Prices to be submitted by Yazaki and SEI as part of the 2008 Supplier Selection Process, and they describe the agreement as the 2008 Supplier Selection Agreement.
28. With appropriate alterations to reflect the fact that the 2008 Agreement relates to the 2011 Toyota Camry, the ACCC alleges that the 2008 Agreement contained five provisions to similar effect to the five provisions which it alleges were part of the 2003 Agreement, and the respondents admit, in terms of substantial effect, the first three provisions. They deny the fourth and fifth provisions (see [164] above). The ACCC makes the same allegations about the legal effect of these provisions. It also alleges that the 2008 Agreement gave effect to the Overarching Cartel Agreement.
29. I apply the same analysis and reach the same conclusions in relation to the 2008 Agreement as I have in relation to the 2003 Agreement (at [165]-[179]).
30. After the telephone conversation between Mr Nagano and Mr Kawai in late April or early May 2008, there were a number of meetings between SEI representatives and Yazaki representatives at which the prices to be submitted to TMC were coordinated. The aim of these meetings was to ensure that the prices of the party who was to lose were higher than the prices of the party who was to win (generally by about 2 – 3%), but not so much higher as to make the party who was to lose appear uncompetitive. The parties needed to analyse and simulate the implications of each adjustment on the component prices, assembly times and rate, and other pricing elements. Mr Nagano and either Mr Shida or Mr Nakai, or both, attended these meetings as representatives of SEI, and Mr Sudo and Mr Niimi attended as representatives of Yazaki. In addition to the meetings, there were a number of telephone conversations between Mr Shida and Mr Niimi about the prices to be submitted to TMC. A number of spreadsheets were created showing the prices of different parts in different locations and the prices in relation to components such as wiring, parts, manufacturing, administration, other and total costs.
31. On 29 May 2008, SEI submitted its quotation to TMC for 16 different WHs, including the engine room main WH and the engine WH. The quotation related to seven geographical areas: Japan, North America, China, Australia, Taiwan, Thailand and Vietnam. The quotation was consistent with the agreed allocation.
32. The respondents “admit” that in or about May 2008, representatives of Yazaki and representatives of SEI met in Japan and discussed and agreed the Drawing Prices to be submitted by Yazaki and SEI as part of the 2008 Supplier Selection Process and that in doing so it gave effect to the 2008 Supplier Selection Agreement. They also admit that the Drawing Prices Yazaki submitted to TMC on 29 May 2008 were those agreed with SEI and that that was done in furtherance of the 2008 Supplier Selection Agreement. As with the 2003 Agreement, I think it clear that the submission by Yazaki of the Drawing Prices to TMC *gave effect* to the prior arrangement or understanding.
33. Mr Nagano instructed Mr Nakai and Mr Shida of SEI to contact SEWS-A and provide it with the same prices to provide to TMCA as had been submitted by SEI to TMC for Australia. That was also the direction given by SEI to its subsidiaries and affiliates in other manufacturing locations with the exception of China.
34. Although SEI had submitted prices to TMC which had been agreed, TMC indicated that it was likely to award the door WH to SEI for Japan, Thailand, Taiwan and Vietnam. Yazaki raised a query with SEI as to what the latter had done. Although SEI had submitted a lower price for the door WH than Yazaki in relation to Japan, Thailand, Taiwan and Vietnam, it had acted in accordance with the agreement with Yazaki. The parties had (as it turned out wrongly) assumed that TMC would select one supplier globally for each WH based on which supplier bid the lowest for that part in the larger volume markets, such as the United States of America.
35. In August 2008, TMC advised SEI that it had been awarded the supply of the engine room main WH, engine WH and, for Japan, Thailand, Taiwan and Vietnam, the door WH in relation to the 2011 Toyota Camry. SEI provided its prices for Australia to SEWS-A so that those prices could be supplied by SEWS-A to TMCA.
36. I now turn to events in or involving Australia.
37. Mr Kazahaya was transferred from Japan to SEWS-A in Australia in 2008 to work as a senior manager responsible for the sales of WHs to TMCA. He remained in this position until September 2009. Mr Ianzano was employed by SEWS-A from October 2000 to July 2012. He was responsible for seeking and coordinating new business opportunities with SEWS-A’s chief customer, TMCA, and to engage in pricing negotiations with TMCA. Mr Borg commenced employment with TMCA in August or September 1988 and, since 13 February 2013, he held the position of Corporate Manager of Procurement.
38. On 29 January 2008, Mr Nagasawa and Mr Kazahaya of SEWS-A met Mr Kawatake and Mr Takotoshi Masuda of AAPL at a café in South Yarra, Melbourne. On 27 May 2008, Mr Kazahaya and Mr Kotaka (who had succeeded Mr Yokoyama as managing director of SEWS-A) met with Mr Ito, managing director of AAPL. On 18 August 2008, Mr Kazahaya of SEI was introduced to Mr Ito’s successor, Mr Takashi Ikeda. On 2 September 2009, Mr Kazahaya took Mr Morii (who had succeeded Mr Kotaka as managing director of SEWS-A) to AAPL’s offices to introduce him to Mr Ikeda.
39. Sometime in January or February 2008, Mr Kazahaya and Mr Kawatake had a brief discussion in relation to the 2011 Toyota Camry RFQ during which Mr Kazahaya said words to the effect that the issue was being decided in Japan and there was nothing for them to do. Mr Kawatake indicated that he thought that that was probably the case.
40. Between late May and early June 2008, Mr Kazahaya instructed Mr Ianzano to prepare a response from SEWS-A to TMCA in relation to the 2011 Toyota Camry RFQ. Mr Ianzano prepared a response between 29 May 2008 and 25 June 2008. Mr Nagano instructed SEWS‑A to submit Mr Ianzano’s response to TMCA even though TMCA had not issued a local RFQ. On 25 June 2008, SEWS-A provided the quote to Mr Male of TMCA. The prices submitted were the same as the prices SEI had submitted to TMC for the supply of WHs in Australia.
41. Mr Kazahaya said that TMCA made annual price down requests and that in April or May 2008 he had discussions with Mr Kawatake of AAPL during which information about prices was exchanged.
42. Mr Borg gave evidence that, found in TMCA’s procurement files, was a document recording a PowerPoint titled “Australian Arrow [2011 Toyota Camry] Pricing 25thJune 2008” (“PowerPoint presentation document”). The prices shown in that document were the same as the prices Yazaki had submitted to TMC in Japan with the exception of part number 82662. Another copy of this document was produced by AAPL in response to a s 155 notice issued by the ACCC. The ACCC’s case is that the 2011 Toyota Camry agreed prices were submitted to TMCA by AAPL in mid-2008, whereas the respondents contend that that did not take place, or at least it has not been proved.
43. In one of TMCA’s letters, TMCA said that in relation to the 2011 Toyota Camry, it was directed by TMC “to purchase specified wire harnesses relating to body from AAPL and specified wire harnesses relating to engine from SEWS-A and at prices advised by TMC”. TMCA said that it did not issue a separate RFQ for Australian supply.
44. I turn now to summarise the evidence of Mr Ward. His evidence is important to the issue of whether AAPL submitted the 2011 Toyota Camry agreed prices to TMCA in or about mid‑2008. His evidence is that that did not take place. I find that it did.
45. Mr Ward said that in 2007 he and other employees of AAPL were looking at securing all of the WH supply for the 2011 Toyota Camry. On 22 January 2008, he received an email from Mr Kawatake, who is described by the company as business partner in wire harnessing engineering division of AAPL, in which Mr Kawatake forwarded a request from Yazaki’s TBU in Japan to provide a cost target rate for the 2011 Toyota Camry model based on the current drawings for the 2006 Toyota Camry. The TBU asked AAPL to assume in its calculations that the target selling price was to be reduced by 15%.
46. On 4 March 2008, Mr Okumura, who by that time was back working for Yazaki in Japan, wrote to Mr Ward (among others) about Yazaki’s response to TMC’s proposed 2011 Toyota Camry RFQ, and seeking from AAPL pricing information in relation to the 2006 Toyota Camry. One attachment to the email contained price targets and the then current model prices for the 2006 Toyota Camry. The prices included a price for the engine room main WH. Mr Ward asked Mr Okumura whether the price for the engine room main WH was correct or an estimate and, on 7 March 2008, Mr Okumura advised that the price was “very close real price”.
47. On 28 March 2008, TMC issued an RFQ for the 2011 Toyota Camry in which it sought quotes from suppliers for the supply of WHs.
48. Yazaki proposed to submit certain prices to TMC. Mr Niimi of the TBU asked AAPL through Mr Ito to review urgently AAPL’s profitability status based on these proposed prices. The TBU planned to present the proposed prices to Mr Suzuki, who held the position of director/deputy general manager of the TBU, that day for approval.
49. AAPL was not involved in the formulation of the prices for Australia proposed by Yazaki. Yazaki had used historical monthly financial figures from Yazaki EDS Samoa (“YES”) to calculate the manufacturing cost of WHs for Australia. The role of YES is explained below (at [320]).
50. On 29 May 2008, Yazaki submitted its response to TMC’s 2011 Toyota Camry RFQ. Mr Ito advised AAPL’s staff of this fact and of the fact that TMC wanted Yazaki to submit the same to “local Toyota (today or tomorrow)”. Mr Ito asked whether AAPL was in a position “to present to TMCA?”. On 30 May 2008, Mr Ito asked AAPL team members if there were any unique factors in the historical monthly finance figures which Yazaki would not know and which could distort the true cost of YES producing WHs.
51. Mr Ward’s evidence was that TMC requested that each of the Yazaki affiliates submit the prices to their respective local Toyota affiliates. However, he said that TMCA’s sourcing responsibility was changed to TMAP‑EM (Thailand) and that, as a result, AAPL never submitted the prices to TMCA in respect of the 2011 Toyota Camry WHs.
52. AAPL prepared weekly reports for Yazaki and in the reports for the weeks dated 13 June 2008 and 20 June 2008 respectively, there is a statement that “[confidential pre-production code for the 2011 Toyota Camry] next generation price information has been provided to AAPL by the TBU. TMCA will issue formal RFQ’s to AAPL by 30 June”.
53. On 29 May 2008, Mr Niimi wrote to a number of persons, including Mr Kawatake and Mr Ito of AAPL, advising those persons that Yazaki had submitted its response to the 2008 Toyota Camry RFQ that day. He went on to say the following:

I have a request to everyone in the regions.

I checked with Mr Nomura about submitting quotations to Procurement

locally.

Basically, that {he} wants them submitted simultaneously. (Tomorrow or around early next week)

The quotation format was to be left up to the overseas businesses, so {we} submitted indicating cost on a part number basis for overseas regions to

TMC Purchasing.

1. Mr Ito then wrote to a number of employees of AAPL, including Messrs Ward, Kawatake, O’Donohue, Masuda and Dormer on 4 June 2008 and he said:

TBU has request to overseas affiliate.

TBU discussed with TMC Purchasing Mr. Nomura as to submission of the data to local Toyota.

TMC wants Yazaki to submit the same to local Toyota (today or tomorrow). TMC shall leave Yazaki a format of local submission.

TBU submitted to TMC for overseas requirements based on

Costs for each part numbers.

1. Mr Ward was in Japan in the first week of June 2008. It seems that he and Mr Kawatake attended a meeting with representatives of Yazaki’s TBU on 3 June 2008. Yazaki’s TBU representatives included Mr Sudo and Mr Okumura. Mr Ward’s notes of the meeting include the following:

Submitted to TMC global –

All regions

TMC requested each region to submit pricing.

1. On 4 June 2008, Mr Ward, whilst still in Japan, wrote to Mr Ito among others stating the following:

Regarding submission to TMCA when we return we will submit. Just Australian price and VE summary sheet.

1. On 20 June 2008, Mr Ward received an email from Mr Moore, who is described as sales and distribution manager at AAPL, stating that he had just received a letter from TMCA informing that the sourcing and pricing for the 2011 Toyota Camry would be coordinated by TMAP‑EM in Thailand, rather than in Australia.
2. There was an exchange of emails between Mr Ward and Mr Kawatake on 23 and 24 June 2008. On 23 June 2008, Mr Ward wrote to Mr Kawatake setting out the prices for 13 parts, all of which corresponded with the prices which were part of Yazaki’s submission to TMC. Mr Ward said:

Please check for safety. This is the final price submitted to TMC for Australian Camry Cost Control Set.

We are meeting with TMCA tomorrow for office relocation. We can submit at this time as well.

1. Mr Kawatake responded on the following day as follows:

This price sheet and also the VA/VE strategy (with chart) we should explain to TMCA.

Since this information deployment is a formal demand from TMC, so that even if TMCA says that such kind of information deployment has unnecessary, we have to carry it out certainly to TMC as soon as possible.

1. Mr Ward responded in the following terms:

As discussed, we have a meeting at TMCA at 2.30 pm tomorrow afternoon and we will submit pricing as per below.

Can you please supply the VA/VE data as I don’t have it.

1. It seems that it was proposed that there be a meeting between representatives of AAPL and representatives of TMCA on 24 June 2008 at 11 am for the purpose of discussing AAPL’s plans to relocate to new premises. That meeting was cancelled. Mr Ward’s evidence was that Mr Male of TMCA cancelled the meeting which was to take place on 24 June 2008.
2. There was another meeting between representatives of AAPL and representatives of TMCA planned for 25 June 2008. The purpose of that meeting appears to have been to introduce Mr Tom Varley and Mr O’Donohue of AAPL to the TMCA leadership team.
3. Mr Ward’s diary has a note for 25 June 2008 which reads as follows:

TMCA

[confidential planning code for the 2011 Toyota Camry in Australia]

Pricing

1. On 7 July 2008, Mr Ito wrote to a number of AAPL employees, including Mr Ward, stating that TMAP‑EM was not ready to function in the way TMCA expected, and that TMC Japan Purchasing would continue to handle sourcing and pricing for the 2011 Toyota Camry.
2. On 18 August 2008, Mr Ito wrote to AAPL and YES employees stating that he had received a business report from the TBU which contained details of TMC’s sourcing decision for the 2011 Toyota Camry. Yazaki had retained supply for all WH parts for the 2011 Toyota Camry in Australia, North America and China. Mr Ito said that “this does not mean the guarantee of business to AAPL/YES”, and that AAPL must work to ensure its competitiveness.
3. On 10 September 2008, Yazaki wrote to AAPL enclosing the factory cost and profit information of the prices submitted to TMC by Yazaki in May 2008 in respect of Australia.
4. As had happened between 2003 and 2006 in relation to the 2006 Toyota Camry after the allocation in relation to the 2011 Toyota Camry there were further discussions and negotiations about prices between both Yazaki and TMC, and AAPL and TMCA over the months and years that followed. They related to initial pre-K4 drawings. K4 drawings relate to a stage of model development which occurs between the RFQ stage and the release of SE drawings. These negotiations involved Yazaki and AAPL and Yazaki’s subsidiary in Thailand TAP, and then TMAP-EM. After K4 drawings were released, negotiations took place between Yazaki, AAPL and TMCA regarding prices, including VA/VE proposals. There were then negotiations concerning SE level prices, pre-CV level prices, submission of CV-level prices, submission of 1A level prices, submission of 2A level prices, and submission of final start of production prices.
5. The important factual issue which must be resolved is whether AAPL submitted the prices to TMCA in June 2008.
6. The respondents rely on the following matters in support of its case that AAPL did not submit the 2011 Toyota Camry agreed prices to TMCA. First, that was the evidence of Mr Ward. He said that the PowerPoint presentation document was a draft, and was never submitted to TMCA. He said that the document did not contain the level of detail usually provided to a major customer of AAPL, and that AAPL would not have submitted pricing information to TMCA in the absence of an RFQ from TMCA. He said that he could not explain how it was that TMCA had a copy of this document and that AAPL did not submit prices to TMCA in respect of WHs for the 2011 Toyota Camry. Prices were submitted by Yazaki to TMC, and by YICAP (a Thai subsidiary of Yazaki) to TMAP-EM. On one occasion, TAP (another subsidiary of Yazaki) submitted prices to TMAP-EM. At one point in his cross‑examination, Mr Ward said that he had “no recollection” of the PowerPoint presentation document or of submitting it. Secondly, there is no oral evidence to the effect that the 2011 Toyota Camry agreed prices were submitted to TMCA. Thirdly, it seems that there was some uncertainty at the time about whether the local sourcing decision would be made by TMCA or by TMAP‑EM. Fourthly, there is no evidence that TMCA issued a local RFQ for the 2011 Toyota Camry. Fifthly, there is documentary evidence before me that a meeting planned for 24 June 2008 was cancelled by Mr Male of TMCA. Finally, the PowerPoint presentation document does not contain any information other than the prices themselves, and it is devoid of any further detail.
7. On the other hand, there are powerful reasons for concluding that AAPL did submit the 2011 Toyota Camry agreed prices to TMCA. First, there is the evidence that TMC and Yazaki wanted Yazaki’s local subsidiaries or agents to submit the prices to TMC’s local subsidiaries or agents. That is clear from Mr Ito’s email dated 4 June 2008. Mr Ward knew that himself from his meeting with the TBU in Japan on 3 June 2008. Secondly, Mr Ward indicated in his email dated 4 June 2008 that AAPL would submit the prices to TMCA. He said that again on both 23 June 2008 and 24 June 2008. Thirdly, it is clear that a meeting between AAPL and TMCA was planned. Fourthly, there is Mr Ward’s diary entry for 25 June 2008 which refers to TMCA, the 2011 Toyota Camry and pricing. Fifthly, Mr Borg produced the PowerPoint presentation document from the records of TMCA and the most likely explanation for that is that it was provided to TMCA by AAPL. Finally, I accept that SEWS-A provided the 2011 Toyota Camry agreed prices to TMCA on or about this time. That was done by email from SEWS-A to TMCA dated 25 June 2008. This suggests that the absence of a local RFQ for the 2011 Toyota Camry is of no particular significance.
8. As I have said, I did not think that Mr Ward had a particularly good recollection of events. I think the meeting which was planned for 24 June 2008 was cancelled, but as Mr Ward’s email to Mr Kawatake on 24 June 2008 and his diary entry for 25 June 2008 suggest, it was rescheduled for 25 June 2008 and took place on that day. I find that AAPL provided the 2011 Toyota Camry agreed prices to TMCA at the meeting held on 25 June 2008.
9. I also find that at some time after late May 2008, but prior to mid-2008, Yazaki directed AAPL to submit the 2011 Toyota Camry agreed prices to TMCA. That is clear from Mr Niimi’s correspondence and that of Mr Ito. It is also clear from Mr Ward’s diary entry for 3 June 2008. It is not any less of a direction from Yazaki because the customer, TMC, wanted it to happen.
10. I summarise my findings in relation to the 2008 Agreement. For the same reasons I gave in relation to the 2003 Agreement, I find that there was an arrangement or understanding between Yazaki and SEI in 2008 containing the first four provisions identified by the ACCC, but not the fifth, and that Yazaki gave effect to the 2008 Agreement by meeting with SEI and discussing and agreeing the 2011 Toyota Camry agreed prices and by submitting the 2011 Toyota Camry agreed prices to TMC. Again, I think Yazaki gave effect to the 2008 Agreement through its agent, AAPL, when AAPL submitted the 2011 Toyota Camry agreed prices to TMCA. There is clear evidence that Yazaki directed AAPL to submit the 2011 Toyota Camry agreed prices to TMCA, and I find that Yazaki gave effect to the 2008 Agreement by this act. As far as the fifth alleged act of Yazaki of giving effect to the 2008 Agreement, there is no allegation of continuing to supply. The anti-competitive conduct was exposed before supply commenced. The alleged failure to inform and failure to compete fail for the same reasons they fail in relation to the 2003 Agreement (at [221]-[226]). In making the arrangement or arriving at the understanding constituting the 2008 Agreement, Yazaki gave effect to the Overarching Cartel Agreement in contravention of s 45(2)(b)(i) and s 45(2)(b)(ii) of the Act and the Competition Code.
11. As far as the two alleged acts by AAPL of giving effect to the 2008 Agreement are concerned, they fail for the same reasons they fail in relation to the 2003 Agreement.
12. In terms of AAPL’s knowledge or otherwise of the 2008 Agreement, the ACCC relied on similar matters as it did in relation to the 2003 Agreement plus two additional matters. First, by 2008, Mr Kawatake held a position at AAPL broadly similar to the position previously held by Mr Okumura. Mr O’Donohue gave a description of his role (see [324] below). I do not think Mr Kawatake had any greater knowledge of the arrangements and understandings between Yazaki and SEI than Mr Okumura and that is not sufficient to establish knowledge by AAPL of the 2008 Agreement. Secondly, the ACCC relied on some emails and a diary entry to argue that Mr Okumura or others at AAPL were aware of the 2008 Agreement. These are suggestive, but I do not think that they establish knowledge.

## The Extra-territorial Application of the Act and the Competition Code

1. The arrangements or understandings constituting the Overarching Cartel Agreement, the 2003 Agreement and the 2008 Agreement were made or arrived at in Japan. The acts of giving effect to the Overarching Cartel Agreement (i.e., the 2003 Agreement and the 2008 Agreement) occurred in Japan. The acts of giving effect to the 2003 Agreement and the 2008 Agreement by discussing and agreeing prices with SEI and submitting those prices to TMC occurred in Japan. The Act extends to that conduct if Yazaki was carrying on business in Australia. The Competition Code extends to that conduct if Yazaki was carrying on business in Australia or if Yazaki was otherwise connected with the jurisdiction of Victoria.

### A summary of the submissions

1. Before setting out the relevant facts, it is convenient to outline the arguments of the parties.
2. Yazaki is the parent company and AAPL is its wholly owned subsidiary. AAPL is a separate legal entity (*Industrial Equity Limited and Others v Blackburn and Others* (1977) 137 CLR 567 (“*Industrial Equity v Blackburn*”) at 577 per Mason J (as his Honour then was)). At the relevant times, AAPL appeared to be carrying on a business in Australia and prima facie, that business was AAPL’s business and not that of Yazaki. The respondents accept that there are cases where it might be found that a parent company was, in fact, carrying on the business of its subsidiary and they were cases where the wholly owned subsidiary was carrying on the business as the agent of the parent, or the circumstances were such that it was appropriate to pierce the corporate veil. The respondents’ argument is that AAPL was carrying on its own business in Australia and it was not Yazaki’s agent and there was no reason to pierce the corporate veil. The respondents relied on *Adams v Cape Industries plc* [1990] 1 Ch 433 (“*Adams v Cape Industries”*) and *Bray v F Hoffman-La Roche*. The latter case went on appeal, but the Full Court did not disagree with any of the propositions of Merkel J which are discussed below (*Bray v F Hoffman-La Roche Ltd and Others* (2003) 130 FCR 317). The respondents also referred to *Federal Commissioner of Taxation v Tasman Group Services Pty Ltd* [2009] FCAFC 148; (2009) 180 FCR 128 at 144 [56].
3. The ACCC argued for a broader interpretation of the “carrying on business” criterion and one that was not restricted, in the case of an overseas parent and a wholly owned Australian subsidiary, to concepts of agency or piercing the corporate veil. The interpretation included the familiar concepts in the law of agency such as the power to contract on behalf of another, or vicarious liability for torts of an agent, but it was not restricted to them. The ACCC did not concede that the facts in this case did not establish agency between Yazaki and AAPL, but rather it submits that it did not need to establish that relationship in order to make out the carrying on business criterion. The ACCC submits that, on the facts, both Yazaki and AAPL can be considered to have been carrying on business in Australia. It put its argument in two ways. The first was that Yazaki was carrying on AAPL’s business generally. It submits that whilst the mere indirect legal and commercial capacity of an overseas parent to control and direct its Australian subsidiary is not sufficient, in this case Yazaki directly and actively monitored and influenced AAPL’s operations across its automotive electronic components business in Australia. The second way the ACCC puts its case on this point is to confine it to that aspect of AAPL’s business involving Toyota WHs in Australia. The submission is that Yazaki’s relationship with AAPL in relation to Toyota WHs was closer (and different) from that relating to other goods supplied by AAPL and other purchasers it dealt with. The ACCC also submits that, insofar as Yazaki engaged in anti-competitive conduct in Australia, that in itself constituted carrying on business in Australia with the consequence the Act and the Competition Code applied to the anti-competitive conduct which took place outside Australia. In support of this proposition, the ACCC relied on *April International Marketing* at 523-524 [68]‑[72] per Bennett J.
4. With respect to the “otherwise connected” criterion, the ACCC submits that any connection between Yazaki and Victoria is sufficient, providing it is not too remote. A connection is made out in the circumstances of this case.
5. For their part, the respondents submit that a company is otherwise connected with the jurisdiction only if it carried on business within the jurisdiction or had a legal or physical presence in the jurisdiction and that Yazaki neither carried on business within the jurisdiction nor had a legal or physical presence in the jurisdiction. To support the test they advanced, the respondents relied on what they contended is the purpose of the CPRA and on the terms of s 8 of the CPRA.

### The facts

1. The nature of the evidence adduced in relation to these issues falls into two broad categories. First, there is evidence called by the respondents from three employees or former employees of AAPL which addresses the relationship between Yazaki and AAPL. This evidence, insofar as it relates to the general relationship between Yazaki and AAPL, is, for the most part, not challenged by the ACCC. Secondly, there are a large number of documentary exhibits in the Tender Book which are relied on by one or other of the parties.
2. A feature of both forms of evidence is its generality. In many respects, that was inevitable because the period in question, even leaving aside the Overarching Cartel Agreement, is a lengthy one (2003‑2009). For example, a helpful document in general terms is a document produced by AAPL in response to a s 155 notice issued by the ACCC. It deals with communications between Yazaki and AAPL. It shows, for example, weekly reports on AAPL operations relating directly to TMCA business and weekly reports for Yazaki and Yazaki affiliates relating directly to Toyota business. Whilst the general topics to be addressed are clear and to be anticipated, for example, the extent to which Yazaki controlled AAPL’s affairs or its board of directors, or provided financial assistance to AAPL, it was simply not possible for the parties to adduce evidence which dealt in detail with every interaction between Yazaki and AAPL. I also bear in mind that some of the documents related to matter and events after 2009.
3. Mr O’Donohue gave a good deal of evidence of the relationship between Yazaki and AAPL and most of it was not challenged by the ACCC. Mr O’Donohue has been an employee of AAPL since 1996. In 2002, he held a position described by the company as Chief Financial Officer and the General Manager – Finance and Information, and in that position he supervised the finance and information technology staff of AAPL. After March 2003, he was Group General Manager – Production and Engineering, and in that position he was responsible for electronics manufacturing, design and engineering, and WH operations. In April 2008, he was Senior Manager – Corporate Strategy and Quality, and in that position he was responsible for the electronics production, quality and corporate sustainability departments of AAPL. From May 2008 until July 2013, he was the Deputy Managing Director of AAPL, and in that position he had executive responsibility for the business, and he was involved in day-to-day support and longer term strategy issues. At the time he gave evidence, he was the managing director of AAPL.
4. AAPL’s business includes the supply of electrical distribution systems to the Australian automotive industry. Its business activities include the supply of WH components to Australia’s automotive industry. It supplies goods and services to a number of car manufacturers, including TMCA, General Motors Holden (“GMH”) and, until it closed its Australian operations in March 2008, Mitsubishi Australia. It also supplies some design services for Yazaki.
5. Mr O’Donohue described aspects of Yazaki’s business structure. He said that Yazaki has a number of business units which are responsible for its major customers. There is the TBU in Japan, and a GMH Business Unit in North America. Mr O’Donohue said that the relationship between AAPL and Yazaki differs depending on the customer AAPL is supplying and that, in the case of Toyota, the supply of WHs is awarded at a global level in Japan, and so (as he put it) the relationship between Yazaki and TMC is particularly relevant to the conduct of business between AAPL and TMCA.
6. YES is a wholly owned subsidiary of Yazaki and it operates a manufacturing plant in Samoa. YES’ manufacturing plant in Samoa manufactures the WHs which are sold by AAPL to TMCA. AAPL is responsible for providing various management and related services to YES and it receives a fee for these services.
7. Since 2002, AAPL’s board of directors has consisted of four or five members. Generally speaking, three or four directors are Japanese employees of Yazaki, and one or two directors are Australian based employees of AAPL. The non-Australian based directors are typically drawn from the senior executive team of Yazaki, and are based in Japan. Generally speaking, those directors not based in Australia did not attend board meetings. Mr O’Donohue gave examples of the types of matters considered by the board of directors. AAPL has a senior management team which met at least every month, but often more frequently. Mr O’Donohue gave examples of the types of matters considered by the senior management team.
8. Yazaki has a reporting and approval process referred to as the “Kian process” which applies to all of its overseas affiliates. Mr O’Donohue said that in his experience Yazaki ordinarily approved decisions submitted to it by AAPL. Generally speaking, more significant decisions must be approved by Yazaki, and less significant decisions must be the subject of a report to Yazaki.
9. Mr O’Donohue said that from 1996 until 2010 AAPL’s headquarters were located at 65 Lathams Road, Carrum Downs in Victoria. Its assets, including bank accounts, are held in its own name. AAPL’s major assets are its factory, plant and equipment, and it holds a number of patents. AAPL issues its own annual reports and employs its own employees. In 2006, it had approximately 556 employees, and in 2009 it had approximately 244 employees. The managing director of AAPL is appointed by Yazaki. From time to time, Japanese expatriates from Yazaki come to Australia and take up employment with AAPL, often for a period of three to five years.
10. Mr O’Donohue gave evidence about the position and role of various Japanese expatriates who have been employed by AAPL. He said that Mr Okumura was employed by AAPL as a program manager in the WH customer relations group at AAPL between 23 August 2002 and 15 September 2007. One of Mr Okumura’s roles was to liaise between Japanese speaking Yazaki employees and AAPL employees. Mr Okumura’s role included providing assistance to AAPL employees who were responsible for AAPL’s pricing or sales to customers, but Mr O’Donohue said that Mr Okumura’s role did not include any responsibility for AAPL’s pricing or sales to TMCA, Mitsubishi or any of AAPL’s other customers. Mr O’Donohue said that Mr Ukita was a program manager at AAPL between 5 October 1997 and 19 September 2002, and his role was similar to that of Mr Okumura. Mr O’Donohue said that Mr Kawatake was employed as a business partner in the WH engineering division at AAPL between 20 December 2004 and 14 March 2011. For the first couple of years, Mr Kawatake was involved in the implementation of a computer-assisted design system at AAPL. After the first couple of years, he became involved in providing engineering support at both AAPL and YES. Mr Kawatake reported to Mr Dormer, who was the general manager of WH engineering. From time to time, Mr Kawatake assisted as a translator for personnel at AAPL who were dealing with Yazaki. Mr O’Donohue said that Mr Ito was the managing director of AAPL from 2002 to 2008. Mr O’Donohue said that Mr Takashi Ikeda was the managing director of AAPL from 2008 to 2013. Mr O’Donohue said that Mr Takatoshi Masuda was employed by AAPL from 2002 to 2009 and initially he worked as an engineer in relation to particular parts. Over time, Mr Masuda’s role expanded beyond electronics and into other parts produced by AAPL. He occasionally acted as a translator.
11. Mr O’Donohue said that Yazaki has, from time to time, provided guarantees and indemnities to institutions which have lent money to AAPL. Yazaki has also provided letters of comfort to AAPL’s directors. In 2006, Yazaki provided substantial capital to AAPL when it was in financial difficulties. AAPL has not paid a dividend to Yazaki with respect to Yazaki’s increased shareholding as a result of that capital injection.
12. Mr O’Donohue said that AAPL does not submit any tenders on behalf of Yazaki or any of its affiliates. AAPL submits tenders and makes offers on its own behalf. It has no authority to enter into agreements on behalf of Yazaki.
13. AAPL and Yazaki provide services to each other for a fee. Those services are provided pursuant to various written agreements between the two companies and those agreements are exhibited to Mr O’Donohue’s affidavit.
14. From time to time, AAPL makes payments to Yazaki and its affiliates, and those payments include royalties in relation to products designed by Yazaki, and payments for the supply of components. AAPL also makes payments to affiliates for products it purchases. AAPL also makes payments to Yazaki on behalf of YES for machinery, components and wires purchased by YES from Yazaki and for royalties payable to Yazaki. YES does not have a foreign exchange facility, and Yazaki requires payments made to it to be in Japanese yen. From time to time, Yazaki has made payments to AAPL for design and engineering work.
15. AAPL’s largest customer between 2003 and 2010 was GMH, and its second largest customer during this period was TMCA.
16. Mr O’Donohue described the process which was adopted over a number of years involving the supply of WHs for the Toyota Camry by AAPL to TMCA. There were a number of stages in the process. The first stage was the sourcing decision which generally began about three years before the manufacturing of the new model was due to commence. An RFQ was issued by TMC on a global basis and in that RFQ TMC sought the supply of WHs in countries in which TMC or its affiliates had manufacturing operations. Those countries included Australia. Mr O’Donohue referred to the fact that there are different types of WHs and each WH has a distinctive part number. Previous models and drawings of previous models were used for the preparation of estimates. Mr O’Donohue said that the 770 Avalon model was used for the 2006 Toyota Camry RFQ, and the 2006 Toyota Camry was used for the 2011 Toyota Camry RFQ. On occasions, Yazaki sought information from its affiliates in the relevant manufacturing location about its costs in responding to an RFQ.
17. After receiving the responses to the RFQ, TMC made a decision about the supplier of each WH in each manufacturing location. It was possible for TMC to decide to award supply of different WHs to different suppliers, and to award supply to different suppliers in different manufacturing locations. The local affiliate in a relevant manufacturing location may be required to respond to an RFQ issued by TMC’s affiliate in that location.
18. The second stage commenced after the allocation of supply and involved the commencement of tooling. AAPL commenced tooling about two years before it commenced production of the WHs. The process of tooling involved a substantial financial commitment. During the period leading up to the production of the WHs, the submitted prices may change because of changes in design, variability in exchange rates and changes to input costs. The process of considering ways of reducing costs was an expectation of TMC and its affiliates from the outset, and as part of the allocation of supply decision. Toyota requested potential suppliers to present ideas to reduce the costs of producing the WHs. The savings might result from a change in the design of the WH, or a change in the components making up the WH, or changes in the supplier’s process. These cost saving ideas were known as value-added or value analysis (VA), or value-engineering (VE), and Toyota continued to seek these ideas over the life of the model. As I have already explained, Mr Ward’s evidence was to the same effect (at [170] above). In one of the TMCA letters, it said prices might change between the quote and the start of vehicle production, and it said that this might occur because of negotiations between TMCA and the supplier and design change to the parts. Prices might also change during production because of design changes or as a result of annual price requests.
19. Mr Woods commenced employment with AAPL as a financial controller in 1996. In 1997, he became the company secretary, and in 2000 he became the company’s chief financial officer. He was a director of AAPL from 31 March 2000 to 23 December 2009, and a member of the company’s senior management team during this period. He retired in December 2009. Mr Woods said that during his time as a director, AAPL had two Australian based directors (i.e., the managing director and himself), and two or three Japanese directors. Mr Woods said that he never met the Japan based directors, or had any dealings with them. Board decisions were made by the managing director or Mr Woods, or both of them. Mr Woods said that during his time with AAPL, Yazaki never directed him or, to his knowledge, anyone else at AAPL to conduct AAPL’s business in a particular way, to invest in particular areas, or to target particular customers. He said that, to his knowledge, AAPL always conducted itself independently of Yazaki, but kept Yazaki informed of AAPL’s business in its capacity as AAPL’s shareholder. In his experience, AAPL’s senior management team directed AAPL’s business priorities and was responsible for the major decisions made by the company. He never heard of any price fixing or market sharing occurring in either Australia or Japan.
20. In support of its contention that Yazaki was carrying on the whole of the business of AAPL in Australia, the ACCC advanced a number of matters which it submitted are established by the evidence and, in particular, the documentary evidence.
21. Yazaki established a liaison office in Australia in 1965 to supply Ford Australia and Chrysler Australia.
22. Yazaki was encouraged by the Ford Motor Company of Australia Ltd to establish an Australian manufacturing base in anticipation of increased local content requirements in 1973. AAPL was established. Manufacturing facilities were constructed.
23. AAPL was incorporated in Australia on 20 February 1996. However, it is an extension of Yazaki’s operations in Australia which began in the 1960s.
24. AAPL is Yazaki’s business centre in the Oceania region which includes Australia, New Zealand and Samoa.
25. AAPL is also responsible for the operation of other Yazaki entities, including YES which is 100% owned by Yazaki. YES operates a manufacturing plant which manufactures the WtrHs sold by AAPL to TMCA. The company employs 800 people and it receives and pays for management services, engineering support and IT services provided by AAPL. Between 31 March 2003 and 31 August 2012, AAPL made payments to Yazaki on behalf of YES of approximately AUD $200 million and 2.8 million Japanese yen for components, machinery and wires purchased by YES from Yazaki.
26. Yazaki has a number of logos registered as trade marks in Australia. In marketing its business, AAPL uses Yazaki’s corporate branding and logos in various ways. Since at least 1998, in its branding in Australia, AAPL has used Yazaki symbols, including the Yazaki arrow. In 2008, Yazaki took steps to include indications of its association with AAPL in the latter’s marketing and promotional material.
27. In May 2007, AAPL represented to TMCA that it equalled Yazaki (“AAPL=Yazaki”).
28. From time to time, Yazaki provided support to AAPL in connection with the latter’s customers. It is not necessary to set out the details.
29. Yazaki holds all of the shares in AAPL.
30. Under AAPL’s articles of association, Yazaki has the power to appoint additional directors at any time and to replace existing directors at any time. Furthermore, Yazaki can remove the Chairman or Deputy Chairman of the directors at any time. Yazaki determines the remuneration paid to directors of AAPL and is able to inspect its books and documents at any time.
31. Under AAPL’s articles, AAPL must have Yazaki’s consent before exercising a number of powers, including the allocation or disposal of shares, the registration of transfers of shares, the delegation by the directors of any of their powers to committees, the declaration and payment of dividends, and the capitalisation of profits.
32. For the period from 2002 to 2012, the majority of the directors of AAPL were Japanese expatriates from Yazaki or Japanese based directors from Yazaki. The Japanese directors on AAPL’s board are drawn from Yazaki’s senior executive team.
33. Yazaki has provided financial support to AAPL in the form of letters of comfort and letters of confirmation of financial support.
34. AAPL’s Financial Reports for the years ended 31 March 2001 to 31 March 2012 show that it made a loss in each of those years. There is a statement in each of the reports to the effect that AAPL’s ability to continue as a going concern depends on the support of its parent, Yazaki.
35. Yazaki has provided corporate guarantees and indemnities to secure contractual obligations on behalf of AAPL.
36. In 2006 or 2007, Yazaki provided AAPL with a capital injection of $50 million to ensure AAPL’s solvency.
37. Yazaki provides services to AAPL under written agreements between the companies. These agreements include a Master Services Agreement dated 1 April 2000 under which Yazaki provides AAPL with marketing, managerial administrative and technical services and subordinate agreements of the same date being a Service Agreement for Technical Services and a Service Agreement for Marketing, Managerial and Administrative Services.
38. There is an equivalent set of agreements dated 29 February 2006 under which AAPL provides marketing, managerial administrative and technical services to Yazaki.
39. There were substantial inter-company payments between Yazaki, AAPL and other Yazaki affiliates.
40. The ACCC served a s 155 Notice on AAPL and one of the matters addressed in that notice was the relationship between Yazaki and AAPL during the relevant period. AAPL said in its response that it was primarily responsible for its own day to day and strategic operations with a structured review process involving Yazaki as the global parent organisation.
41. Yazaki monitored AAPL’s operations to the extent of requiring it to provide weekly and monthly reports on its business operations and commercial activities, including sales forecasts and profits; requesting detailed information about the employee numbers and redundancies at AAPL; requesting information about AAPL’s product faults and claims; confirming AAPL’s balance sheets and profit and loss statements and setting AAPL’s capital expenditure.
42. AAPL must seek approval from Yazaki as part of the Kian process for “significant” decisions affecting AAPL’s business operations.
43. Yazaki has a World Wide Strategy (“WWS”) which it implements by reference to Operations Principles. The evidence suggests that a form of that system was in place from at least 2003.

The ACCC submits that the WWS creates a hierarchical approach that subordinates regional offices to the global enterprise and one aspect of the WWS is that it sets out a global pricing strategy for companies in the Yazaki Group to follow when dealing with customers.

I find that these propositions are established by the evidence.

1. The findings I make in relation to the ACCC’s more confined proposition that Yazaki was carrying on business in Australia in relation to the supply of WHs to TMCA are as follows.
2. Yazaki’s TBU in Japan was responsible for Yazaki’s relationship with TMC and for dealing with Yazaki’s subsidiaries in respect of their supply of WHs to TMC’s subsidiaries. Employees within the TBU visited AAPL from time to time. The TBU was responsible for the awarding of business, and AAPL was required to report back to the TBU about pricing and design issues which arose after the allocation of the business.
3. The TBU continued to have ongoing responsibility in relation to pricing decisions so far as the relationship with TMCA was concerned. Furthermore, the TBU continued to have regular input in relation to pricing matters even after the allocation of business. AAPL might “restack” the data provided by the TBU in making its submission to TMCA, but it would not depart from it because it knew that the TBU was coordinating a global business. There was a person who acted as a liaison person between the TBU and AAPL. For example, Mr Okumura acted in that position between 23 August 2002 and 15 September 2007.
4. The relationship between Yazaki and AAPL was different in the case of the business of TMCA from the business of GMH and Mitsubishi Australia. In the case of the business of TMCA, the marketing and supply of WHs to TMCA was initially managed by Yazaki through the TBU because the product was based on a global design and globally sourced through TMC in Japan. The TBU was responsible for bids for Toyota WH tenders for the Toyota Camry manufactured in Australia. The TBU was responsible for setting global prices for the Toyota WH business for the Toyota Camry. This was for all of its overseas companies, including AAPL. Yazaki reviewed and approved AAPL’s short and long term business plans. AAPL’s Sales and Marketing Department managed Australian aspects of the global tender such as providing local cost information to Yazaki.
5. After the award of the global tender, AAPL’s Sales and Marketing Department was responsible for the preparation of quotations to TMCA which were based on the global tender but may have price adjustments due to local design requirements, exchange rate adjustments, input price variations etc. AAPL’s Sales and Marketing Department was responsible for local design customisation and customer management with TMCA after the primary global business was awarded.
6. In the case of the business of GMH and Mitsubishi Australia, the position was as follows. The marketing and supply of WHs was primarily the responsibility of AAPL’s Sales and Marketing Department. In relation to GMH, this was the case because the Holden Commodore vehicle was a local vehicle platform. In relation to Mitsubishi Australia, this was the case until it closed its operations in Australia in March 2008. The preparation of bids for tenders was also the responsibility of AAPL’s Sales and Marketing Department. Finally, AAPL formulated the prices for WHs and electronic products and these prices were reviewed by Yazaki before AAPL submitted the bid or the quote to the customer.
7. In relation to the supply of WHs, TMCA issues an RFQ which is “the opportunity for AAPL to confirm the unit prices which have been submitted as part of a global business quotation or submit a revised price if necessary due to local TMCA requirements”. The separate RFQ issued by TMCA or TMAP (Toyota Motor Asia Pacific) is issued “to formalise the process at a local level”.
8. AAPL was also required to seek Yazaki’s approval to submit price down reductions to TMCA as part of the VE process.
9. AAPL’s senior executives had frequent and regular communications with Yazaki executives concerning the Toyota business and AAPL provided Yazaki with financial information about its activities on a regular basis.

### Was Yazaki carrying on business in Australia?

1. “Business” has been said to mean a commercial enterprise in the nature of a going concern, that is to say, activities engaged in for the purpose of profit on a continuous and repetitive basis (*Hope v The Council of the City of Bathurst* (1980) 144 CLR 1 at 8-9 per Mason J). There was no dispute in this case that there was a business being carried on in Victoria. The issue in dispute is whether that business was being carried on by AAPL or by Yazaki or by both companies.
2. It is trite to say that a wholly owned subsidiary is a separate legal entity from its parent capable of having its own assets, its own creditors and conducting its own business (*Walker v Wimborne and Others* (1976) 137 CLR 1 at 6-7 per Mason J; *Industrial Equity v Blackburn* at 577 per Mason J).
3. In *Adams v Cape Industries*, an issue arose as to the presence of an overseas trading corporation in a jurisdiction other than that in which it was incorporated and, in turn, as to whether a local representative of the corporation was carrying on the corporation’s business or his own business. As to that latter question, the English Court of Appeal identified the following matters as relevant (at 530-531):

(a) whether or not the fixed place of business from which the representative operates was originally acquired for the purpose of enabling him to act on behalf of the overseas corporation; (b) whether the overseas corporation has directly reimbursed him for (i) the cost of his accommodation at the fixed place of business; (ii) the cost of his staff; (c) what other contributions, if any, the overseas corporation makes to the financing of the business carried on by the representative; (d) whether the representative is remunerated by reference to transactions, e.g. by commission, or by fixed regular payments or in some other way; (e) what degree of control the overseas corporation exercises over the running of the business conducted by the representative; (f) whether the representative reserves (i) part of his accommodation, (ii) part of his staff for conducting business related to the overseas corporation; (g) whether the representative displays the overseas corporation's name at his premises or on his stationery, and if so, whether he does so in such a way as to indicate that he is a representative of the overseas corporation; (h) what business, if any, the representative transacts as principal exclusively on his own behalf; (i) whether the representative makes contracts with customers or other third parties in the name of the overseas corporation, or otherwise in such manner as to bind it; (j) if so, whether the representative requires specific authority in advance before binding the overseas corporation to contractual obligations.

1. The Court said that the list it gave was not exhaustive and that the answer to none of them was necessarily decisive. The Court said that the absence of an ability to contract on behalf of the overseas company was not fatal to a conclusion that the overseas company had a presence in the jurisdiction, although the presence or absence of that matter was a powerful factor.
2. The Court also considered the possibility of piercing the corporate veil in the case of a group of companies where there are special circumstances indicating that the separate incorporation of an entity was a mere façade concealing the true facts (at 539-544).
3. In *ACN 007 528 207 Pty Ltd (in liq) v Bird Cameron (Reg) and Others* [2005] SASC 204; (2005) 91 SASR 570, I considered whether a company was carrying on business as chartered accountants (excluding statutory audit and insolvency work) as agent for a firm or partnership of chartered accountants. The issue arose in the context of various claims for, among other things, breach of contract, negligence and breach of fiduciary duty. I referred to the well‑known case of *Smith, Stone & Knight Ltd v Lord Mayor, Alderman and Citizens of City of Birmingham* [1939] 4 All ER 116 (“*Smith, Stone & Knight v City of Birmingham*”) where the question was whether a subsidiary company was carrying on its parent company’s business or its own business, and Atkinson J identified the following six questions as relevant to that issue:

1. Were the profits of the business treated as the profits of the parent company?

2. Were the persons conducting the business appointed by the company?

3. Was the parent company the head and brain of the trading venture?

4. Did the parent company govern the adventure, decide what should be done and what capital should be embarked on the venture?

5. Did the parent company make the profits by its skill and direction?

6. Was the parent company in effectual and constant control?

1. I said that the answer to the first question was an important indicator of whether or not there was an agency relationship. I also cautioned about placing too much emphasis on control as an indicator of whether or not there was an agency relationship. In the result, I found that the company was not the agent of the firm or partnership.
2. *Bray v Hoffman-La Roche* addressed the very issue involved in this case, that is to say, whether foreign corporations were carrying on business in Australia under the Trade Practices Act at the time of alleged contraventions of s 45(2) of the Act. The issue arose in an application under O 9 r 7 of the *Federal Court Rules 1979* (Cth) to set aside service of the originating process upon them or, in the alternative, to discharge the order giving leave to serve that process.
3. The case involved a class action against companies in the Hoffman-La Roche, Aventis and BASF groups of companies which were alleged to have entered into and carried into effect an international price fixing and market sharing arrangement in respect of vitamin products manufactured and sold by them and their subsidiaries. A number of the respondent companies were foreign corporations and leave to serve them outside Australia was required. That leave was granted ex parte.
4. Merkel J considered the application of the Trade Practices Act to conduct outside of Australia. That issue turned on whether the foreign respondents were carrying on business in Australia at the time of the alleged contraventions. Merkel J said that that was the relevant time and not the time of the service of the proceeding.
5. Merkel J said that Parliament could have included a provision which gave the Act extra‑territorial operation where the conduct had consequences in Australia (*Meyer Heine Proprietary Limited v The China Navigation Company Limited and Another* (1966) 115 CLR 10). However, it did not do so and the expression of carrying on business should be given its ordinary or usual meaning (18 [60]). His Honour said that whether a corporation was carrying on business in Australia was a question of fact and he referred to authorities which have considered the meaning of the word, “business”. His Honour said that it was not necessary that a foreign corporation have a place of business in Australia before it could be said that it was carrying on business in Australia (at 19 [63]). His Honour noted that the Australian subsidiaries of the foreign respondents carried on business in Australia and the question was whether they did so on their account or on account of their parent companies.
6. His Honour referred to *Smith, Stone & Knight v City of Birmingham* and *Adams v Cape Industries* and then addressed a submission put to him that, in effect, the companies, including the parent and the subsidiary, were a group of companies operating at a global level and that the subsidiary should be seen as an integrated part of a global enterprise and, therefore, as the agent of the parent. Merkel J rejected this submission on the basis that it was not consistent with established authority (21 [72]).
7. His Honour decided that the Australian subsidiaries were conducting their own businesses and not their parent’s business. He relied on the following matters:
8. the Australian subsidiaries held their own assets (including bank accounts) in their own names and employed employees and purchased and sold products in their own names;
9. their businesses were not confined to the class vitamins (i.e., the vitamins the subject of the proceeding) or to products supplied by other companies in their respective groups;
10. the accounts of each of the subsidiaries were included in the Consolidated group accounts, but that was commonplace with subsidiaries and accorded with established accounting and regulatory requirements;
11. there may have been some overlapping board appointments in respect of the subsidiaries and the regional or parent companies in the respective groups but, for the most part, the subsidiaries had different boards to the European or regional parent;
12. the evidence did not suggest that the Australian subsidiaries were not maintained as distinct or separate entities or that the parents had disregarded corporate boundaries;
13. the European and regional parents did not appear to hold assets in Australia, save for intellectual property rights and shares in the Australian subsidiaries. They had no premises, offices or employees in Australia and, in general, did not purport to engage in business activities in Australia;
14. in terms of foreign direction and control, his Honour said that something more was required than indirect legal and commercial capacity of the parent companies to control and direct the subsidiaries, plus the parent’s involvement in implementing the cartel arrangement, before the corporate veil between the subsidiaries and their parents is lifted on a finding made that each of the subsidiaries is carrying on its business as agent for the parent;
15. his Honour was not satisfied at that stage that the foreign respondents were carrying on business in Australia. That conclusion might need to be revisited if the applicant was able to establish that some of the foreign respondents engaged in sufficient business activity in Australia in their own right (for example, by supplying group products to an Australian subsidiary) or that the parent’s involvement in the implementation of the cartel arrangement in Australia was sufficient to constitute carrying on business in Australia (at 22-23 [77]-[81]).
16. In *April International Marketing* Bennet J considered an application to set aside service of a proceeding on an overseas corporation to discharge the order giving leave to serve. Her Honour appears to have taken the view that implementation of a cartel arrangement was sufficient to constitute carrying on business in Australia. Her Honour said (at 523 [72]):

The Commission has established a prima facie case that APP Singapore carried on business in Australia through its branch office, APP Australia, which acted under its direct control. The involvement of the APP overseas respondents in implementing the AAA Club arrangements in Australia is also sufficient to constitute their carrying on business in Australia. Finally, there is prima facie evidence that Indah Kiat carried on business in Australia by supplying paper to customers in Australia through its agent, APP Australia.

1. The test of when a corporation incorporated overseas and with a subsidiary operating in Victoria/Australia is carrying on a business in Victoria/Australia involves a consideration of a number of factors and the evaluation of the significance of the various factors before reaching a conclusion. Although the English Court of Appeal in *Adams v Cape Industries* and Merkel J in *Bray v Hoffman-La Roche* refer to agency or lifting the corporate veil, I do not think they are using those terms in a narrow sense. By that I mean I do not think the notion is confined to the ability to enter into contracts on another’s behalf. That is, according to the English Court of Appeal, a powerful factor but it is not a decisive factor. A number of matters are to be considered.
2. I think that the relevant matters are those identified by Merkel J in *Bray v Hoffman-La Roche* rather than those identified by the English Court of Appeal in *Adams v Cape Industries*, some of which are not particularly relevant to the issue before me*.* Nevertheless, there are some common matters.
3. Yazaki did provide substantial capital to AAPL and from time to time it has provided guarantees, indemnities and letters of comfort in respect of AAPL. As far as control is concerned, and leaving aside AAPL’s supply of WHs to TMCA, Yazaki appears not to have exercised any significant control over AAPL’s business with its other major customers, such as GMH and Mitsubishi Australia. There does not appear to have been any substantial control exercised in practice through the board of directors. AAPL had no general authority to enter into contracts on behalf of Yazaki and, in fact, I do not think there was any evidence of a specific authority conferred by Yazaki on AAPL. The additional matters identified by Merkel J in *Bray v Hoffman La-Roche*, favour the respondents. AAPL held its own assets (including bank accounts) in its own name and employed employees and purchased and sold products in its own name. AAPL produced its own financial accounts. There was some use by AAPL of Yazaki branding. AAPL conducted a substantial business in terms of turnover and employees, and I do not think it can be said that it was not maintained as a distinct and separate entity. Yazaki itself had no premises, offices or employees in Australia and it did not purport to engage in business activities in Australia.
4. I am not aware of any norm in terms of the relationship between an overseas holding company and its local subsidiary. I am prepared to accept that Yazaki exercised a fairly high level of control over AAPL. The matters which the ACCC identified and which I think are of particular significance are as follows:
5. the extensive power Yazaki had under AAPL’s articles;
6. the fact that AAPL was making losses and was only surviving because of Yazaki’s support;
7. the fact that there were agreements under which Yazaki determined the rate of consideration; and
8. the frequency with which AAPL reported to, and communicated with, Yazaki as illustrated by the document referred to above (at [316]).
9. Despite these matters, I think the matters earlier identified (at [360]) mean that it cannot be said that AAPL was acting as Yazaki’s agent or that both Yazaki and AAPL were conducting the whole of the business apparently conducted by AAPL.
10. The ACCC’s alternative argument that both Yazaki and AAPL were conducting the business in Victoria/Australia of supplying WHs to TMCA is much stronger. That is because of the degree of direction and control exercised by Yazaki over the supply of WHs to TMCA. I refer to the findings set out above (at [336]-[343]). If one looks at the process of supply as a continuum from bidding for the supply contracts to the actual supply some years later, Yazaki had a substantial involvement in the process. The first crucial step involved Yazaki to the exclusion of AAPL. Yazaki made the bids for supply of WHs in Australia and by reason of its anti-competitive conduct, the decision as to which bids would be genuine. AAPL supplied certain parts to TMCA. Insofar as the supplier had control over what those parts were to be, the “supplier” was Yazaki not AAPL. Insofar as there were local bids, they were, as the respondents submit albeit in a different context, “by way of formality only”. As to the post allocation of supply stage, although there was a good deal of contact between AAPL and TMCA after the awarding of supply, it is apparent that Yazaki maintained a level of control over and involvement in the process. That can be seen from Mr Ward’s evidence-in-chief where he refers to the need for approval from Yazaki for the idea to combine the floor WHs, the prices put forward in June 2004, the “Obeya” meetings, the Australian prices to be submitted by Yazaki in July 2005, reviewing position with Yazaki in May 2006, and the contact which Mr Nagasawa had with the TBU, including draft requests for approval in relation to the 2002 Toyota Camry Minor RFQ.
11. I think that Yazaki’s involvement in the supply of WHs to TMCA was such that, in relation to that business, Yazaki and AAPL were carrying on business in Australia.

### Was Yazaki otherwise connected with the jurisdiction of Victoria?

1. The particular connections referred to in s 8(1) of the CPRA are persons carrying on business within the jurisdiction ((1)(a)), bodies corporate incorporated or registered under the law of the jurisdiction ((1)(b)), persons ordinarily resident in the jurisdiction ((1)(c)), and persons otherwise connected with the jurisdiction ((1)(d)). Section 8(2) provides that in the case of those persons or bodies corporate referred to in s 8(1), the Competition Code extends to conduct, and other matters and things, occurring or existing outside or partly outside the jurisdiction (whether within or outside Australia).
2. There is a difference between the structure and wording of s 5(1) of the Act, and the structure and wording of s 8(1) and (2) of the Competition Code. Section 5(1) of the Act states expressly that it extends to the engaging in conduct outside Australia by the nominated entities, including (and relevant to this case) bodies corporate carrying on business within Australia. By contrast, s 8(1) identifies the entities to which the Competition Code applies and then s 8(2) identifies the extension of the Competition Code to conduct outside the jurisdiction. However, I do not think this difference in structure and wording leads to any difference in result. The plain intent of s 8(1) and (2) is to extend the application of the Competition Code to conduct outside the jurisdiction of Victoria by those persons and entities falling within one of the categories in s 8(1). My conclusion that Yazaki was carrying on business in Australia, including Victoria, in relation to the supply of WHs to TMCA, means that the Competition Code also applies to Yazaki and its conduct outside of Australia.
3. In case I am wrong in my conclusion that Yazaki was carrying on business in Australia, including Victoria, in relation to the supply of WHs to TMCA, the ACCC advanced an alternative argument that Yazaki was a body corporate otherwise connected with the jurisdiction of Victoria. The ACCC said that the concept of otherwise connected was one of broad import and included any connection provided it was not too remote. The outer limits were provided by the boundaries of constitutional competence and those boundaries have been the subject of a number of High Court authorities, including *Pearce v Florenca* (1976) 135 CLR 507 and *Mobil Oil Australia Pty Limited v The State of Victoria and Another* [2002] HCA 27; (2002) 211 CLR 1. In the latter case, Gaudron, Gummow and Hayne JJ said (at 34 [48]):

It is clear that legislation of a State parliament “should be held valid if there is any real connection – even a remote or general connection – between the subject matter of the legislation and the State”. This proposition has now twice been adopted in unanimous judgments of the Court and should be regarded as settled. That is not to say, however, that there may not remain some questions first, about what is meant in a particular case by “real connection” and, secondly, about the resolution of conflict if two States make inconsistent laws.

(See also *Union Steamship Co of Australia Pty Ltd v King* (1988) 166 CLR 1 at 14; *Lipohar v The Queen* (1999) 200 CLR 485 at 534-535 [123] per Gaudron, Gummow and Hayne JJ.)

1. The ACCC submits that the matters it identified in support of its argument that Yazaki carried on business within Australia, either in the broad sense or in the more constrained sense, support a conclusion of a real connection between Yazaki and the jurisdiction of Victoria such that Yazaki falls within s 8(1)(d) of the Competition Code.
2. The respondents submit that s 8(1)(d) should not be construed in the expansive way advanced by the ACCC. First, it submits that the question of constitutional competence and the question of the proper construction of s 8(1) should not be conflated. In other words, it should not be assumed that the Parliament of Victoria has legislated to the limits of its constitutional competence. The section first needed to be interpreted in the usual way (*Chubb Insurance Company of Australia Ltd and Others v Moore and Others* [2013] NSWCA 212; (2013) 302 ALR 101 at 132-133 [147] per Emmett JA and Ball J). That proposition is correct. The second and third submissions overlap and concern the proper construction of s 8(1) and (2). They are that, having regard to the extrinsic material, it was not an object of the Competition Code to go any further than the extra-territorial application of the Act. As I understand it, the effect of this submission in a case such as the present is that the Competition Code extends no further than a company carrying on business within Australia. In addition, or alternatively, (and this was the respondents’ third submission) s 8(1)(a), (b) and (c) identifies a genus and that is a person, including a body corporate that has a legal or physical presence in Australia, and s 8(1)(d) should be construed to cover that class of case and no more. The submission was that Yazaki had neither a legal nor a physical presence in Australia and, therefore, was not otherwise connected with Australia, including Victoria.
3. The Explanatory Memorandum for the CPRA stated that the reform of competition policy was recommended in the Hilmer Report being a report delivered to the Heads of Government in Australia on or about 25 August 1993 and endorsed by Australian Governments. It stated that the object of the CPR Bill was to enact legislation that would give effect to that reform. The Explanatory Memorandum explained how the scheme was to operate throughout Australia and it contained a statement that the principal purpose of the scheme was to apply Part IV of the Trade Practices Act to those persons and things that did not or may not fall within the constitutional competence of the Commonwealth, in particular individuals and partnerships. It did that by applying Part IV to all persons, including corporations as well as individuals and partnerships. The Explanatory Memorandum stated that clause 8 made it clear that the Competition Code is not to be construed as merely applying in the territorial area of the State and that the extra-territorial competence of the legislature of the State is being used.
4. The Second Reading Speech for the CPRA Bill refers to the agreement of Heads of Government to implement the proposals in the Hilmer Report for a national competition policy. The Speech refers to the policy that all jurisdictions will co-operate to ensure that universal and uniformly applied rules of market conduct apply to all market participants regardless of their form of ownership. The Speech contains the following statement:

This bill deals principally with the application of the Competition Code to persons within the State’s legislative competence and allows for a national scheme to administer the code. The code is created by the Commonwealth’s Competition Policy Reform Act 1995 and essentially consists of part IV as applied to persons rather than corporations as well as the remaining relevant provision of the Trade Practices Act.

1. The Hilmer Report contained a recommendation that a slightly modified version of the rules currently contained in Part IV of the Trade Practices Act should apply universally to all business activity in Australia. It referred to areas not subject to Part IV of the Trade Practices Act because of limits on the Commonwealth’s power: some government-owned businesses, some professions, and other unincorporated businesses. The Report makes the point that in terms of the regulation of market conduct, the exceptions have no rational basis and states by reference to overseas experience that no other jurisdiction appeared to discriminate between businesses depending on the legal form of ownership. The Report discusses the possible options for extending the rules to cover currently exempt non-incorporated businesses. It contains a number of recommendations, including the following:

15.2 The exemptions from the general conduct rules for certain non-incorporated businesses be removed by a referral of powers from the States to the Commonwealth. If this could not be agreed, the Committee would favour States enacting application legislation to the same effect. If this were not to occur in a timely manner, the Committee considers that the Commonwealth should expand the application of the conduct rules by reliance on existing constitutional heads of power.

1. The extrinsic material establishes that one of the principal purposes or objects of the CPRA was to apply the rules prohibiting anti-competitive conduct to all businesses regardless of their form of legal ownership. Other than the passage in the Explanatory Memorandum to which I have referred, there is no reference in the extrinsic material to the extra-territorial operation of the CPRA. There is nothing to suggest that it was intended to operate more widely than the Act. Equally, there is no express statement to the effect that it was not intended to operate any more widely than the Act.
2. There are a number of difficulties with the respondents’ submission. First is the one I have already mentioned that there is no express statement that the Competition Code is not to have any wider application than the Act. Another is that I do not think that the terms of the section are unclear or ambiguous in any way. Ambiguity may not be necessary before the Court can consider the extrinsic material, but it is another thing to allow what at the very best would be an implication in the extrinsic material to determine the meaning of a section which is otherwise clear. Yet a further difficulty with the respondents’ argument is that the construction they advance would give s 8(1)(d) very limited work to do. A legal presence in the jurisdiction presumably means incorporated in the jurisdiction, and physical presence in the jurisdiction presumably means an office or a factory in the jurisdiction. It is difficult to think that an overseas company with an office or factory here would not be carrying on business in the jurisdiction.
3. In my opinion, there is no reason for restricting the scope of s 8(1)(d) by reference to a genus of legal or physical presence in the jurisdiction said to arise by reason of s 8(1)(a), (b) or (c). The use of the word “otherwise” is significant because it means any real connection other than those identified in the preceding paragraphs of s 8(1) is sufficient. I note that in *Australian Competition and Consumer Commission v Prysmian Cavi E Sistemic Energia SRL (formerly Pirelli Cavi E Sistemi Energia SPA) and Others (No 4)* [2012] FCA 1323; (2012) 298 ALR 251 at 285 [264]-[265], Lander J construed the section in the same way.
4. If I am wrong in concluding that Yazaki was carrying on business in Australia in relation to the supply of WHs to TMCA, I hold that, for the same reasons, Yazaki was otherwise connected with the jurisdiction of Victoria. I do not need to decide whether Yazaki was otherwise connected with the jurisdiction of Victoria by reason of its involvement with AAPL’s business as a whole.

## A Market in Australia

1. An element of the contravention of s 45(2)(a)(ii) and (b)(ii) is that the provision of the arrangement or understanding has the purpose, or would have or be likely to have the effect of substantially lessening competition, and competition means, by reason of s 45(3) and s 4E, competition *in a market in Australia* in which the corporation or a body corporate related to the corporation supplies goods or but for the provision would be likely to supply goods.
2. The respondents contend that a market in Australia is also an element of the contravention of s 45(2)(a)(i) and (b)(i). This contention raises a question of statutory construction.
3. Neither party disputes that proof of a market in Australia is not an element of a contravention of s 44ZZRK, that is, giving effect to a cartel provision. However, in view of my earlier findings, that section is not relevant.
4. On the one hand, s 45(3) defines “competition”, but that word is not used in s 45(2)(a)(i) or s 45(2)(b)(i). Nor is the word used in s 4D(1) which contains a definition of an exclusionary provision and refers not to *competition* as such, but to persons who *are competitive with each other*. Furthermore, there is a deeming provision in s 4D(2) as to when a person is competitive with another person, and that does not refer to a market in Australia. On the other hand, there is no reason apparent from the sections themselves for a difference based on whether or not there is a market in Australia between the two types of contraventions.
5. It seems to me that the first group of matters are the more compelling and, in any event, I think the matter is probably covered by authority. In *ASX Operations Pty Ltd and Another v Pont Data Australia Pty Limited (No 2)* (1991) 27 FCR 492 the Full Court said (at 495):

In *Trade Practices Commission v TNT Management Pty Lt*d (1985) 6 FCR 1 at 74, Franki J pointed out that in s 4D no mention is made of “market”. Whilst “competition” as it appears in s 45 (and s 45A) is defined in s 45(3) by reference to competition in a “market”, the term “competition” does not appear in those limbs of s 45 which proscribe exclusionary provisions. In dealing with exclusionary provisions, s 4D(1) itself requires that the parties in question be “competitive” with each other, and s 4D(2) deems persons to be competitive only if the criteria it specifies are met. But those criteria are not framed in terms of competition in a “market”.

These provisions were introduced by the *Trade Practices Amendment Act 1977* (Cth), which followed upon the presentation in August 1976 of the report of the Trade Practices Review Committee (the Swanson Committee). In its report (pars 4.116‑4.117) the Swanson Committee had recommended the prohibition of what are now styled exclusionary provisions and had said that in its view “such matters are appropriate to be listed by reference to their competitive effect between the parties and other persons, and not by reference to market”.

(See *Norcast v Bradken* at 78 [261] per Gordon J.)

1. The respondents referred to authorities which they submit support a contrary view: *Wright Rubbish Products Pty Ltd v Bayer AG* [2008] FCA 1510; [2008] ATRR 42-258; *Wright Rubbish Products Pty Ltd v Bayer AG* [2010] FCAFC 85; *SPAR Licensing Pty Ltd v MIS QLD Pty Ltd (No 2)* [2012] FCA 1116. I reject that submission because it seems to me that those cases proceed by reference to the way in which the applicant pleaded its case and they did not address this particular issue of statutory construction.
2. In my opinion, there is no need for the ACCC to establish a market in Australia in relation to the alleged contraventions of s 45(2)(a)(i) and s 45(2)(b)(i). The fact that in the general section of its Amended Statement of Claim the ACCC has pleaded a market in Australia does not preclude it from establishing contraventions of s 45(2)(a)(i) and s 45(2)(b)(i) without proving a market in Australia.
3. As to the alleged contraventions of s 45(2)(a)(ii) and s 45(2)(b)(ii), the ACCC alleges in its Amended Statement of Claim that at all material times there has been a market in Australia for the supply of Toyota Camry WHs. It describes this market as the Australian Toyota Camry WH market. It pleads in support of this case that there was demand in Australia for Toyota Camry WHs from TMC and TMCA, and that that demand was met by manufacturers and suppliers of Toyota Camry WHs, including Yazaki and SEI or their respective subsidiaries, AAPL or SEWS-A or both.
4. The Trade Practices Tribunal in *Re Queensland Co-operative Milling Association Ltd* (1976) ATPR 40-12; (1976) 8 ALR 481 at 517 described the concept of market in the following terms:

We take the concept of a market to be basically a very simple idea. A market is the area of close competition between firms or, putting it a little differently, the field of rivalry between them. ... Within the bounds of a market there is substitution — substitution between one product and another, and between one source of supply and another, in response to changing prices. So a market is the field of actual and potential transactions between buyers and sellers amongst whom there can be strong substitution, at least in the long run, if given a sufficient price incentive. Let us suppose that the price of one supplier goes up. Then on the demand side buyers may switch their patronage from this firm’s product to another, or from this geographic source of supply to another. As well, on the supply side, sellers can adjust their production plans, substituting one product for another in their output mix, or substituting one geographic source of supply for another. Whether such substitution is feasible or likely depends ultimately on customer attitudes, technology, distance, and cost and price incentives.

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

1. The respondents submit that there was no market in Australia because the relevant “consumer choices” or demand side substitution decisions were made in Japan by TMC, not by TMCA in Australia, and the relevant competition between the sellers accordingly was (or would have been but for the anti-competitive conduct) in Japan between Yazaki and SEI, not in Australia between AAPL and SEWS-A. That is to say, despite the fact that the goods were supplied in Australia by companies with substantial operations in this country to a company which also had a substantial operation here, there is no market in Australia because the competition between potential suppliers and the purchaser’s decision as to which entity was to supply occurred in Japan and not in Australia.
2. The market in Australia pleaded by the ACCC is a market for the supply of Toyota Camry WHs. The competition which may take place in Australia between AAPL and SEWS-A in relation to the supply of WHs to other motor vehicle manufacturers is not relevant.
3. In relation to the supply of Toyota Camry WHs in Australia, the bid or tender for supply and the allocation of supply occurred in Japan. Prices were resubmitted in Australia, but that was a matter of formality only. The prices submitted in Japan were a starting price in terms of the prices at which the WHs will be supplied in Australia in the manner I have described earlier in these reasons. There is then a period in the order of three years where there are fairly intense communications and discussions between the supplier in Australia (i.e., AAPL and SEWS-A) and TMCA where consideration is given to design changes, other variations and VE proposals and revised prices are submitted. Where AAPL was involved, Yazaki kept a close watch over these events, but at the same time, AAPL exercised some autonomy and discretion. Once supply commenced, it took place in Australia between two companies in Australia and the purchase price was paid in Australia. The contract for the supply of any particular WH or batch of WHs was made between the two companies in Australia with the purchaser (i.e., TMCA) advising the supplier from time to time of the quantity of WHs it required. The Australian purchaser was regularly, both before and after supply commenced, seeking price reductions from the Australian supplier. The Australian purchaser placed significant pressure on the Australian supplier in terms of the prices at which WHs were supplied and it no doubt had high quality control standards which were to be met.
4. It might be said in a very broad sense that the presence of SEWS-A in Australia brought competitive pressure to bear on AAPL and its relationship with TMCA in relation to the supply of WHs in Australia. However, the real place of competitive activity in terms of the supply of WHs to TMCA in Australia was in Japan and it involved Yazaki, SEI and TMC.
5. In *Emirates v Australian Competition and Consumer Commission* [2009] FCA 312; (2009) 255 ALR 35 (at [66]), Middleton J said that the place of contracting was not determinative of the geographic locality of the relevant market. His Honour suggested that the fact that some marketing and negotiating occurred in Australia was relevant to the question of whether there was a market in Australia.
6. In *Auskay International Manufacturing & Trade Pty Ltd v Qantas airways Limited (No 5)* [2009] FCA 1464 (at [40]), Tracey J agreed that the place of negotiations and where the contracts were entered into are relevant, but not decisive considerations. His Honour expressed the view that for there to be a market in Australia, there must be competitive activity in Australia. The competitive activities he identified included advertising campaigns, offers of efficient services or superior goods, or better quality after-sales service, or the ready availability of spare parts. His Honour said that it had yet to be authoritatively determined whether there is a market in Australia where there is competitive activity in Australia, but the terms and conditions upon which goods or services are provided are negotiated and agreed upon wholly outside Australia. In the case before me, the actual contracts of supply of WHs in Australia were almost certainly entered into in Australia, but the competitive activity took place in Japan.
7. In *ACCC v Air New Zealand*, Perram J considered whether there was a market in the case of international air freight involving inbound air cargo services between Hong Kong and Sydney. His Honour considered whether the provision of services in Australia in relation to the inbound cargo provided a foundation for finding a market in Australia. His Honour said that the correct question was “where are the relevant substitutable services provided to consumers of those services” (at 456 [321]). He found that the substitutable services were provided in Hong Kong, being that of taking possession of the cargo and loading it onto the airlines. The ground handling services provided in Sydney were not substitutable for the services provided in Hong Kong.
8. His Honour considered the significance of the fact that there were market participants in Australia. He did not think that that was in any way decisive because the key consideration was not where the “switching decision” was made, but where it was given effect (i.e., in Hong Kong) (at 457 [323]). His Honour concluded that the relevant markets for the transport of cargo to ports in Australia from Hong Kong were not markets in Australia.
9. Not without some hesitation, I have concluded that there was no market in Australia for the supply of Toyota WHs. In my opinion, the key consideration is whether all or some of the competitive activity in relation to the supply of Toyota WHs in Australia took place in Australia. I do not think that it did. Such competitive activity as there was in relation to the supply of Toyota WHs in Australia took place in Japan.
10. This conclusion means that s 45(2)(a)(ii) and s 45(2)(b)(ii) did not apply to the Overarching Cartel Agreement, the 2003 Agreement or the 2008 Agreement.

## Conclusions

1. The ACCC has established that AAPL contravened s 45(2)(a)(i) and s 45(2)(a)(ii) of the Act and the Competition Code by making an arrangement or arriving at an understanding described in these reasons as the 2002 Toyota Camry Minor RFQ Agreement and that AAPL contravened s 45(2)(b)(i) and s 45(2)(b)(ii) by giving effect to that agreement in the manner described in these reasons.
2. The ACCC has established that Yazaki contravened s 45(2)(a)(i) by making an arrangement or arriving at an understanding described in these reasons as the 2003 Agreement and that Yazaki contravened s 45(2)(b)(i) by giving effect to the agreement in the manner described in these reasons. Furthermore, in making the arrangement or arriving at the understanding Yazaki contravened s 45(2)(b)(i) by giving effect to the Overarching Cartel Agreement.
3. The ACCC has established that Yazaki contravened s 45(2)(a)(i) by making an arrangement or arriving at an understanding described in these reasons as the 2008 Agreement and that Yazaki contravened s 45(2)(b)(i) by giving effect to the agreement in the manner described in these reasons. Furthermore, in making the arrangement or arriving at the understanding Yazaki contravened s 45(2)(b)(i) by giving effect to the Overarching Cartel Agreement.
4. I will hear from the parties as to appropriate orders in light of these conclusions and further directions concerning relief.

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| I certify that the preceding three hundred and ninety-nine (399) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Besanko. |

Associate:

Dated: 24 November 2015