IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY **NO S245 OF 2016**

BETWEEN: **AIR NEW ZEALAND LIMITED (ARBN 000 312 685)**
Appellant

AND: **AUSTRALIAN COMPETITION AND CONSUMER COMMISSION**
Respondent

SUBMISSIONS OF THE RESPONDENT

(to be read with the Respondent's submissions in S 248 of 2016)

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PART I FORM OF SUBMISSIONS

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

PART II ISSUES

2. The issues in dispute may be divided into two categories.

3. **Market**. The appellant's submissions (**AS**) [2] – [3] identify the market issues at an unhelpful level of generality. The real question for the Court is whether the markets for the supply of air cargo services between origin ports in Hong Kong, Singapore and Indonesia to destination ports in Australia found by the trial judge were markets "in Australia" for the purposes of s 4E of the *Trade Practices Act 1974* (Cth) (**TPA**).

4. That question is to be answered with due regard to a number of uncontroverted matters: (a) each element of the air cargo services (transportation, ground handling and enquiry services) was provided, in large part, in Australia; (b) competition in each market physically took place in Australia; (c) participants in each market were located in Australia; (d) demand for the services was derived from Australia; and (e) the services were marketed to large importers in Australia.

5. **Foreign State compulsion**. The submissions of the respondent (**ACCC**) on "foreign state compulsion" issues are contained in its ACCC Garuda submissions at [5], [11], [35]-[60]. This submission does not repeat that material.

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

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

PART IV FACTS

7. Air NZ's summary of the facts is incomplete.

Market

8. The trial judge (Perram J) found that the appellant (**Air NZ**) and PT Garuda Indonesia Ltd (**Garuda**) had each reached a number of understandings with their competitors to fix surcharges for the carriage of cargo on flights to ports in Australia. His Honour found that each of those understandings would have contravened s 45(2) of the TPA due to the deeming provision in s 45A if the airlines competed in a market in Australia.

9. Perram J found that the relevant markets in which Air NZ and Garuda competed were route specific markets for the services of carrying air cargo from individual origin ports in each of Singapore, Hong Kong and Indonesia to individual destination ports in Australia. For convenience, both the trial judge and Full Court focused upon routes between Hong Kong and ports in Australia but their reasoning applied equally to routes from Singapore and Indonesia to Australia.

10. As individual routes, Perram J found that there were no demand or supply side substitutes for each particular origin and destination: TJ [234] – [235]. For

example, air cargo services between Hong Kong and Sydney were not substitutable for services between Hong Kong and Melbourne or between Singapore and Sydney.

11. Perram J found that the air cargo services comprised: (a) transporting cargo from a port of origin to a port of destination; (b) ground handling services at both origin and destination airports; and (c) enquiry services for tracing delayed or lost shipments and dealing with issues arising from damaged cargo at destination: TJ [254] - [256]. The air cargo services were supplied on a consolidated basis and were described by the trial judge as a "suite of services": TJ [321].

12. Contrary to the impression given by Air NZ's summary of the facts, Perram J found that the markets were connected with Australia in several fundamental respects.

13. Perram J found that each part of the suite of air cargo services (transportation, ground handling and enquiry) was provided, *inter alia*, in Australia: TJ [257]. Perram J also held that competition in the market for air cargo services between Hong Kong and Australian airports "physically took place in Australia". At TJ [313], his Honour said:[1]

> I accept that a separate market for air cargo services existed for the carriage of cargo between Hong Kong and each airport in Australia. Part of the service provided was provided in Australia in the form of carriage through Australian air space, ground handling services at destination airports and the service of handling enquiries about lost and damaged cargo. There is no doubt that the airlines competed against each other in providing these services and that the competition physically took place in Australia.

14. Further, Perram J held that the participants in the various markets into Australia included large importers in Australia: TJ [263]. The "airlines tousled to obtain" the custom of these importers, who had the capacity to influence or even direct the decision as to which airline was to be used to transport goods from Hong Kong to Australian ports: TJ [313], [314], [290].[2] Such decisions were likely to be made in Australia: TJ [309]. It followed that there was demand in Australia for the air cargo services provided by Air NZ and its competitors.[3]

15. As to AS [12], airlines participating in the air cargo services market had direct contact with large importers in Australia, whom the airlines regarded as the ultimate source of their business: TJ [221], [272], [291], [292], [299]. Airlines would adopt sales and marketing strategies directed to shippers promoting the airfreight services they offered: TJ [293]. Airlines would also "compete for volumes of cargo directly from large shippers" and airlines "considered

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1 See also TJ [320].

2 See also TJ [308]: "it is obvious, in my opinion, that on any given route (of sufficient size) there would be substantial importers and exporters for whom it would be natural for the airlines to compete."

3 Note also that TJ [313] falls under the heading "Source of demand in Australia". See also TJ [287]: "I conclude that across the Asia Pacific area the airlines recognised that shippers had demand for capacity."

themselves to be carrying large loads or volumes for particular shippers": TJ [272], [274].

16. As to AS [11], Perram J did not find that the only place where the complete package of services could be acquired and obtained was at origin. Rather, the trial judge found that "the service of taking possession of the cargo" took place at origin: TJ [319]. As to AS [15], just as an airline had to be present at the port of origin to be selected to provide the air cargo services, the airline had to have access to, and utilise, each relevant port of destination in Australia in order to perform the services.

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17. No findings of fact are contested by the parties on this appeal. Indeed on all critical matters save the ultimate question co-ordinate findings were made by both the trial judge and the Full Court. It follows that the appeal is to be determined by reference to the markets defined by Perram J in the manner summarised above.

PART V LEGISLATIVE PROVISIONS

18. The ACCC relies upon Air NZ's statement of legislative provisions.

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PART VI ARGUMENT

Market "in Australia"

A1 - Summary

19. The markets for air cargo services were defined by Perram J in an orthodox way and by reference to substitution.

20. The ultimate question for the Full Court, and the critical question for this Court on the market issue, was whether the markets (as found) satisfied the territorial requirement in s 4E of the TPA: namely, whether they were "in Australia". In answering that question, it was (and is) common ground that a market may be "in Australia" even if it is also elsewhere.

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21. The majority was right to conclude that each market (as found) was "in Australia". In reaching that conclusion, it was appropriate to have regard to all features of the markets, including the places where the relevant services were provided and marketed, the location of physical competition in the market, the location of participants in the market, and the location of customer demand (each of which extended to Australia).

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22. Air NZ seeks to avoid this outcome by construing "in Australia" so as to refer to the place or places where the "substitutable sources of supply" are located. This construction is evidently intended to adopt, albeit in different language, the trial judge's focus on the place where a "switching decision" (that is, a decision by a customer to acquire equivalent services from a rival firm) takes effect. Yates J, in dissent, adopted the same analysis. Because Perram J found that place to be located at the port of origin, Air NZ submits that no part of the markets were located in Australia.

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23. Air NZ's construction finds no support in the text of s 4E, in the extrinsic material, or in prior authority. And while Air NZ places great emphasis on the centrality of substitution to market definition, Perram J had already employed

that device to define the dimensions of the relevant market. In addressing that task there is no reason to leave out of account the matters relied on by the Full Court, based on the findings of Perram J. On the contrary, regard to those matters is a necessary part of the flexible, purposive and evaluative exercise that, on orthodox principles, is involved in market definition. This court has repeatedly warned against adopting an overly exact or rigid methodology in this context. Air NZ's submissions suffer from both these flaws.

24. Finally, Air NZ's construction fails to pay due regard to the importance ascribed by the text of the relevant provisions of the TPA to the provision of services in the market. Here, there can be no doubt that the relevant air cargo services were "provided" (and therefore "supplied") in Australia, among other places.

A2 - Legislative context

25. The expression "market in Australia" arises for consideration due to the combined operation of ss 45, 45A and 4E of the TPA. In the present case, the ACCC alleged that Air NZ and Garuda breached s 45(2)(a)(ii) and 45(2)(b)(ii) by, *inter alia*, making a contract or arrangement, or arriving at an understanding, where a provision of the contract, arrangement or understanding had the purpose, or would have or be likely to have the effect, of substantially lessening competition.

26. The ACCC relied upon s 45A, which deemed a provision of a contract, arrangement or understanding that fixed, controlled or maintained the price for goods or services supplied by the parties to the contract, arrangement or understanding to be a provision to which s 45 referred where the parties to the contract, arrangement or understanding were in "competition" with each other.

27. The reference to "competition" in turn directed attention to s 45(3), which relevantly defined "competition" for the purposes of ss 45 and 45A to mean "competition in any market" in which a corporation that is a party to the arrangement or understanding "supplies", or is likely to "supply", "services".

28. "Supply" was defined, in relation to services, to include provide: s 4(1). "Services" was defined to include any rights or benefits that are, or are to be, provided in trade or commerce, including rights or benefits that are, or are to be, provided under a contract for or in relation to the performance of work: s 4(1).

29. It follows that the provision of air cargo services in Australia constituted the supply of those services for the purposes of the TPA.

30. Section 4E provided that:

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

31. As McHugh J recognised in *Boral Besser Masonry Ltd v Australian Competition & Consumer Commission*[4] (***Boral***), s 4E does not "define what a market is for the purposes of the Act".[5] Rather, it performs two different and distinct functions.

32. In its first limb, s 4E imposes a territorial requirement through the use of the opening words "*means* a market in Australia". In combination with s 5, s 4E thereby regulates the extent to which Part IV may operate extra-territorially.[6]

33. *Secondly*, s 4E identifies matters to which regard must be had in defining a market by inclusive and alternative language ("substitutable for or otherwise competitive with"). Importantly, the section refers to goods or services that are substitutable but it does not require that consideration to be confined to the narrow concept of substitution reflected in the trial judge's and Yates J's focus on the place where the "switching decision" was given effect: see further at [69]-[81] below. That s 4E also refers to product substitutability inclusively and alongside the expression "otherwise competitive with", requires or at least permits attention to the question of competition more widely.[7]

34. This construction of s 4E is consistent with relevant extrinsic material, to which the majority properly had regard: FC [80] – [81]. The Explanatory Memorandum to the Bill that inserted s 4E in its present form[8] noted that s 4E defined a "market" to include substitutable or competitive goods or services. The Second Reading Speech to the Bill referred to a 1976 Trade Practices Act Committee Report (**Swanson Report**),[9] which had noted that market is determined by considering:[10]

> the relationship between such factors as price, product substitutability, desired use and distance from supply, to name some. Because of the variable nature of such factors, the boundaries of product and geographic markets are necessarily flexible.

35. The Swanson Report had also rejected any attempt exhaustively to define "market" given the fact that "[n]o definition could produce a formula capable of certainty, having regard to the variable nature of the factors" identified above. The Report disavowed the utility of "artificial rules designed to achieve what we would suggest is an illusory certainty". The Report did, however, consider there was utility in requiring that "regard" be had to product substitution when considering the nature and scope of a market.

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4 (2003) 215 CLR 374.

5 *Boral* at [247].

6 Explanatory Memorandum, *Trade Practices Bill 1974* (Cth), [87]; see TJ [211].

7 While AS [fn6] refers to *Seven Network v News Ltd* (2009) 182 FCR 160 at [621] for the proposition that "or otherwise competitive with" does not expand market definition beyond substitutability, the Court was careful to note that the question was not argued in that case. There are decisions to the contrary: see *Queensland Wire Industries Pty Ltd v Broken Hill Proprietary Co Ltd (1989)* 167 CLR 177 at 199 per Dawson J; *News Ltd v Australian Rugby Football League Ltd* (1996) 58 FCR 447, per Burchett J at 478 (not challenged on appeal, (1996) 64 FCR 410 at 563); *Regents Pty Ltd v Subaru (Aust) Pty Ltd* (1998) 84 FCR 218 at 237 per RD Nicholson J.

8 Save for the words "unless the contrary intention appears", which were inserted in 1990 by the *Trade Practices (Misuse of Trans-Tasman Market Power) Act 1990* (Cth).

9 *Swanson Report*: see Trade Practice Act Review Committee, *Report to the Minister for Business and Consumer Affairs* (Australian Government Publishing Service, Canberra, 1976).

10 The relevant paragraphs of the Swanson Report are extracted at FC [80].

A3 - Defining the market

36. In order to determine whether a market is "in Australia" for the purposes of s 4E, it is first necessary to define the market. So much was recognised by the trial judge and by the Full Court: TJ [212]; FC [72]-[73]. Air NZ equally accepts that "the necessary predicate step to determining if a market is 'in Australia' ... is to define the market according to orthodox market definition principles": AS [32].

37. **"Market"**. The word "market" is "not susceptible of precise comprehensive definition".[11] However, it has been described, using a variety of spatial metaphors, as "an area of potential close competition in particular goods and/or services and their substitutes",[12] the "sphere within which price is determined",[13] a "field of rivalry" and a "field of actual and potential transactions between buyers and sellers".[14]

38. Each of these descriptions is useful in understanding the concept of "market" in s 4E of the Act. Each seeks to identify the boundaries, both functional and geographic, in which competition takes place: "[t]he process of market definition consists in seeking to isolate the area of effective competition in which the parties operate".[15]

39. While Air NZ fixes upon various short-hand descriptions used by the majority in their discussion of "market", the use of those words does not disclose error: *contra* AS [20]. In particular, there is no relevant distinction between describing the market as the "'space' in which the competitive process takes place" (FC [124]) and using descriptors such as "sphere", "area" or "field" in the manner set out above.

40. **A flexible and evaluative process**. Air NZ is also critical of the majority's recognition that market definition involves a flexible assessment of a range of relevant matters: cf AS [20]. However, it is established that the identification of a market involves "value judgments about which there is some room for legitimate differences of opinion".[16] In *Queensland Wire Industries Pty Ltd v Broken Hill Proprietary Co Ltd* (1989) 167 CLR 177 ***(Queensland Wire)***, Deane J further noted at 196 that the definition of a market:

> will commonly involve assessment of the relative weight to be given to competing considerations in relation to questions such as the extent of product substitutability and the significance of competition between traders at different stages of distribution.

41. In the same case, Dawson J described the process of market definition as "inexact" (at 199) and cautioned against adopting "[t]oo rigid an approach in defining a market" (at 200).

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11 *Queensland Wire* at 195 (Deane J).

12 *Queensland Wire* at 195 (Deane J).

13 *Queensland Wire* at 199 (Dawson J).

14 *Queensland Co-operative Milling Association Ltd* (1976) 8 ALR 481 at 517.

15 *QIW Retailers Ltd v Davids Holdings Pty Ltd [No 3]* (1993) 42 FCR 255 at 267 (Spender J, quoting the *Second Annual Report* (1975) of the Trade Practices Commission).

16 *Queensland Wire* at 195-6 (Deane J).

42. These observations of Deane and Dawson JJ were echoed by French J (with whom Spender J and O'Loughlin J each agreed) in *Singapore Airlines Ltd v Taprobane Tours WA Pty Ltd* (1991) 33 FCR 158 (***Taprobane***) at 174:[17]

> In competition law, ["market"] has a descriptive and purposive role. It involves fact-finding together with evaluative and purposive selection. ...It involves a choice of the relevant range of activity by reference to economic and commercial realities and the policy of the statute. To the extent that it must serve statutory policy, the identification will be evaluative and purposive as well as descriptive.

43. More recently, this Court has recognised that the expression "market" is one that is "not precise or formally exact"[18] (although the appellants here contend for a need for precision,[19] often in reliance on formal considerations[20]). Put another way, market definition is "a focussing process and the court must select what emerges as the clearest picture of the relevant competitive process in the light of commercial reality and the purposes of the law."[21] An evaluative approach recognises that "competition may take many forms" and that its effects may be immediate or delayed.[22] An evaluative approach also recognises that market definition is "not an exact physical exercise to identify a physical feature of the world ... [r]ather, it is the recognition and use of an economic tool or instrumental concept".[23]

44. These authorities reflected principles as to market definition of long standing. In the first edition of Donald and Heydon, *Trade Practices Law* (1978) the authors said (at 92):

> The market is where sellers meet buyers. It is the mechanism accommodating the transactions which pass goods and services from one person to another. It also encompasses the events leading up to those transactions. There are two streams of prior conduct meeting at the point of final transaction: the conduct of the seller and the conduct of the buyer. ***Both streams must be considered*** in order to form a picture of the market.
>
> The dimensions of a market are real, not theoretical, and to define those dimensions the best evidence will come from the people who work in the market: the marketing managers and salesmen, the market analysts and researchers, the advertising account executives, the buyers or purchasing officers, the product designers and evaluators. Their records will establish the dimensions of the market; they will show the figures being kept of competitors' and ***customers' behaviour*** and the particular products being followed. They will show the ***potential customers whom salesmen are***

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17 French J refers to the observations of Deane and Dawson JJ at 178 of *Taprobane*.

18 *NT Power Generation Pty Ltd v Power and Water Authority* (2004) 219 CLR 90 at [68].

19 AS Air NZ [37], [38].

20 AS GA [52], [53].

21 *Taprobane* at 178 (French J).

22 See *Seven Network Ltd v News Ltd* (2009) 182 FCR 160 at [670] (Dowsett and Lander JJ).

23 *Australian Competition and Consumer Commission v Liquorland (Australia) Pty Ltd* [2006] ATPR 42-123 at [429] (Allsop J); approved in *Australian Competition and Consumer Commission v Metcash Trading Ltd* (2011) 198 FCR 297 at [244].

> ***visiting***, the suppliers whom purchasing officers regularly contact, products against which advertising is directed, the price movements of other suppliers which give rise to intra-corporate memoranda, the process by which products are bought, ***what buyers must seek*** in terms of quantities, delivery schedules, price flexibility, ***why accounts are won and lost***. (emphasis added)[24]

45. The authors go on to say that "the courts must never allow the law to dictate what the market is; the task of the court is to ensure that the real market is revealed to it." (at 94).

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46. As these authorities show, the fact that the process of market definition is flexible, evaluative, and involves consideration of a wide range of factors, does not mean that the concept of "market" lacks content or is "at large". At no stage did the majority below suggest otherwise: *contra* AS [31], [36].

Markets are not defined solely by reference to a narrow conception of product substitution

47. It is with the above principles in mind that the relevance of substitution to market definition is to be assessed.

20 48. It has always been common ground that the relevant markets were to be defined by reference to product substitution, and that substitution plays a central role in the assessment of market power. As Mason CJ and Wilson J observed in *Queensland Wire* (at 188):

> Section 4E directs that a market is to be described to include not just the defendant's product but also those which are "substitutable for, or otherwise competitive with", the defendant's product. This process of defining a market by substitution involves both including products which compete with the defendant's and excluding those which because of
30 differentiating characteristics do not complete.

49. Both Perram J and the Full Court adopted the same approach. As noted further below, the markets for air cargo services found by the trial judge were defined by reference to product substitution. Perram J's findings were not disturbed on appeal. The majority was also careful to observe that "market definition primarily addresses substitution": FC [117].

50. However, it is important not to take the reference to substitution in s 4E as exhaustive. The text makes this plain. *First,* it is an inclusive definition.
40 *Secondly,* at least as a matter of text, substitutability is subordinate to the concept of competition: "or otherwise competitive with".[25] *Thirdly,* the evident intent of the inclusive language is to confirm a broader definition of market than might otherwise be adopted. And as Heydon observes, s 4E:

> may do no more than raise some of the questions that must be asked in leading the evidence. It says that the market must be in Australia. When used of goods and services, "market" is to include substitutable or otherwise competitive goods and services. This raises some questions

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24 See also *Boral* at [257] per McHugh J.

25 Cf *Seven Network v News Ltd* (2009) 182 FCR 160 at [621].

about mapping the product dimensions of the market but it provides no answers. Nor would it be proper for the Act to do so.[26]

51. In *Boral,* McHugh J observed that s 4E invites attention to the concepts of "substitution and competition": cf AS [27].[27] To similar effect are the remarks of Deane J and Dawson J in *Queensland Wire.* In the passage set out at [40] above, Deane J made reference to "questions such as the extent of product substitutability and the significance of competition between traders" (emphasis added).[28] Dawson J also recognised that considerations other than substitution may be relevant:[29]

> [i]mportant as they are, elasticities and the notion of substitution provide no complete solution to the definition of market. A question of degree is involved – at what point do different goods become closely enough linked in supply or demand to be included in the one market – which precludes any dogmatic answer.

52. Air NZ pays lip service to these observations but then contends that all considerations relevant to the definition of a market are to be examined exclusively through the prism of "substitutable sources of supply": eg AS [33]. Neither s 4E, nor the authorities, supports this approach. The majority did not err in criticising an assumption that "the market contains only substitution decisions": FC [48].

53. Ultimately, however, the precise role of substitution in market definition does not arise for determination on this appeal. The markets for air cargo services were, in fact, defined by reference to substitution.

A4 - The markets for air cargo services were defined by reference to substitution

54. The markets found by the trial judge were defined in a conventional fashion by reference to substitution. Co-ordinate findings were made on appeal and no findings are challenged in this Court. Once these matters are appreciated, the premise underpinning Air NZ's appeal on the "market" issues falls away.

55. The trial judge was well aware of the role of substitution in defining a market. The concept was "basic to the process of market definition and "market" is defined in s 4E in a way which confirms this": TJ [213]. His Honour noted that product substitutability can exist both from the supply side and demand side (TJ [213]) and recognised that the substitution effect must be strong (TJ [214]).

56. Perram J then had regard to what are commonly called the product, geographic and functional dimensions of the market: TJ [216].

57. In considering the product dimension, his Honour applied the hypothetical monopolist test, which involves identifying the smallest collection of products or services in respect of which a hypothetical monopolist would find it profit

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26 J D Heydon, *Competition and Consumer Law,* [30.258].

27 *Boral* (2003) 215 CLR 374 at [247] (McHugh J) (emphasis added).

28 *Queensland Wire* at 196 (Deane J).

29 *Queensland Wire* at 199 (Dawson J).

maximising to impose a small but significant and non-transitory increase in price (a 'SSNIP'): TJ [220].

58. Perram J concluded that there was *no* product substitutability in respect of the relevant markets, either from the demand or supply side: TJ [234]. This was because of the nature of the unidirectional air cargo routes. A route between Hong Kong and Sydney was thus not substitutable with a route between Hong Kong and Melbourne or Singapore and Sydney. It followed that there were single product markets for air cargo services between each port of origin and each port of destination in Australia.

59. In this way, the product dimension itself involved a geographic dimension, the boundaries of which necessarily extended to the port of destination. When dealing with a transportation service, the geographic boundaries of the market are inherent ***in the product itself***. Professor Church puts the point starkly: "the unique feature of [the] market for transport service, including air cargo, is the one-to-one correspondence between the geographic aspects or characteristics in the product dimension and the geographic dimension".[30]

60. This feature of transport markets has been recognised in the literature. In an article which the airlines' expert cited with approval, G J Werden[31] noted that the product and geographic dimensions elide in this context:[32]

> These two terms are convenient and very commonly used in antitrust; however, they can be misleading. There is but one relevant market with product and geographic dimensions-not separate product and geographic markets. The product and geo-graphic dimensions of relevant markets must be delineated in the context of each other, and the separation into product and geographic dimensions is an oversimplification. Transportation, for example, cannot be sensibly separated along such lines.

61. As to the geographic dimension, Perram J found that each aspect of the suite of services was provided, *inter alia*, in Australia and that certain participants in the market were located in Australia and demand from those participants existed in Australia: TJ [253] – [265]; see also at [13]-[16] above. And keeping in mind the purposive aspect of market definition, what his Honour said at [262] is of particular significance:

> The relevance of whether the shippers were market participants turned on the discipline which might be imposed on an upstream market such as air cargo by a downstream market (such as goods importers). One effect that a price increase might well have in the Hong Kong air cargo market could be to cause importers in Australia to stop importing from Hong Kong altogether. An analysis of market power in Hong Kong would therefore necessitate an assessment of that phenomenon which would be

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30 Tpt.2283.25-30, 2286.15-24

31 Lately Senior Economic Counsel, Anti-Trust Division, US Department of Justice.

32 See G J Werden, *The History of Antitrust Market Delineation* (1992) *Marquette Law Review* 123 at 133, cited in R.J. Gilbert "*Report of Professor Richard J. Gilbert, Ph.D*" (6 July 2012) at [15]; see also Tpt 2471.26-2475.26.

Australian in origin. ***It would be to encourage error not to take into account the location of the source of that effect***. (emphasis added)

62. As to the functional dimension, Perram J described the manner in which the suite of air cargo services was provided and held that large Australian importers were capable of switching between alternative sources of supply and therefore at least in theory operated as a constraint on the airlines' cargo rates: TJ [266] – [309]. Specifically the trial judge accepted the ACCC's submissions that:

62.1. "airlines, in general, regarded significant importers and exporters both as targets for their marketing activities and also as the ultimate source of business ... That the airlines would compete for volumes of cargo directly from large shippers is, with respect, obvious": TJ [272]

62.2. "across the Asia Pacific area the airlines recognised that shippers had demand for capacity. Indeed, they actively followed the position of shippers, recognising that these were the economic foundation of the market": TJ [287]

62.3. "the airlines designed their products according to the demand for particular scheduling, handling and storage requirements of specified shippers": TJ [289]

62.4. "airlines had direct contact and negotiations with shippers regarding price and service": TJ [291]

62.5. "airlines adopted sales and marketing strategies directed to shippers promoting the airfreight services which they offered": TJ [293]

62.6. "airlines entered into tripartite arrangements with freight forwarders and shippers" ...An internal email received by Mr Gregg on 13 May 2003 gives the correct flavour: TJ [294]:

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

62.7. "airlines competed with each other for the custom of particular shippers": TJ [298]

62.8. "the airlines regarded the goods they carried as belonging to the shippers": TJ [300]

62.9. "the airlines marketed themselves as dealing directly with the shippers": TJ [301].

63. Both the majority and minority recorded the findings of Perram J in relation to market definition without criticism: FC [25]-[27], [30]-[35], [164]-[167], [588]-[611].

64. For these reasons, both Perram J and the Full Court defined the markets by reference to substitution and found that markets existed for a suite of air cargo services between ports of origin in Hong Kong, Singapore and Indonesia and

ports of destination in Australia. It is to those markets (as found) that the territorial requirement "in Australia" in s 4E is to be addressed.

A5 - The markets (as found) were "in Australia"

65. The question for the Court is therefore whether the markets (as found) were "in Australia" for the purposes of s 4E. In answering that question, it is common ground that a market may be "in Australia" for the purposes of s 4E even if only part of the market is located here.

66. In the ACCC's submission, the answer to this question is straightforward. As found by the trial judge:[33]

66.1. each air cargo route extended to a port of destination in Australia;

66.2. each of the three aspects of the air cargo services (being transportation, cargo handling and enquiry) were physically provided, *inter alia*, in Australia;

66.3. in order to provide the air cargo services, each applicable airline required "multiple approvals from regulatory authorities" and individual airports in, *inter alia*, Australia to permit it to utilise destination airports in Australia;

66.4. the participants in each market included entities that operated in Australia;

66.5. the providers of the air cargo services (ie the airlines) competed for custom in Australia;

66.6. the services were marketed to shippers (including large importers) in Australia;

66.7. demand for the air cargo services existed in Australia.

67. These findings – each of which was made with due regard to principles of substitution - comfortably satisfy the territorial requirement in s 4E.

68. This conclusion is consistent with orthodox approaches to defining the market, which seek to isolate "the area of effective competition in which the parties operate"[34] or, as framed by French J in *Taprobane*, "the geographic area within which those activities occur".[35] The boundaries of the area are to be assessed as a matter of fact and with regard to, *inter alia*, actual sales patterns, the commercial realities of the industry, and the location of customer demand.[36] They are also to be assessed with the recognition that there is a temporal aspect to be considered. Markets are dynamic in nature and the performance of the relevant service (here delivery of cargo into Australia) will impact on the extent to which consumers of those services (including large importers in this country) choose to continue with one airline or change to another.

69. Air NZ seeks to avoid the conclusion that the markets are "in Australia" by submitting that the geographic location of a market is exclusively determined by the location of the "substitutable sources of supply": eg AS [33].

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33 See TJ [60], [76] and [11]-[16], [58], [61], [62] above.

34 *QIW Retailers Ltd v Davids Holdings Pty Ltd [No 3]* (1993) 42 FCR 255 at 267.

35 *Taprobane* at 174.

36 *Taprobane* at 179; *Re Fortescue Metals Group Ltd* (2010) 271 ALR 256 at [1022].

70. Air NZ thereby seeks to invoke the ultimate approach of Perram J to s 4E. While his Honour defined the market by reference to substitution and made the findings summarised above, he later held that, for the purposes of the expression "in Australia", the location of a market was confined to the place where "the switching decision" was given effect: TJ [323] (read with [321]). The same approach was adopted by Yates J in dissent, where his Honour said that the relevant question was "where and how a switching decision, once made, is implemented": FC [675].

71. It was this step in Perram J's analysis that the majority below were unable to accept as correct. Their Honours were right to reject such a narrow, and with respect, formalistic approach to the question of whether a market is "in Australia".

72. *First*, fixing upon the location of the 'switching decision' draws no support from the text of s 4E or the extrinsic material: see [30]-[34] above.

73. *Secondly*, no previous authority has identified the place where the "switching decision" is given effect as relevant, let alone determinative of the location of a market for the purposes of s 4E. Rather the bounds of a market are discerned by the techniques described by Donald and Heydon at [44] above and findings of the kind set out at [62] above.

74. *Thirdly*, no explanation was given by the trial judge, or by Yates J, as to why the place where the "switching decision" was given effect was the element of substitutability to be fixed upon when determining whether a market was "in Australia". To fix upon this matter necessarily excludes a wide range of attributes of competition, including where the service is performed, where demand for the service exists, where its quality is assessed by customers (here, shippers) and where suppliers must maintain operations in order to meet demand (all of which were located, *inter alia*, in Australia).

75. To put it another way, it is just as true to say that the switching decision takes effect at destination as it is at origin. Indeed it is more true: once the freight contract is made the consignee and consignor will be interested in the precise mechanism or route for carriage only insofar as it might affect safe and timely delivery at the destination.

76. The majority was therefore correct to note that a focus on the place where the "switching decision" was given effect was a "quite arbitrary choice of the criterion for deciding the section 4E question": FC [98].

77. *Fourthly*, the arbitrariness of the choice is reinforced by the absence of any analysis as to how a court is to determine where a "switching decision" is given effect. The trial judge did not deal with this issue but appears to have assumed that the place where the switching decision is given effect may be equated with the place where the "legal moment" in which "possession is transferred" takes place: cf TJ [319]; see also Yates J at FC [675]. Here the formalism appears, a formalism reflected in Air NZ's emphasis on such matters (eg, AS[12], [14])

78. There is no evident reason why the effect of a switching decision is to be equated with the "legal moment" in which possession is transferred. This is particularly so if the switching decision is given effect through standing agreements that may be executed prior to any cargo being delivered. The focus

on a "legal moment" also fails to recognise that a market is dynamic and includes both existing and future transactions and actual and potential competition.

79. Nor, in the case of transportation services from A to B, is it appropriate to prefer the "legal moment" when possession is transferred at A to the legal moment when possession is transferred at B. It is not logically possible to isolate the place where a unidirectional transportation service commences from where the service reaches its intended destination. There is no demand (still less a "market") for the mere commencement of a transportation service. As the majority recognised below, "[t]aking delivery of the cargo in Hong Kong is no more important in the provision of [the] suite of services than is the flight itself, and the delivery of the cargo at the Australian port": FC [165].

80. *Fifthly*, there is no policy reason for approaching the territorial requirement in s 4E in the narrow fashion contended for by Air NZ. The evident purpose of the words "in Australia" in s 4E is to ensure that only markets with sufficiently close geographic connections to Australia fall within the terms of the TPA. That purpose is not achieved by focusing on the place where the switching decision is given effect. This is particularly so where the market has the features summarised at [66] above, each of which locate the market in Australia.

81. *Sixthly*, no different conclusion follows even if regard is only had to Perram J's findings as to the geographic dimension of the market. As noted above, Perram J's findings in respect of those matters are replete with references to competitive conduct physically occurring in Australia: see [13]-[16], [61] above.

A6 - Other matters

82. It remains to consider the matters otherwise raised by Air NZ in its submissions. None of those matters justifies a departure from the result reached by the majority below.

83. **Expert evidence**. Air NZ's characterisation of the expert evidence is apt to suggest that, in contrast to a universal view adopted by the experts, the majority located the markets "in Australia" merely by reference to the location of the customers and the places where the economic consequences or effects on the impugned conduct occurs: cf AS [34]. This characterisation is wrong for two reasons.

84. *First*, the majority did not adopt the approach suggested by Air NZ. Rather, the majority had regard to each of the geographic matters summarised at [61] and [66] above. Insofar as those matters included the location of certain customers (ie large importers) in Australia, that matter was relevant because it showed that demand for the air cargo services existed in Australia for the physical supply of services in Australia and that persons in Australia participated in the market.

85. *Secondly*, and in any event, the experts did not agree that the substitutable sources of supply could be equated with the place at which the switching decision takes effect, with at least one expert emphasising that it made no sense to fix upon the location of suppliers at origin given that the relevant

services necessarily required that the suppliers be located at both origin and destination.[37]

86. **So-called 'visualisation test' and 'Seven Factors'**. AS [36] – [51] mischaracterise the reasons of the majority in two fundamental respects.

87. *First*, Air NZ submits that the majority established a new 'visualisation test' for the purpose of market definition. That submission is wrong.

88. The majority did not identify or apply a 'visualisation test': *contra* AS [36] – [38]. Air NZ unfairly criticises language used by the majority which does not depart in any relevant way from language used by past members of this and other courts when discussing the concept of a "market": see further at [36]-[46] above. Nor did the majority err in describing the "market" as a metaphorical concept. As French J correctly observed in *Australian Gas Light Company v Australian Competition and Consumer Commission* (2003) 137 FCR 317 (***AGL)***, the "concept of market describes, in a metaphorical way, an area or space of economic activity whose dimensions are function, product and geography".[38]

89. *Secondly*, Air NZ submits that the majority identified "Seven Factors" that indicated that the relevant markets were "in Australia". Air NZ proceeds to submit that the "factors" do not support that conclusion either considered collectively or individually: AS [39] – [51].

90. The so-called seven "factors" were nothing of the sort. Rather, the majority was simply summarising its reasoning on the market issues at the conclusion of that section of the judgment. So much is obvious from the words used by their Honours at FC [161]: "[i]n summary, our seven reasons are as follows". It is also obvious from a consideration of the reasons themselves, which outline, in a short-hand way, the various observations already made by the majority in their lengthy judgment.

91. As a summary of reasons, rather than factors, Air NZ's suggestion that they do not individually or collectively lead to the conclusion that the relevant markets were "in Australia" is misdirected: *contra* AS [51]. It is neither helpful nor appropriate to construe a summary of judicial reasons in that way.

92. Turning to the reasons themselves, the ACCC makes the following submissions in response to the criticisms of Air NZ.

93. As to the *first* reason, Air NZ does not criticise the majority's conclusion that a market can be "in Australia" even if the market was also in another country.

94. As to the *second* reason, the majority was correct, for the reasons set out above, to conclude that it was permissible to consider a range of matters – including the presence of customers in Australia and the performance of the services in Australia – in determining whether the territorial requirement in s 4E was satisfied. Air NZ's submissions also fail to recognise that the markets (as found) were defined by reference to substitution in an orthodox way. The passage in the judgment of McHugh J in *Boral* relied on by Air NZ is not to the

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37 Tpt 2283.29-38 (Church).

38 *Australian Gas Light Company v Australian Competition and Consumer Commission* (2003) 137 FCR 317 at [378].

contrary. He was summarising an academic discussion of factors relevant to the definition of the *product* dimension of markets.[39] His affirmation that suppliers' marketing decisions are relevant to substitutability supports the approach of the majority below, and is consistent with the techniques of market definition employed by Perram J as well as the majority.

95. As to the *third* reason, the fact that the services that constitute the product of the market are provided, *inter alia*, in Australia is plainly relevant to the question whether the market is "in Australia"; so too the fact that competition in the market occurred in Australia, that demand in the market existed in Australia and that participants in the market resided in Australia: *contra* AS [43]. Having regard to these matters in determining the location of the market for the purposes of s 4E is far removed from simply concluding that a market exists wherever the relevant services are performed: cf AS [43]. Neither the majority, nor the ACCC, embraced such a narrow approach.

96. Air NZ's mischaracterisation of the majority's approach means that the example at AS [43] (global roaming telephony services) is irrelevant. No part of the majority's reasoning would lead to the conclusion that a market for the provision of international roaming telecommunication services to consumers resident in Australia is a market that extends globally merely because some services are provided overseas. And properly understood the example does not assist Air NZ's argument. In the case of roaming telephony as well as air cargo: the source of demand is Australia; the services are provided in large part in Australia; and suppliers compete for customers in Australia. In each case it is properly concluded that the market is, for the purposes of s 4E, *in Australia,* even though a critical dimension of the service occurs outside Australia.

97. Air NZ's reliance on *Taprobane* is also misplaced: cf AS [42]. The Court in that case did not need to consider the territorial requirement in s 4E. This was because "[t]here was no real dispute that the geographic market in issue is Australia wide"[40] and no party to the proceedings asserted a more expansive market. As French J noted in *Taprobane*, the exercise of market definition only goes as far as is necessary to address the competition issue before the court.[41] Further, the flexible and evaluative approach to market definition adopted by French J in that case is consistent with the majority's approach below: see [68] above.

98. As to the *fourth* reason, there were factual findings that barriers to entry were significant: *contra* AS [44]. Landing rights, regulatory requirements and ground handling services were found to be essential to the provision of the air cargo services in Australia: eg TJ [76], [77]. There is no basis for excluding a consideration of the existence of barriers to entry from a determination of whether a market is "in Australia". The "existence of barriers to entry is one of the central elements of market structure".[42]

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39 See Corones, *Competition Law in Australia*, 2nd ed at 94 and *Boral* at [253], [256].

40 *Taprobane* at 182.

41 *Taprobane* at 182.

42 *Taprobane* at 183-4.

99. Again the example deployed by Air NZ (European tours) does not assist it. It may readily be accepted that the *mere* fact of barriers to entry in a place may not be sufficient to locate a market there. But add to their example the presence (in Europe) of market participants, a main source of demand (in Europe, for the tours), effective constraint on suppliers (by actual or potential switching by European customers), and suppliers who market to and compete for the business (of Europeans) and the picture changes dramatically.

100. By contrast the arbitrary consequences of the narrow focus required by the trial judge and Yates J (and embraced by the appellants) can be simply demonstrated. The same cartellists might have achieved monopoly returns by agreeing to reduce the quality of their services in Australia, for example, by restricting collection times ("giving less") or by charging an agreed fee at destination ("charging more"). That narrow focus would dictate that the market is still not in Australia because any switching still takes effect in Hong Kong and the only substitutable sources of supply are in Hong Kong.

101. As to the *fifth* reason, it was plainly relevant to consider the fact that competition in the market took place in Australia, and that the services were marketed to shippers (including large importers) in Australia, in determining whether the territorial threshold in s 4E was satisfied: *contra* AS [45]. Air NZ's suggestion that the majority overstated the factual position is incorrect. The trial judge made a raft of factual findings in this regard, including that Australian shippers had the relevant demand for the capacity that was offered by the airlines for air cargo services (TJ [287]), were "actively considered as a revenue source by the airlines" (TJ [288]), were "the ultimate source of business" (TJ [272]), and made decisions about which airlines to use and had "direct contact and negotiations" with airlines regarding price and service (TJ [290] – [292], [286]) and that "airlines competed with each other for the custom of particular shippers" (TJ [298]) and considered themselves as dealing directly with shippers (TJ [301]).

102. As to the *sixth* reason, the majority's consideration of the legislative purposes underpinning the TPA was both orthodox and obligatory: *contra* AS [47]. Their Honours did not seek to give s 2 some freestanding operation but correctly observed that the purposes were consistent with the evaluative way in which markets are to be defined. There was no relevant difference between the majority's approach and the approach of this Court:

> The provisions of Pt IV are to be interpreted in accordance with the subject, scope and purpose of the legislation, in particular the object stated in s 2 of enhancing the welfare of Australians through the promotion of competition.[43]

103. Contrary to AS [48], the majority's approach is not likely to harm Australian consumers in the long term. As already explained, the process by which the markets in the present case were defined was uncontroversial and took place by reference to substitution. The majority's conclusion that s 4E was satisfied simply involved a consideration of whether the markets (as found by Perram J) fell within the territorial requirement. No part of the majority's decision involved

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[43] *Boral* at [159] per Gaudron, Gummow and Hayne JJ See also *NT Power Generation Pty Ltd v Power and Water Authority* (2004) 219 CLR 90 at [68].

drawing "wider market boundaries". They merely characterised the market that had been found as having the requisite Australian dimension. Indeed, the markets (as found) were narrower than those proposed by Air NZ because the markets required airlines to have the ability to provide air cargo services at both origin and destination (in contrast to Air NZ's focus on origin alone). Far from the majority unduly expanding the market, it is Air NZ which seeks to do so.

104. As to the *seventh* reason, the majority did not rely on the New Zealand and European case law. Their Honours merely observed that decisions in those jurisdictions were "consistent" with the conclusions that they had reached from an orthodox application of Australian legal principles: FC [169]. Further, the majority expressly noted that there were "substantial differences" between the New Zealand decision and the present case, including "a departure from the role of substitutability in s 4E applied in Australia" and the absence of any basis in the present case to draw inferences as to the existence of downstream substitution: FC [133] – [135]. As to *Atlantic Container Line AB v Commission of the European Communities* [2005] 4 CMLR 20, the majority was again careful merely to refer to that decision by way of "comparison": FC [138]. In any event, the approach taken by both the European Commission and the Court of First Instance was consistent with the approach taken by the majority, namely after determining that Mediterranean ports were not substitutable for northern European ports (that is, the origin ports were not substitutable as in the present case), the European Commission concluded that the geographic market was the area in which the relevant maritime services were marketed (at [519]) a conclusion that was endorsed by the Court of First Instance (at [853]), in which the Court explained that the relevant geographic market was:

> ... intended to determine the territory on which the undertakings concerned are engaged in the supply of the services in question, on which conditions of competition are also sufficiently homogenous and which may be distinguished from neighbouring geographical areas because, in particular, the conditions of competition there are significantly different.

105. **Effects doctrine**. The approach of the majority does not constitute an 'effects test',[44] whereby s 4E is deemed to reach conduct simply because that conduct has an economic effect in Australia: *contra* AS [52]. The majority was well aware that: (a) Australian law does not support an effects test; and (b) no party before the court sought to rely on that doctrine: FC [75]. There was no need to focus on the 'effects' in Australia of alleged anti-competitive conduct outside Australia in circumstances where the markets (as found) included conduct, and competition, within Australia.

PART VII NOTICE OF CONTENTION

106. Not applicable.

[44] See eg *United States v Aluminum Co of America* 148 F 2d 416 at 423 (1945); *Sherman Antitrust Act*, 15 USC §§ 1 – 7 (1890).

PART VIII ESTIMATED HOURS

107. This matter is being heard together with the related appeal of *PT Garuda Indonesia Ltd v ACCC* (S248 of 2016). The ACCC estimates that it will require a combined total of 3 hours for the presentation of oral argument in both matters.

Dated: 9 December 2016

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