IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

No. S245 of 2016

BETWEEN: **Air New Zealand Ltd (ARBN 000 312 685)**
Appellant

and

Australian Competition and Consumer Commission
Respondent

APPELLANT'S SUBMISSIONS

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PART I CERTIFICATION

1 These submissions are in a form suitable for publication on the Internet.

PART II ISSUES

2 This appeal raises three issues:

a) *First*, is a "market" for purposes of s 4E of the *Trade Practices Act 1974* (Cth) (now the *Competition and Consumer Act 2010* (Cth)) (the **Act**) defined by questions of substitutability or by other considerations?

b) *Secondly*, what determines whether a market is "in Australia" for purposes of s 4E of the Act?

c) *Thirdly*, where particular conduct is compelled by a law or valid administrative practice of a foreign state, can a person acting in accordance with that law or practice make "a contract or arrangement", or arrive at an "understanding", having the purpose, effect or likely effect of substantially lessening competition for the purposes of s 45(2) of the Act?

3 As to the *first* issue, the Appellant (**Air New Zealand**) contends that markets are defined by substitutability for purposes of the Act. The majority of the Full Court of the Federal Court (Dowsett and Edelman JJ) erred in holding otherwise. While various factors may affect the determination of whether one product or source of supply is substitutable for another, the ultimate question for purposes of market definition remains one of substitutability.

4 As to the *second* issue, Air New Zealand contends that Dowsett and Edelman JJ erred in concluding that the relevant markets at issue were "in Australia" for purposes of s 4E in circumstances where all of the substitutable sources of supply between which purchasers could switch their patronage in response to a change in price or quality were located outside Australia in Hong Kong and Singapore.

5 As to the *third* issue, Air New Zealand contends that Dowsett and Edelman JJ erred in concluding that the fact that Air New Zealand could choose not to impose a fuel surcharge in accordance with an index mechanism meant that there was no relevant compulsion by reason of the requirement of the Hong Kong regulator that all airlines seeking approval of an index mechanism file a joint application.

PART III SECTION 78B OF THE JUDICIARY ACT 1903 (CTH)

6 The appellant certifies that it has considered whether a notice should be given under s 78B of the *Judiciary Act 1903* (Cth) and that no notice needs to be given.

PART IV JUDGMENT OF COURT BELOW

7 The judgment of the Full Court of the Federal Court is reported as *Australian Competition and Consumer Commission v P T Garuda Indonesia Ltd* [2016] FCAFC 42; (2016) 330 ALR 230. The judgment of the primary judge is reported as *Australian*

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

PART V FACTS

A. The Market Issues

8 Air New Zealand is an international airline that, in the period 2002 to 2006, provided the service of carrying freight by air from airports in Hong Kong and Singapore to airports in Australia. During that period, Air New Zealand charged various surcharges in relation to those services, including fuel and insurance surcharges.

9 The Australian Competition and Consumer Commission (**ACCC**) contends that some
10 of those surcharges were implemented as a result of understandings reached by Air New Zealand with other airlines in contravention of ss 45(2)(a)(ii) and 45(2)(b)(ii) of the Act. The effect of s 45(3) is that, in order for ss 45(2)(a)(ii) and 45(2)(b)(ii) to be engaged, the relevantly affected competition must have been competition in a "market", which in turn is defined in s 4E of the Act to mean "a market in Australia". Thus, in short, the alleged understandings would only give rise to liability if they affected competition in a "market in Australia".

10 The relevant product was the service of flying cargo from each of Hong Kong and Singapore to individual ports in Australia (TJ[252]-[256], [336]; FC[21], [591]-[592]). That service was sold and acquired as a single package or suite of services (TJ[321];
20 FC[96], [638]), that included the transport service (i.e., the flight), ground handling at origin and destination (i.e., the loading and unloading of the planes) and enquiry services (i.e., cargo tracing and tracking) (FC[22], [593]-[596]). There was no evidence that these services were ever sold on a disaggregated basis.

11 The only places at which the complete package of services that constituted the relevant product could be acquired and obtained was in Hong Kong and Singapore respectively (TJ[260], [264], [319]-[321], [336]; FC[650]). That was so notwithstanding that the performance of the services by the airlines involved the provision of some services in Australia. As the trial judge noted, the services that comprised the relevant product were, in each case, "provided physically at both the origin and destination" and "along
30 a geodesic line across the surface of the globe corresponding with the route taken by the plane" (TJ[257]). The subset of services provided in Australia comprised part of the relevant product but was not itself substitutable for that product (TJ[321]).

12 The relevant product was typically priced, negotiated and paid for at the place of departure or 'origin' (TJ[94], [97], [108], [258], [266]; FC[22], [438]-[439], [598], [650]). The relevant surcharges were imposed by the airlines on an outgoing basis at origin, rather than on an incoming basis at destination (TJ[5], [20]).

13 Airlines principally dealt with freight forwarders, rather than the consignors or consignees of the cargo (so-called 'shippers') (TJ[221], [268]-[269], [309]; FC[30], [32], [602], [650]). Other than in extremely rare cases, the airlines dealt only with the
40 freight forwarder at the origin, with whom the price of the relevant service was negotiated and agreed (TJ[94], [97], [108], [121], [258], [266]; FC[22], [438]-[439], [598], [650]). It was the freight forwarder at origin that typically made the decision of which airline to use, save that larger shippers (including, potentially, shippers in Australia) often (but not always) selected the airline to use for their shipments (FC[32],

[602], [650]). For this reason, the primary judge found that the participants in the relevant markets were the airlines, freight forwarders and large shippers (TJ[309]). Even for large shippers, though, the services of a freight forwarder were 'indispensable': (TJ[309]).

14 The contractual relations were generally between the airline and the freight forwarder, who "cut" or "raised" the air waybill at origin (TJ[111], [114]; FC[650]). In some cases, large shippers entered into tripartite agreements with freight forwarders and airlines (TJ[297], [309(c)]). It was the freight forwarder at origin, and not the shipper, that was usually obliged to pay the airline for the service (TJ[121], [123]; FC[650]).

15 To be selected to provide the relevant service, an airline had to be present at the port of origin where the airline would take possession of the cargo (TJ[319]; FC[650]). The place of origin was therefore the place at which customers could switch between suppliers of the relevant service. That was so notwithstanding that part of that service was thereafter performed in Australia in each case (TJ[319]-[320]; FC[650]).

B. The Foreign State Compulsion Issue

16 There are concurrent findings of fact by the Courts below that under Hong Kong law (see generally TJ[447]; FC[236]-[238]):

a) Fuel and other surcharges were "tariffs" within the meaning of the applicable Air Services Agreements (TJ[412]; FC[236(1)]);

b) An airline that wished to impose a fuel or other surcharge was required by Hong Kong domestic law to obtain approval from the Hong Kong Civil Aviation Department (**CAD**) before doing so (TJ[418]; FC[236(2)]);

c) The only surcharges that could be imposed were ones that had been approved by the CAD (TJ[419]; FC[236(3)]);

d) An airline that had obtained approval from the CAD to charge a fuel or other surcharge was required to charge the approved amount specifically, and was not permitted to charge a lesser amount (TJ[419], [425]; FC[236(4)]);

e) The requirements of the CAD in relation to applications for authorisation to charge a fuel or other surcharge differed according to whether what was sought was:[1]

   i) authorisation to charge a fixed, specified, amount (a **static charge**); or

   ii) authorisation to charge fuel surcharges at pre-determined levels specified by a fuel index mechanism, and which would thus vary with movements in that index (an **index mechanism**).

f) In particular, the CAD (TJ[435], [436], [442], [443], [446]; FC[236(6)], [237], cf. [247]-[250]):

[1] Insofar as it is relevant, the reason for the difference was apparently because the CAD did not regard it as possible for it to implement and monitor more than one fuel index mechanism in Hong Kong, and also because the CAD considered that shippers would find multiple index mechanisms confusing: TJ[435], [441], [442].

i) would not consider separate applications by individual airlines for authorisation to impose a fuel surcharge in accordance with different index mechanisms; and

ii) would only consider one application for permission to impose a fuel surcharge in accordance with an index mechanism, to be made jointly by all airlines who wished to obtain such approval.

g) Furthermore, there were certain differences in the way in which the CAD would deal with the different types of application (TJ[435], [436], [442], [443], [446], FC[239]):

10 i) an application for approval of a static charge would take between 60 to 90 days to process,[2] whereas applications for approval of an index mechanism were processed more quickly (between 10 and 45 days)[3]; and

ii) any approval to impose a static charge would remain in force for a period of only two months,[4] whereas approvals of index mechanisms would remain in force for longer (either a year or six months)[5].

17 Those requirements, or features, of Hong Kong law arose both pursuant to the *Air Transport (Licensing of Air Services) Regulations* (Hong Kong) (see TJ[395]-[427]), and pursuant to administrative policies or requirements presumed to have been validly adopted or imposed by the CAD (see TJ[392], [428]-[446]; FC[247]).

20 18 To comply with those requirements, Air New Zealand joined in common applications to the CAD for approval of various index mechanisms (see TJ[520]-[658]).

PART VI ARGUMENT

A. Market in Australia

The Judgments Below

19 The primary judge found that none of the conduct was in respect of competition in a 'market in Australia'. His Honour reasoned that a market for purposes of s 4E is defined by considerations of substitutability, and that substitution between competing

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2 Very occasionally, applications for approval of a static charge for *insurance and security* surcharges, not *fuel* surcharges, were approved more quickly, as the Full Court observed at FC[244].

3 The 5 June 2002 application was approved on 19 July 2002 (44 days later) (TJ[545]-[547]); the 20 June 2003 application was approved on 11 July 2003 (21 days later) (TJ[666]); the 18 December 2003 application was approved on 17 January 2004 (30 days later) (TJ[669]); the 20 May 2004 application was approved on 30 June 2004 (41 days later) (TJ [670]); the 16 June 2004 application was approved on 2 July 2004 (16 days later) (TJ[670]); the 7 October 2004 application was approved on 21 October 2004 (14 days later) (TJ[671]); the 7 April 2005 application was approved on 19 April 2005 (12 days later) (TJ[672]); the 12 May 2005 application was approved on 1 June 2005 (20 days later) (TJ[672]); the 29 August 2005 application was approved on 8 September 2005 (10 days later) (TJ[673]); the 17 October 2005 application was approved on 1 November 2005 (15 days later) (TJ[674]); the 5 June 2006 application was approved on 21 June 2006 (16 days later) (TJ[675]).

4 Again, as the Full Court observed, approval for longer periods was occasionally given for static *insurance and security*, not *fuel*, surcharges.

5 The 19 July 2002, 2 July 2004, 1 June 2005, and 21 June 2006 approvals were valid for one year (TJ[546]-[547], [670], [672], [675]); the 11 July 2003 and 17 January 2004 approvals were valid for six months (TJ[666], [669]).

sources of supply could only occur in Hong Kong and Singapore where the complete suite of services that constituted the relevant product was acquired and obtained (TJ[319]-[323], [336]-[338]).

20 The Full Court (Dowsett and Edelman JJ, Yates J dissenting) allowed the appeal. Dowsett and Edelman JJ held that the process of defining a "market" for purposes of the Act involved a "flexible assessment" of various matters, not limited to questions of substitutability (FC[81], [98]). Their Honours said that a 'market' was to be defined as "the 'space' in which the competitive process takes place" (FC[124]).

21 At FC[156], Dowsett and Edelman JJ stated what, in their Honours' view, was the correct test for determining whether the market was 'in Australia' for purposes of s 4E:

> The better approach is, in effect, to 'visualise' the metaphorical market, having regard to all of its dimensions and its content, and then to consider whether it is within Australia, in the sense that at least part (perhaps a substantial or significant part) of it must be in that 'location'.

22 Their Honours then proceeded at FC[162]-[170] to identify seven overlapping reasons for concluding that the markets in the present case were relevantly 'in Australia': (1) it was not necessary that the market be wholly in Australia; (2) the legislative text and authorities did not preclude consideration of the location of customers or where services were performed in defining markets; (3) an important part of the services in the present case was performed in Australia; (4) there were 'barriers to entry' in Australia; (5) the services were 'marketed' in Australia to persons who, as "a matter of economic reality", were the airlines' customers; (6) to find a market in Australia in the present case would "enhance the welfare of Australians", being the specified purpose of the Act; and (7) the decision was consistent with conclusions reached by courts in Europe and New Zealand.

23 Dowsett and Edelman JJ said that these seven factors likewise demonstrated that the geographic dimension of the relevant markets extended to Australia (FC[160]).

24 In dissent, Yates J held that none of the relevant markets was in Australia. His Honour held that the focus of market definition must be the identification and analysis of substitution possibilities: FC[643]. His Honour found that all of those substitution possibilities were located at origin in Hong Kong and Singapore (FC[653]).

Markets are defined by substitution

25 A central aspect of the reasoning of the majority in the Full Court was the proposition that the boundaries of a 'market' for purposes of the Act may be defined by reference to considerations other than substitutability. Dowsett and Edelman JJ emphasised repeatedly that markets are not defined by considerations of substitutability alone, and that substitutability is only one of a number of factors to be considered in defining markets for purposes of the Act. For example, their Honours said that considerations of substitutable products was only "*one* of the factors to be considered in the flexible assessment of the factors comprising a market" (FC[81]). Similarly, Dowsett and Edelman JJ said that "[t]he process of substitution may be relevant to market identification, and may therefore have an effect on whether the market is 'in Australia' but s 4E is not confined to substitution" (FC[98]). Put simply, their Honours concluded, "the market... includes much more than choices or substitution" (FC[125]).

26 The proposition that substitution is one of only several factors that define the boundaries of a market for purposes of the Act is both novel and inconsistent with the authorities in this Court. In *Queensland Wire Industries v The Broken Hill Proprietary Company* (1989) 167 CLR 177, the Court unanimously endorsed the view that markets are defined by considerations of substitutability: 167 CLR 188 (Mason CJ and Wilson J), 195 (Deane J), 199 (Dawson J) and 210 (Toohey J). Mason CJ and Wilson J said that s 4E dictated a "process of defining a market by substitution" and that "the defining feature of a market is substitution" (at 188).

27 Similarly, in *Boral Besser Masonry Ltd v ACCC* (2003) 215 CLR 374 at 454 [247]-[248], McHugh J observed:[6]

> Section 4E does not define what a market is for the purposes of the Act. But it makes clear that the parameters of the market are governed by the concepts of substitution and competition. The inclusion of the terms "substitutable" and "competitive with" in s 4E also means that market definition must be determined in accordance with economic principles. The terms of the Act have economic content and their application to the facts of a case combines legal and economic analysis. Their effect can only be understood if economic theory and writings are considered.
>
> In economic terms, a market describes the transactions between sellers and buyers in respect of particular products that buyers see as close or reasonable substitutes for each other given the respective prices and conditions of sale of those products.

Later, his Honour said (at 455 [252]):

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

As in *Queensland Wire*, that description fixes upon substitution as the defining feature of a market.

28 To understand this Court's emphasis on the importance of substitution in defining markets, it is necessary to have regard to the purpose of the market definition exercise required by the Act. The object of market definition under the Act is to discover the degree of the defendant's market power (its ability to "give less and charge more"), the identification of such power being essential to the application of the substantive provisions of Part IV of the Act: *Queensland Wire* 167 CLR 187 (Mason CJ and Wilson J); *Boral* 215 CLR 414 [100] (Gleeson CJ and Callinan J, Gaudron, Gummow and Hayne JJ agreeing at 427 [155]), 456 [255] (McHugh J). Thus, because the process of defining a market is the first step in the process of identifying the extent of market power, it is necessary to define markets in a manner that will best identify any market power of the firms whose conduct is in question.

29 Markets are defined by substitution for this reason because it is the possibility of substitution (to other products or other sources of supply) that limits the extent of a firm's market power. This was explained by the Trade Practices Tribunal in *Re*

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[6] Section 4E provides that a market in relation to 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". The phrase "or otherwise competitive with" in this context does not expand the market definition inquiry beyond questions of substitutability: *Seven Network v News Ltd* (2009) 182 FCR 160 at 295 [621].

Queensland Co-Operative Milling Association Ltd: Re Defiance Holdings (***QCMA***) (1976) 8 ALR 481 at 517:[7]

> 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 (if there is no close competition there is of course a monopolistic market). 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".

30 This emphasis on substitution and substitutability does not mean that it is only some narrow conception of competition that is relevant to the market definition exercise. As
20 McHugh J explained in *Boral* 215 CLR 456 [253], factors such as the physical and technical characteristics of the product, the views and past behaviour of consumers and producers, and the cost to consumers and producers of switching from one product to another, are all relevant matters when defining markets. To that list may be added the factors identified by the Tribunal in the passage quoted above from *QCMA* — "customer attitudes, technology, distance and cost and price incentives". Another factor of "cardinal importance" is the geographic relationship of other producers to the firm whose conduct is impugned, because "[t]he further away a producer is from the firm, the more difficult it will be for that other producer to be in competition with that firm": *Boral* 215 CLR 456 [254] (McHugh J). In the case of each of these factors,
30 however, their relevance is that they affect the assessment of substitutability — they do not have some independent importance to the market definition exercise in and of themselves: see *Boral* 215 CLR 456 [253] (McHugh J).

31 In light of these authorities, Dowsett and Edelman JJ erred in proceeding as if matters of substitution were only one factor relevant to the identification of markets and a relatively insignificant factor in the present case. Similarly, their Honours erred in proceeding as if market definition was a "flexible" process of no fixed content (FC[82]-[83], [91] [105]). It has long been recognised that market definition is a process that involves choice, evaluation and judgment, with the result that the application of that process will be 'inexact' and will not yield 'dogmatic answers': see
40 *Queensland Wire* 167 CLR 199 (Dawson J). Nevertheless, the principles governing market definition are not themselves at large, undefined or subject to change from case to case. Notably, the ACCC accepted below that the boundaries of the relevant markets were to be defined by considerations of substitutability: FC[622].

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[7] This passage was cited with approval by this Court in *Boral Besser Masonry Ltd v ACCC* (2003) 215 CLR 374 at 422 [133] (Gleeson CJ and Callinan J; Gaudron, Gummow and Hayne JJ agreeing at 427 [155]); 454 [248] (McHugh J); *Queensland Wire Industries Pty Ltd v Broken Hill Pty Co Ltd* (1989) 167 CLR 177 at 188 (Mason CJ and Wilson J), 199-200 (Dawson J), 210 (Toohey J).

32 The extent to which Dowsett and Edelman JJ departed from the orthodox approach to market definition is evident from their Honours' treatment of *Queensland Wire*. Their Honours said of that case (at FC[117]):

> We accept that, as Mason CJ and Wilson J observed, market definition primarily addresses substitution. However it does not follow that a market is comprised only of substitution or substitution possibilities.

With respect, that misrepresents the relevant passage from *Queensland Wire*. Mason CJ and Wilson J did not state that market definition "primarily" addresses substitution, but that the correct process was to "defin[e] a market by substitution" (167 CLR 188). While it is unclear what Dowsett and Edelman JJ meant by the phrase "addresses substitution", it is apparent from their next sentence that they intended something other than that a market was defined by substitution. Then, at FC[117], Dowsett and Edelman JJ sought to distinguish *Queensland Wire* altogether, noting:

> In *Queensland Wire*, the relevant question was whether there was a market, rather than whether an identified market was 'in Australia'".

If that observation was intended to suggest that the principles of market definition identified in *Queensland Wire* are of diminished relevance to the inquiry required in this case, that should not be accepted. Indeed, the necessary predicate step to determining if a market is 'in Australia' for purposes of s 4E of the Act is to define the market according to orthodox market definition principles. The majority erred in regarding *Queensland Wire* as relevantly distinguishable. In the course of doing so, they also erred as to the effect of Dawson J's reasoning in that case at FC [116] and [118].

33 Once orthodox market definition principles are applied to the findings of fact made by the primary judge, it is apparent that none of the relevant markets was "in Australia" because all of the possibilities for substitution were outside Australia in Hong Kong and Singapore. That is, if an airline sought to "give less and charge more", the alternative or substitutable sources of supply to which customers could change or switch to obtain the relevant services (i.e., the complete package or suite of services) were necessarily located outside Australia. The reasons of Yates J in dissent at FC[650]-[651] demonstrate that Hong Kong and Singapore were the places where, as a matter of economic reality, the product was "bought and sold". To use McHugh J's language from *Boral*, Hong Kong and Singapore were the "area[s] of actual and potential, and not purely theoretical, interaction between producers and consumers where given the right incentive... substitution will occur": 215 CLR 455 [252].

34 This analysis accords with the relevant economic principles. Professor Jeffrey Church, an economist called by the ACCC, and Professor Richard Gilbert, the economist called by Air New Zealand, agreed that the so-called 'geographic dimension' of a market is defined by the location and identity of the substitutable sources of supply, rather than the location of the customers or the places where the economic consequences or effects on the impugned conduct occur.[8]

35 A danger inherent in Dowsett and Edelman JJ's alternative approach is that it severs the market definition exercise from its purpose. As noted above, the utility and object

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[8] *Report of Economists on Extent of Agreement and Disagreement on Principal Issues in Air Freight*, 24 February 2013, propositions 9, 10, 11, 16 and 17; See also, *Report of Professor Richard J Gilbert*, 6 July 2012, at [24]-[41], [75]-[78], [96]-[101].

of the market definition process is to identify market power. Consequently, defining markets too narrowly will create the appearance of more market power than in fact exists, while defining markets too broadly may mean that the anticompetitive effects of the conduct at issue may never be shown: *Queensland Wire* 167 CLR 188 (Mason CJ and Wilson); *Boral* 215 CLR 456 [252] (McHugh J); *Singapore Airlines Limited v Taprobane Tours WA Pty Ltd* (1991) 33 FCR 158 at 167. In the present case, there was no place in Australia that a purchaser could go to acquire or obtain the relevant product — all such transactions occurred in dealings between freight forwarders and airlines in Hong Kong and Singapore (TJ[319]-[321], [336]). Thus, there was no substitutable source of supply in Australia that could limit the exercise of market power by an airline in Hong Kong or Singapore in respect of the relevant services. In those circumstances, including Australia in the market would have the effect of diluting the true market power of the relevant airlines in Hong Kong and Singapore, thereby concealing the very thing which the market definition inquiry is designed to identify.

The Majority's 'Visualisation' Test and Seven Factors

36 The majority in the Full Court endorsed an approach to determining whether a market was 'in Australia' for purposes of s 4E whereby a court is required to "'visualise' the metaphorical market, having regard to all of its dimensions and its content, and then to consider whether it is within Australia" (FC[156]). What that really means, how such visualisation should occur and what matters should be considered in undertaking that exercise were unexplained.

37 While some earlier Australian authorities have described the statutory concept of a 'market' as a 'metaphor' (see, e.g., *Australian Gas Light v ACCC* (2003) 137 FCR 317 at 426 [378]), that description is used in those authorities to indicate that the term 'market' denotes an economic concept, rather than a physical feature of the world. Thus, in *Taprobane Tours* at 33 FCR 174, French J (with whom Spender and O'Loughlin JJ agreed) noted that the concept of a 'market' employed by the Act differed from the ordinary or common law meaning of that term — it did not include, for example, a place for "the meeting together of people for the purchase and sale of provisions or livestock", but was rather a conceptual grouping of a range of economic activities. It is in this sense, and this sense only, that the market is 'metaphorical' or conceptual. That description does not require or permit market definition to be conducted without regard to the applicable economic principles or as if the relevant guiding principles are at large: see *Boral* 215 CLR 454 [247] (McHugh J). Nor does it permit a market to be defined by trying to render a picture of how the economic activity in question might be visually represented if it were a physical marketplace in a particular location in the real world. Apart from anything else, an exercise of that nature would be analytically useless for purposes of the Act because it tells one nothing about the constraints on market power.

38 Similarly, even if one were to successfully 'visualise' the metaphor as the majority directed, it is unclear how one would then determine whether the metaphor was relevantly 'in Australia'. That is particularly so given the majority's insistence that the words 'in Australia' in s 4E are not to be construed "in a strictly geographical" or "purely geographical" sense (FC[153]-[154], [156]). Dowsett and Edelman JJ did not identify the other senses in which those words are to be understood.

39 The difficulties inherent in this 'visualisation' approach are made manifest when one considers the seven factors identified by Dowsett and Edelman JJ as indicating that the relevant markets were 'in Australia' in the present case. Those factors, whether considered individually or collectively, do not reveal why the markets, properly 'visualised', were in Australia.

40 The first factor was that a market could be both "in Australia" and also in another country (FC[162]). That is a general matter of statutory construction; it does not itself assist in determining whether any particular market is 'in Australia' in a given case.

41 The second factor was that the language of the Act and the authorities did not preclude consideration of such matters as the location of customers or the place of performance in determining where a market is located (FC[163]). That proposition appears to depend upon a misreading of the authorities. As noted above, the geographic attributes of customers and suppliers may have an effect on market definition, but that is because they affect considerations of substitutability: see *Boral* 215 CLR 456 [253]. Those matters do not have some independent relevance for purposes of market definition, let alone in such a way as to contradict a substitutability analysis.

42 The third factor was that "a significant and important part of the operation of the 'suite of services' was provided in Australia" (FC[164]). Even assuming such importance, the majority did not identify why the place of performance of the relevant services matters for purposes of market definition. The majority said that the place of performance will not always be conclusive, yet did not say how one determines when it will and will not matter (FC[158]). Indeed, the services performed in Australia in the present case could not be any more important to the purchaser than the services provided at the Pacific Island destinations at issue in *Taprobane Tours* (1991) 33 FCR 158 (i.e., the travel services provided in Bali, Fiji, Tahiti and so forth). Nevertheless, Dowsett and Edelman JJ held that the market in *Taprobane Tours* was properly limited to the origin (Australia), whereas in the present case, the market included the destination (Australia) (FC[159]).

43 Dowsett and Edelman JJ's supposition that the place of performance matters for purposes of market definition appears to be allied to their conclusion at FC[112] that the "actual supply and receipt of the goods or services" must occur within the market such that the boundaries of the market must encompass the location of performance. That conclusion was in error. Again, once it is appreciated that the purpose of market definition is to identify market power, it is apparent that markets are not to be defined by the place of performance because the location where services are performed will generally tell one nothing about market power. Australian telecommunications companies, for example, provide 'roaming' services to their customers when they are in other countries, but it would be nonsensical to suggest that the market for such services encompasses everywhere that those customers use their mobile telephones overseas. That is because, for an Australian customer looking to acquire a mobile telephone service, the choices of alternative suppliers are likely limited to those telecommunications companies located in Australia. That is where the substitutable alternatives exist, and hence where the market is to be defined. It would be an analytical error in such circumstances to extend the market to all of the places where the services are performed because there are no substitutable alternatives in those places that could limit or control the market power of the Australian telecommunications companies. Thus, when one focuses on the object of the market

definition exercise, it is apparent that it is the location of the substitutable alternatives that determines the location of the market, and not the place of performance.

44 The fourth factor was that there were 'barriers to entry" in Australia: FC[166]. There was almost no examination of that issue at trial (as the trial judge noted) and no factual findings that any such barriers were significant (TJ[230], [318]). Even if there was such evidence, the analysis of Yates J at FC[654] is compelling. The existence and location of barriers to entry may affect questions of substitutability, but they do not themselves determine the boundaries of the market. As Yates J noted, travel companies offering tours to Australian consumers from Australia to Europe likely require all manner of European licenses, registrations and approvals in order to offer those services effectively. Such regulatory requirements would constitute barriers to entry in Europe, but that does not mean that the relevant market for those tours extends to Europe.

45 The fifth factor was that the services were "marketed in Australia" to shippers who were, "as a matter of economic reality", customers of the airlines (FC[167]). The majority said that "[s]ome shippers were in Australia and were capable of operating as a constraint on the fixing of cargo rates" (FC[167]). One cannot find findings to that effect in the primary judge's judgment. The primary judge found that the demand of shippers provided "the economic foundation of the market", but that smaller shippers were nevertheless not market participants (TJ[287], [309]). Even in the case of larger shippers, the primary judge stopped short of finding that such shippers were the customers of the airlines. His Honour's actual finding was that such large shippers always used freight forwarders as intermediaries, but often made decisions about which airlines to use and therefore could, "at least in theory", operate as a constraint on airlines by determining to switch to another airline (TJ[268], [299], [309]).

46 But even if it were accepted that Australian shippers were the airlines' true customers, it is not apparent why that would locate the market in Australia. For one thing, as Yates J noted, the fact that shippers typically dealt with airlines only indirectly through freight forwarders located in Hong Kong and Singapore tends to underscore that the relevant commerce was outside Australia (FC[659]). This was not a case where Australian purchasers dealt directly with foreign suppliers by telephone or across the internet; to the contrary, even large Australian shippers had to use Hong Kong and Singapore-based foreign freight forwarders, and those freight forwarders then obtained the relevant services by negotiating and transacting with airlines in Hong Kong and Singapore.

47 The sixth factor was that the majority considered that it would serve "the welfare of Australians" to find that the markets in the present case were 'in Australia', consistent with the statutory purpose specified in s 2 of the Act (FC[168]). The error in that reasoning is that it elevates the general statement of purpose in s 2 to the level of some guiding principle as to the application of the Act in individual cases. In *Carr v State of Western Australia* (2007) 232 CLR 138 at [5], Gleeson CJ identified the difficulty with such an approach:

> In the interpretation of a provision of an Act, a construction that would promote the purpose or object underlying the Act is to be preferred to a construction that would not promote that purpose or object... That general rule of interpretation, however, may be of little assistance where a statutory provision strikes a balance between competing interests, and the problem of interpretation is that there is uncertainty as to how far the provision goes in seeking to achieve the underlying purpose or object of the Act. Legislation rarely pursues a single purpose at all

> costs. Where the problem is one of doubt about the extent to which the legislation pursues a purpose, stating the purpose is unlikely to solve the problem. For a court to construe the legislation as though it pursued the purpose to the fullest possible extent may be contrary to the manifest intention of the legislation and a purported exercise of judicial power for a legislative purpose.

See also *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue* (2009) 239 CLR 27 at [51]-[53] (Hayne, Heydon, Crennan and Kiefel JJ); *ACCC v Channel Seven Brisbane* (2009) 239 CLR 305 at [101] (Heydon J).

48 Moreover, as noted above, the approach adopted by Dowsett and Edelman JJ in the present case is, if anything, rather more likely to harm Australian consumers in the long term because it results in a market definition that is wider than would be dictated purely by reference to questions of substitutability. The effect will necessarily be that, in future cases, lower courts will draw wider market boundaries to include activity which, though analytically irrelevant to the question of market power, may nevertheless be considered part of the 'visualised' market. The result will be to obscure or conceal the market power of the firms in those markets.

49 The seventh factor was that the conclusion reached by the majority "is consistent with the conclusion reached upon similar fact patterns in New Zealand and in Europe" (FC[169]). The majority did not, however, consider the obvious legal and factual differences in analysing the question raised by s 4E and that considered by these foreign courts. As Yates J observed, the New Zealand decision referred to was a judgment at first instance on agreed facts, and one in which the New Zealand court adopted an approach to market definition that is inconsistent with the Australian authorities (FC[677]-[679]).

50 Neither party made submissions on the European decision referred to, *Atlantic Container Line v Commission* [2005] 4 CMLR 20: FC[138]-[147]. When the reasons of the European Commission (**EC**) and the Court of First Instance (**CFI**) in that case are considered in full, they do not support Dowsett and Edelman JJ's reasoning. The EC's reasons (which were upheld by the CFI) make clear that the relevant geographic market was defined by substitutability: see *Decision 1999/243/EC relating to a proceeding pursuant to Articles 85 and 86 of the EC Treaty (Case No IV/35.134 – Trans-Atlantic Conference Agreement)*, at [76]-[83] and [519]; *Atlantic Container Line* [2005] 4 CMLR 20 at [884]-[890]. Dowsett and Edelman JJ construe those decisions as turning on where the relevant services were "marketed" (in the sense of 'advertised' or 'promoted'), but that is a misreading of the passage quoted at FC[141]. There is no discussion or findings in the EC's reasons of where the relevant products were advertised or promoted; instead, the analysis focused on where purchasers could obtain and acquire the relevant services from substitutable sources of supply. Those places were all at origin, even though the services were performed elsewhere.

51 It follows from the foregoing that the seven factors identified by the majority do not, either individually or collectively, lead to the conclusion that the relevant markets were 'in Australia'. This Court should not endorse a test which is of uncertain and variable application and which does not yield clear results. That is particularly so in circumstances where s 4E plays an important function in controlling the extraterritorial operation of various pecuniary penalty provisions of the Act.[9] The Legislature could

[9] There is little in the legislative history of s 4E that assists in the construction of the phrase 'in Australia'. The origin of the requirement that a 'market' be 'in Australia' was the *Trade Practices Bill 1974* (Cth).

not have intended that the reach of s 4E would turn on after-the-fact 'visualisations' by courts. These provisions carry significant consequences for Australian and foreign companies and s 4E should be construed, so far as possible, so as to clearly identify the Act's extraterritorial limits.

An 'effects' doctrine by another name

52 A final difficulty with the approach adopted by Dowsett and Edelman JJ is that it amounts, in substance, to an 'effects doctrine', whereby s 4E is deemed to reach conduct because that conduct has an economic effect in Australia. There can be little doubt on the authorities that the Act does not employ an effects doctrine: see *Trade Practices Commission v Australian Iron & Steel* (1990) 22 FCR 305 at 319-320 (Lockhart J). So much was conceded by the ACCC at both first instance and on appeal (FC[75]). Nevertheless, Dowsett and Edelman JJ appeared to doubt that proposition and to leave open the possibility that effects in Australia might be sufficient for purposes of s 4E (FC[75], [87]).

53 The test adopted by the majority amounts to an effects doctrine by another name. Two aspects of their Honours' reasoning makes that clear. The first is the majority's insistence that the markets in the present case were in Australia because Australian shippers were the airlines' customers "as a matter of economic substance" (FC[87]). What their Honours appear to mean by that statement is that it was Australian shippers that ultimately bore the cost of the conduct. That is plainly an inquiry based on effect, albeit that it is expressed in the language of market definition. The same is true of the majority's reliance on the statutory purpose of the Act, being to "enhance the welfare of Australians" (FC[7], [85], [168]). It cannot be that, by reason of that object, any conduct which harms Australian consumers is necessarily in a market in Australia. The observations of Yates J at FC[680] are, respectfully, correct: "there is no warrant for incorporating in the process of market definition an effect-based doctrine".

B. Foreign State Compulsion

54 It is not in dispute that Hong Kong law contained no general requirement that an airline impose a fuel surcharge, let alone a surcharge set by reference to an index mechanism (cf. FC[245]). Rather, airlines were permitted to do so, provided they complied with the requirements of Hong Kong law set out above.

55 The issue to be immediately confronted by Air New Zealand in this context is thus: how can an airline be said to have been compelled by Hong Kong law to make an application for approval of an index mechanism collectively, when it was perfectly free to make an individual application for approval of a static charge, or not to apply a surcharge at all, or simply to raise its overall rates?

56 The answer to that question lies, in Air New Zealand's submission, in appreciating that it is necessary to identify the point at which the presence or absence of compulsion is required to be addressed. Nearly all forms of compulsion may be avoided by making

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As the trial judge noted, the explanatory memorandum to that Bill indicated that the definition of a 'market' as a market "in Australia" was intended to limit the extraterritorial operation of the Act (TJ[211]): Explanatory Memorandum, *Trade Practices Bill 1974* (Cth), 19 [87]. Other than that statement, there is nothing in the legislative history that assists in identifying the intended extent of that limitation.

anterior choices which will remove or avoid some fact or circumstance giving rise to the compulsion. The question is thus whether the existence of those anterior choices is relevant to the identification of compulsion in the context of the particular legal question being considered.

57 In Air New Zealand's submission, the fact that a legal requirement may be avoided by choosing not to engage in a particular activity does not make it any less a 'requirement' in the sense relevant to Air New Zealand's argument. A requirement to obtain a license to conduct a particular form of business is no less a requirement because one has a choice as to whether to engage in that business at all.

58 To conclude otherwise would lead to absurd results: no company would ever relevantly be compelled to do anything by the law of a particular jurisdiction, because the company would always have a choice as to whether it did business in, or had some other relevant connection to, that jurisdiction. For the purposes of the arguments set out in the remainder of this section of these submissions, it is thus plain that the question of the existence of a legal requirement must be assessed at the point at which the requirement is imposed. The existence of an anterior choice that could be made not to pursue an otherwise lawful and legitimate objective, the result of which would be to avoid the requirement, is not relevant.

59 In this case, the ultimate question for the Court is whether the conduct alleged to have constituted the making and implementation of the 2002 Hong Kong Lufthansa Methodology Understanding and the Hong Kong Imposition Understanding contravened s 45 of the Act. That question falls to be resolved by reference to the particular terms of s 45 and, in Air New Zealand's submission, the issues raised by a consideration of that section confirm that the question of compulsion is to be addressed at the point at which Air New Zealand sought to pursue an otherwise lawful and legitimate objective.

60 Before turning to consider the particular provisions of s 45, however, it is necessary to address two particular aspects in the reasoning of the Court below.

61 First, both the trial judge and the Full Court held that Air New Zealand could have pursued its lawful and legitimate objective of charging a fuel surcharge calculated by reference to an index mechanism by means that did not require a collective application to be made.

62 Fuel surcharges were first imposed by airlines around the world in early 2000 in an attempt to recover, in part, the dramatically increased fuel costs to which airlines had become subject (TJ[500]). The imposition of a surcharge, rather than an increase in the global rate charged, helped to reassure customers that the increased cost of air cargo services, to the extent it was reflected in the surcharge, was solely a result of those increased fuel costs. Because the justification for the surcharge was the partial recovery of increased fuel costs, however, it was necessary for airlines not only to increase the amount of the surcharge with rising fuel costs, but also to decrease it when those costs fell. As such, the common practice of airlines was to vary the amount of the surcharge imposed by reference to an 'index' of fuel costs that was made available to their customers. (See generally TJ[492]-[504]). The flexibility and transparency of an index mechanism thus worked to the advantage of both airlines and their customers.

63 There is thus no dispute that the imposition of a fuel surcharge by reference to an index mechanism was, in itself, a legitimate commercial objective for an airline to have. The question is whether Hong Kong law permitted the realisation of that objective in a way that would not involve a contravention of s 45 of the Act.

64 The trial judge and the Full Court held that the answer to that question was 'yes'. That is to say, while the Courts below accepted that the CAD required a collective application if the approval sought was to charge fuel surcharges at pre-determined levels in accordance with an index mechanism, the Courts below held that airlines could pursue that objective by charging static surcharges for which approval had been granted by the CAD, where the amount of the static charge for which approval was sought was calculated by reference to an airline's own, internal, index mechanism. The Full Court also observed that the extra cost could simply be included in the airline's overall rates (see FC[245]).

65 The Courts below acknowledged that the alternative of seeking approval for static charges involved "some commercial inconvenience" (TJ[447(d)]; FC[240]) compared to a collective application for approval of an index mechanism, but held that, nonetheless, the two methods were alternative means for an airline to achieve the same result (i.e., "use an index mechanism to determine its surcharges" (TJ[436]). See also FC[243]).

66 In Air New Zealand's submission, however, the conclusion of the Courts below that the range of choices available to airlines meant that there was no relevant compulsion was in error.

67 Insofar as the ability to apply for approval of a static charge is concerned, an individual application for approval of static charges determined by reference to an in-house index did not simply involve "commercial inconvenience" compared to a collective application; the two processes yielded fundamentally different results. The substantive difference between an authorisation to charge fuel surcharges at pre-determined levels specified by an approved common index mechanism, and a series of authorisations to charge a static charge calculated by reference to an in-house fuel index, was, ultimately, a product of the differences between the time taken by the CAD to consider the two types of application, and the duration of any approval it granted. The following considerations demonstrate that those differences went well beyond "commercial inconvenience", and instead produced fundamentally different outcomes:

a) *First*, an airline applying for approval to charge a static charge determined by reference to its own index would presumably set the static charge by reference to the index on the day the application was submitted. When that application was determined, 60 to 90 days later, the amount of that static charge may no longer correspond to the amount indicated by the index. That fact alone may constitute a difficulty in justifying the proposed charge to the CAD, but at the very least, assuming approval were granted, it would not be an approval to charge the surcharge indicated by the index. An airline that obtained approval to charge fuel surcharges at pre-determined levels specified by an index mechanism, on the other hand, would always have approval to charge the surcharge indicated by the index.

b) *Secondly*, any approval to charge a static charge would be valid for a period of two months. Within that two-month period, the airline could not raise or lower

the amount of the surcharge. Any movements in the index in that period could thus not be reflected in the surcharge charged. It follows, once again, that the approval granted may not be an approval to charge the surcharge indicated by the index. Conversely, movements in the index would always be reflected in the surcharges charged by an airline that had obtained approval to charge fuel surcharges at pre-determined levels specified by an index mechanism.

68 It may thus be seen that an airline that wished to charge a surcharge in accordance with a fuel index could not (except by coincidence) achieve that objective by making a series of applications for authorisation to charge a static charge calculated by reference to an index: the approvals would lag behind the index (by as much as five months); would remain fixed in the face of movements in the index; and would thus either under-compensate or over-compensate the airline for its increased fuel costs. Further, because the CAD did not wish to monitor more than one index, and considered that shippers would be confused by multiple indices in the market, any use of an in-house index would necessarily have to be "private". The characteristics of flexibility and transparency, outlined above, that defined the use of an index mechanism, and made it attractive, both to airlines and their customers, would thus be lacking from the static charge option.

69 Similar considerations apply to the possibility of an airline simply raising its rates. A significant aspect of the ability of airlines to charge fuel surcharges was their transparency: the justification for both the surcharge itself, and its movements, was clearly stated. It would have been significantly more difficult for an airline to justify to its customers a general increase in its prices, and considerable skepticism would have attended any assurances that prices would fall when fuel costs decreased.

70 The differences between either a series of short-term approvals to charge a static charge determined by reference to an in-house index or a general increase in price, on the one hand, and a long term approval to charge pre-determined fuel surcharges by reference to an approved index mechanism on the other, cannot be characterized as matters of mere "commercial inconvenience". The differences are fundamental and substantial, with the result that the various outcomes are not equivalent.

71 For these reasons, it is Air New Zealand's submission that, if an airline wished to charge a fuel surcharge in accordance with an index mechanism, the only means of doing so was for it to join in a collective application for approval to the CAD. The Courts below erred in finding otherwise, and thus erred in finding that Hong Kong law did not relevantly compel Air New Zealand.

72 Secondly, the Full Court appears to have placed some weight on the fact that the CAD's requirements were an "administrative practice" adopted as a matter of "policy" (FC[247]). The Full Court thus appears to have assumed that the practice was not "mandatory", and that the CAD "might depart" from it (FC[248]). In that regard, it is sufficient to note that the administrative practices of the CAD must be presumed to be valid, and the possibility of departure from it is nowhere supported by the evidence (and formed no part of the ACCC's case below). More fundamentally, however, the question of the existence of legal compulsion must be addressed by reference to the law as it is. It is no answer to suggest that Air New Zealand should have agitated for a change in the CAD's policies or practices.

73 In all of those circumstances, it is Air New Zealand's submission that it did not contravene s 45 of the Act because (and see generally TJ[651]-[654]; FC[233]):

a) Parties can only "make" an arrangement, or "arrive at" an understanding, by voluntary conduct. An arrangement or understanding that is the product of involuntary conduct, in the sense that it was required by law, is brought about by operation of that law, and not "made" or "arrived at" by the parties.

b) To the extent that an arrangement is "made", or an understanding is "arrived at", by reason of conduct required by foreign law, the entity doing the "making" or "arriving at" is the foreign government, and not the parties to the arrangement or understanding.

c) There is no "arrangement" or "understanding" between parties who have been compelled to act as they have. Rather, there is simply compliance with the law's requirements.

d) To the extent that compliance with foreign law does result in an "arrangement" or "understanding", no provision of them can be said to have the purpose, or to have had or have been likely to have the effect, of fixing, controlling or maintaining the price of goods or services within the meaning of s 45A. It is the law, and not the provisions of arrangements made or understandings arrived at in compliance with it, that has the relevant purpose, effect or likely effect.

74 Each of those arguments is addressed in more detail below.

The "Making" of an Arrangement, or "Arriving at" an Understanding

75 The words "make" and "arrive at" in s 45 of the Act convey a requirement that, in order for conduct to constitute a contravention of that section, it must be voluntary (in the sense that there exists a choice as to whether to engage in that conduct or not). The statute does not focus on a passive outcome or result (the arrangement or understanding), but rather, by the use of those active verbs, directs attention to the actions of the corporation that brought the relevant arrangement or understanding into existence. It follows from that focus on the conduct of the corporation in question that before liability will attach, the corporation must have had a choice as to whether to engage in the impugned conduct. Ultimately, a corporation cannot be said to have "made" an arrangement, or "arrived at" an understanding, if its conduct was mandated by foreign law.

76 The Courts below appear to have regarded conduct as voluntary in the relevant sense if a person could choose not to pursue the end that attracted the legal requirement to engage in the relevant conduct. In Air New Zealand's submission, however, when a person is lawfully entitled to pursue a particular end or objective (in this case, the charging of a surcharge calculated in accordance with an index mechanism), that person does not comply with legal obligations that attach to the pursuit of that end or objective as a matter of choice in any relevant sense.

77 The correct question is whether a person has a choice between means of achieving an end or objective; not whether they have a choice about achieving the end or objective at all. If nothing else, a corporation can, in nearly all instances, "choose" not to subject itself to the law of a foreign nation by choosing not to do business in that country. The

simple fact that Air New Zealand chose to operate out of Hong Kong does not mean that every step it took in compliance with Hong Kong law was voluntary in the relevant sense.

78 So, to say that Air New Zealand "was not compelled to do anything" is strictly, but unhelpfully, true. Having chosen to conduct business in Hong Kong, however, and having determined, as part of the conduct of that business, that it wished to impose a fuel surcharge calculated by reference to an index mechanism, Air New Zealand was, in the relevant sense, compelled to join in a collective application to the CAD. For those reasons, Air New Zealand did not "make" an arrangement, or "arrive at" an understanding.

"Making" etc by a Corporation

79 Section 45 of the Act prohibits a *corporation* from "making" an arrangement, or "arriving at" an understanding. Even if it were to be held, contrary to the previous submission, that conduct required by foreign law could constitute "making" or "arriving at" within the meaning of the section, it could not be said that it was the corporation complying with foreign law that was doing the "making" or "arriving at".

80 As was observed in *Interamerican Refining Corp v Texaco Maracaibo Inc* 307 F Supp 1291 at 1298 (D Del, 1970):

> When a nation compels a trade practice, firms there have no choice but to obey. Acts of business become effectively acts of the sovereign.

81 Once it is accepted that the requirement for a collective application was a requirement of the Hong Kong government, it follows that it was the Hong Kong government that required the consensus that was alleged to constitute an arrangement or understanding within the meaning of s 45 of the Act. In those circumstances, the person "making" the arrangement, or "arriving at" the understanding, was the government of Hong Kong, and not Air New Zealand.

"Arrangement" or "Understanding"

82 The concepts of "arrangement" and "understanding" within the meaning of s 45 of the Act are limited to "consensual dealings" only: *ACCC v Leahy Petroleum* (2007) 160 FCR 321 at [39]. It follows that, as Smithers J observed in *Top Performance Motors Pty Ltd v Ira Berk (Queensland) Pty Ltd* (1975) 24 FLR 286 at 291, there must be:

> 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.

83 Where collective behaviour is required by law, the relevant consensus, or meeting of minds, is not present. The parties do not undertake or assume any obligation towards one another; they simply act so as to comply with a legal requirement. Here, having legitimately, and independently, determined that it wished to impose a fuel surcharge determined by reference to an index mechanism, Air New Zealand was required by law (a) to make a collective application to the CAD with all other airlines; and (b) to charge only that surcharge which the CAD approved.

84 For the reasons given above, Air New Zealand was, in those circumstances, subject to a legal obligation to do the very things that are alleged to constitute a contravention of s 45 of the Act. The existence of its own legitimate objective to impose a surcharge calculated by reference to an index mechanism meant that it had an obligation to act collectively with other airlines in making an application to the CAD, and an obligation to charge only in accordance with the CAD's approval. Air New Zealand thus assumed no duty, moral or legal, towards any other airline in connection with that conduct.

85 In those circumstances, it is simply not possible to conclude that Air New Zealand was a party to any "arrangement" or "understanding" within the meaning of s 45 of the Act.

"Purpose" of Fixing, Controlling or Maintaining Price

86 Even if, contrary to the previous submission, the 2002 Hong Kong Lufthansa Methodology Understanding and the Hong Kong Imposition Understanding were "arrangements" or "understandings" within the meaning of s 45 of the Act, no provision of them can be said to have had the "purpose" of fixing, controlling or maintaining the price of services within the meaning of s 45A.

87 The reference to "purpose" in s 45A is to the subjective purpose of the parties to the contract, arrangement or understanding: *News Limited v South Sydney District Rugby League Football Club Limited* (2003) 215 CLR 563 at [18], [41], [61]-[63], [211]-[212]. Moreover, the effect of s 4F of the Act is that the relevant "purpose" must be a "substantial purpose". Thus, putting questions of "effect" and "likely effect" to one side, s 45A applies only where the subjective purpose of the impugned provision of the relevant contract, arrangement or understanding is to fix, control or maintain prices.

88 It was thus not possible to conclude that any airline had a subjective purpose proscribed by s 45A in making the 2002 Hong Kong Lufthansa Methodology Understanding or the Hong Kong Imposition Understanding. In relation to the former, it was simply not possible to infer the proscribed purpose from the mere fact of the collective application. Similarly, in relation to the latter, the most obvious inference was that the airlines' purpose was to comply with Hong Kong law by only charging the approved surcharge.

"Fixing, Controlling or Maintaining" Price

89 Read together, ss 45 and 45A of the Act relevantly proscribe the making of a contract, arrangement or understanding containing a provision which has the purpose, effect or likely effect of "fixing, controlling or maintaining" the price of a good or service. It is therefore necessary to identify with precision the *provision* of the relevant contract, arrangement or understanding said to have that proscribed purpose or effect: see *Visy Paper Pty Ltd v Australian Competition and Consumer Commission* (2003) 216 CLR 1 at [28]-[32].

90 In a regulated industry where prices must be approved or set by the regulator, it is doubtful that any contract, arrangement or understanding between competitors in relation to prices could be said to fix, control or maintain prices within the meaning of s 45A of the Act. It is the regulator who fixes the price in any relevant sense because no price can be charged without approval, and any stability or diversity in prices in the

market is at the discretion of the regulator. Section 45A has no relevant operation in such circumstances because any contract, arrangement or understanding between competitors could not of itself restrain any price competition that would otherwise exist. Indeed, with or without the impugned contract, arrangement or understanding, the degree of price competition in the affected market is the product of the actions of the regulator.

PART VII APPLICABLE CONSTITUTIONAL AND STATUTORY PROVISIONS

91 *Trade Practices Act 1974* (Cth), ss 4E, 45, 45A.

PART VIII ORDERS SOUGHT

92 The Appellant seek the following orders:

a) The appeal be allowed.

b) Orders 1 to 5 of the Full Court of the Federal Court of Australia made in proceeding NSD1331/2014 on 31 March 2016 be set aside.

c) In lieu thereof:

i) the appeal to the Full Federal Court of Australia be dismissed;

ii) the ACCC to pay the costs of Air New Zealand Ltd in proceeding NSD1331/2014.

d) The Respondent pay the Appellant's costs of this appeal.

PART IX TIME FOR ORAL ARGUMENT

93 It is estimated that 2 hours will be required for the presentation of the oral argument of the Appellant.

Date: 18 November 2016

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Trade Practices Act 1974

Act No. 51 of 1974 as amended

This compilation was prepared on 13 November 2006
taking into account amendments up to Act No. 131 of 2006

Volume 1 includes: Table of Contents
Sections 1 – 110

The text of any of those amendments not in force
on that date is appended in the Notes section

The operation of amendments that have been incorporated may be affected by application provisions that are set out in the Notes section

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Volume 3 includes: Note 1
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Table A

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Attorney-General's Department, Canberra

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.

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.

4F References to purpose or reason

(1) For the purposes of this Act:

(a) a provision of a contract, arrangement or understanding or of a proposed contract, arrangement or understanding, or a covenant or a proposed covenant, shall be deemed to have had, or to have, a particular purpose if:

(i) the provision was included in the contract, arrangement or understanding or is to be included in the proposed contract, arrangement or understanding, or the covenant was required to be given or the proposed covenant is to be required to be given, as the case may be, for that purpose or for purposes that included or include that purpose; and

(ii) that purpose was or is a substantial purpose; and

(b) a person shall be deemed to have engaged or to engage in conduct for a particular purpose or a particular reason if:

(i) the person engaged or engages in the conduct for purposes that included or include that purpose or for reasons that included or include that reason, as the case may be; and

(ii) that purpose or reason was or is a substantial purpose or reason.

(2) This section does not apply for the purposes of subsections 45D(1), 45DA(1), 45DB(1), 45E(2) and 45E(3).

Part IV—Restrictive trade practices

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

(1) If a provision of a contract made before the commencement of the *Trade Practices Amendment Act 1977*:

(a) is an exclusionary provision; or

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

that provision is unenforceable in so far as it confers rights or benefits or imposes duties or obligations on a corporation.

(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.

(4) For the purposes of the application of this section in relation to a particular corporation, a provision of a contract, arrangement or understanding or of a proposed contract, arrangement or understanding shall be deemed to have or to be likely to have the effect of substantially lessening competition if that provision and any one or more of the following provisions, namely:

(a) the other provisions of that contract, arrangement or understanding or proposed contract, arrangement or understanding; and

(b) the provisions of any other contract, arrangement or understanding or proposed contract, arrangement or understanding to which the corporation or a body corporate related to the corporation is or would be a party;

together have or are likely to have that effect.

(5) This section does not apply to or in relation to:

(a) a provision of a contract where the provision constitutes a covenant to which section 45B applies or, but for subsection 45B(9), would apply;

(b) a provision of a proposed contract where the provision would constitute a covenant to which section 45B would apply or, but for subsection 45B(9), would apply; or

(c) a provision of a contract, arrangement or understanding or of a proposed contract, arrangement or understanding in so far as the provision relates to:

(i) conduct that contravenes section 48; or

(ii) conduct that would contravene section 48 but for the operation of subsection 88(8A); or

(iii) conduct that would contravene section 48 if this Act defined the acts constituting the practice of resale price maintenance by reference to the maximum price at which goods or services are to be sold or supplied or are to be advertised, displayed or offered for sale or supply.

(6) The making of a contract, arrangement or understanding does not constitute a contravention of this section by reason that the contract, arrangement or understanding contains a provision the giving effect to which would, or would but for the operation of

subsection 47(10) or 88(8) or section 93, constitute a contravention of section 47 and this section does not apply to or in relation to the giving effect to a provision of a contract, arrangement or understanding by way of:

(a) engaging in conduct that contravenes, or would but for the operation of subsection 47(10) or 88(8) or section 93 contravene, section 47; or

(b) doing an act by reason of a breach or threatened breach of a condition referred to in subsection 47(2), (4), (6) or (8), being an act done by a person at a time when:

(i) an authorization under subsection 88(8) is in force in relation to conduct engaged in by that person on that condition; or

(ii) by reason of subsection 93(7) conduct engaged in by that person on that condition is not to be taken to have the effect of substantially lessening competition within the meaning of section 47; or

(iii) a notice under subsection 93(1) is in force in relation to conduct engaged in by that person on that condition.

(7) This section does not apply to or in relation to a contract, arrangement or understanding in so far as the contract, arrangement or understanding provides, or to or in relation to a proposed contract, arrangement or understanding in so far as the proposed contract, arrangement or understanding would provide, directly or indirectly for the acquisition of any shares in the capital of a body corporate or any assets of a person.

(8) This section does not apply to or in relation to a contract, arrangement or understanding, or a proposed contract, arrangement or understanding, the only parties to which are or would be bodies corporate that are related to each other.

(9) The making by a corporation of a contract that contains a provision in relation to which subsection 88(1) applies is not a contravention of subsection (2) of this section if:

(a) the contract is subject to a condition that the provision will not come into force unless and until the corporation is granted an authorization to give effect to the provision; and

(b) the corporation applies for the grant of such an authorization within 14 days after the contract is made;

but nothing in this subsection prevents the giving effect by a corporation to such a provision from constituting a contravention of subsection (2).

45A Contracts, arrangements or understandings in relation to prices

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

(2) Subsection (1) does not apply to a provision of a contract or arrangement made or of an understanding arrived at, or of a proposed contract of arrangement to be made or of a proposed understanding to be arrived at, for the purposes of a joint venture to the extent that the provision relates or would relate to:

(a) the joint supply by 2 or more of the parties to the joint venture, or the supply by all the parties to the joint venture in proportion to their respective interests in the joint venture, of goods jointly produced by all the parties in pursuance of the joint venture;

(b) the joint supply by 2 or more of the parties to the joint venture of services in pursuance of the joint venture, or the supply by all the parties to the joint venture in proportion to their respective interests in the joint venture of services in pursuance of, and made available as a result of, the joint venture; or

(c) in the case of a joint venture carried on by a body corporate as mentioned in subparagraph 4J(a)(ii):

(i) the supply by that body corporate of goods produced by it in pursuance of the joint venture; or

(ii) the supply by that body corporate of services in pursuance of the joint venture, not being services supplied on behalf of the body corporate by:

(A) a person who is the owner of shares in the capital of the body corporate; or

(B) a body corporate that is related to such a person.

(4) Subsection (1) does not apply to a provision of a contract, arrangement or understanding, or of a proposed contract, arrangement or understanding, being a provision:

(a) in relation to the price for goods or services to be collectively acquired, whether directly or indirectly, by parties to the contract, arrangement or understanding or by proposed parties to the proposed contract, arrangement or understanding; or

(b) for the joint advertising of the price for the re-supply of goods or services so acquired.

(5) For the purposes of this Act, a provision of a contract, arrangement or understanding, or of a proposed contract, arrangement or understanding, shall not be taken not to have the purpose, or not to have or to be likely to have the effect, 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 by reason only of:

(a) the form of, or of that provision of, the contract, arrangement or understanding or the proposed contract, arrangement or understanding; or

(b) any description given to, or to that provision of, the contract, arrangement or understanding or the proposed contract, arrangement or understanding by the parties or proposed parties.

(6) For the purposes of this Act but without limiting the generality of subsection (5), a provision of a contract, arrangement or understanding, or of a proposed contract, arrangement or understanding, shall not be taken not to have the purpose, or not to have or to be likely to have the effect, 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 by reason only that the provision recommends, or provides for the recommending of, such a price, discount, allowance, rebate or credit if in fact the provision has that purpose or has or is likely to have that effect.

(7) For the purposes of the preceding provisions of this section but without limiting the generality of those provisions, a provision of a contract, arrangement or understanding, or of a proposed contract, arrangement or understanding, shall be deemed to have the purpose, or to have or to be likely to have the effect, 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 as mentioned in subsection (1) if the provision has the purpose, or has or is likely to have the effect, of fixing, controlling or maintaining, or providing for the fixing, controlling or maintaining of, such a price, discount, allowance, rebate or credit in relation to a re-supply of the goods or services by persons to whom the goods or services are or would be supplied 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.

(8) The reference in subsection (1) to the supply or acquisition of goods or services by persons in competition with each other includes a reference to the supply or acquisition of goods or services by persons who, but for a 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 each other in relation to the supply or acquisition of the goods or services.

45B Covenants affecting competition

(1) A covenant, whether the covenant was given before or after the commencement of this section, is unenforceable in so far as it confers rights or benefits or imposes duties or obligations on a corporation or on a person associated with a corporation if the covenant has, or is likely to have, the effect of substantially lessening competition in any market in which the corporation or any person associated with the corporation supplies or acquires, or