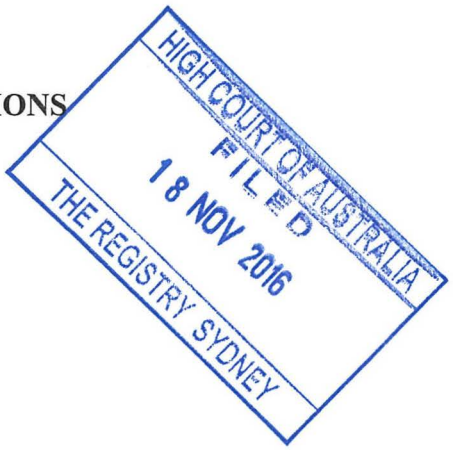
IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY No. S248 of 2016

BETWEEN: **PT Garuda Indonesia Ltd (ARBN 000 861 165)**
Appellant

and

10 **Australian Competition and Consumer Commission**
Respondent

APPELLANT'S SUBMISSIONS



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Part I: Certification

1. This submission is in a form suitable for publication on the internet.

Part II: The Issues on Appeal

2. **Market**: How is the geographic extent of a "market" to be determined for purposes of the *Trade Practices Act 1974* (Cth) ('*Trade Practices Act*') (now the *Competition and Consumer Act 2010* (Cth)), and are markets principally defined by questions of substitutability or by other considerations?

3. What determines whether a market is "in Australia" for purposes of the Act?

4. **Inconsistency**: To what extent did the *Air Navigation Act 1920* properly construed require conformance by Garuda to the obligation that tariffs be agreed between airlines imposed by the Australia-Indonesia Air Services Agreement?

5. What are the principles for resolving the conflict between that requirement and the proscription on competitors agreeing prices in section 45 of the *Trade Practices Act*?

6. Did section 51 of the *Trade Practices Act* operate to preempt that requirement?

7. **Foreign state compulsion**: 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 section 45(2) of the *Trade Practices Act*?

Part III: Section 78B of the Judiciary Act 1903

8. Notice in compliance with section 78B of the *Judiciary Act 1903* need not be given.

Part IV: Judgments of the courts below

9. The citations of the reasons for judgment of the primary and intermediate courts are:

   a. *Australian Competition and Consumer Commission v Air New Zealand Limited* (2014) 319 ALR 388; (2014) ATPR 42-490; [2014] FCA 1157.
   b. *Australian Competition and Consumer Commission v P T Garuda Indonesia Ltd* (2016) 330 ALR 230; (2016) ATPR 42-516; [2016] FCAFC 42.

Part V: Facts

10. *The service supplied*: At all relevant times Garuda was Indonesia's designated international airline for scheduled air services between Indonesia and Australia pursuant to Article 3 of the *Australia Indonesia Air Services Agreement 1969*

('Australia-Indonesia ASA').[1] Garuda's air services included carrying cargo in its passenger aircraft from Denpasar to airports in Australia, and from certain other Indonesian (including Jakarta) and international airports to airports in Australia by trans-shipment at Denpasar.

11. *Conduct offshore*: The conduct in issue all occurred in Indonesia and Hong Kong and concerned the imposition of surcharges in Indonesia and Hong Kong respectively.

12. *The ACCC's claim*: The Australian Competition and Consumer Commission (ACCC) alleged that by its conduct in Indonesia and Hong Kong, Garuda made and gave effect to various understandings having a purpose, effect or likely effect of fixing, controlling or maintaining its prices in contravention of section 45 read with section 45A of the *Trade Practices Act* as in force at the time.

13. *First instance*: The trial judge (Perram J) found that none of Garuda's conduct constituted a contravention of the *Trade Practices Act* because the understandings found concerned services which were not supplied in a "market in Australia" within the meaning of the *Trade Practices Act*.

14. *Appeal*: The majority of the Full Court of the Federal Court of Australia (Dowsett and Edelman JJ) reversed the trial judge's conclusion that supply was not in a "market in Australia". Yates J dissented, agreeing with the trial judge. The majority also rejected Garuda's contention that sections 45 and 45A of the *Trade Practices Act* were inconsistent with the *Air Navigation Act 1920* (Cth) ('*Air Navigation Act*') and that the inconsistency was to be resolved in favour of the more specialised provisions in the *Air Navigation Act*. Yates J found it unnecessary to decide.

15. *Scope of understandings*: The understandings found concerned surcharges imposed in Hong Kong, Jakarta and Denpasar.

16. *Product*: The product was a single package of services, being the carriage of air cargo on unidirectional routes from airports in Hong Kong, Jakarta and Denpasar to airports in Australia. The service included loading and other services at the airport of origin and unloading and related services at the airport of destination (FC[21], [591] – [592]; TJ [252] – [256], [336]).

17. *Supply side substitution*: It was not established that there would be any airline seeking to enter a relevant market if the incumbents imposed a SSNIP (FC[38], [649]).

18. *Market participants*: The market participants were airlines, freight forwarders and shippers (either exporters at origin or importers at destination) whose cargo volume was sufficiently significant for airlines to be commercially motivated to pursue it (TJ[309]; FC[648]). *Airlines* carried freight only from airport to airport (TJ[56] – [58]). *Freight forwarders* supplied consignors and consignees with services associated with the transport of cargo from a place of origin to a place of destination ("door to door") (TJ[38], [267] – [269]). Most *shippers* (consignors or consignees)

[1] Agreement between the Government of the Commonwealth of Australia and the Government of the Republic of Indonesia for Air Services Between and Beyond their Respective Territory (Sydney, 7 March 1969) ATS No 4 of 1969.

who wished to transport cargo required transportation in one direction from a specific place of origin to a specific place of destination (TJ[29]).

19. Those *shippers* which were found to be market participants usually (but not always) made decisions about which airlines they would use. Where the shipper was an importer in Australia this decision was likely to be made in Australia. Shippers of that kind continued to use freight forwarders who provided an indispensable set of services for dealing with the ancillary transport issues which the airlines themselves would not deal with. Relationships erected in the case of shippers of this kind were often tripartite. In some cases, the tripartite nature of what was taking place was consummated with a contract but this was not a necessary nor even particularly common feature. Smaller shippers, which had no view about which airline to use and who left matters entirely to their freight forwarders, were not participants in any of the markets (FC[32], [602], [650]), TJ[309]).

20. *Supply of the product*: The airline took possession of the cargo to be transported from a freight forwarder at the airport of origin. The range of airlines available to be selected to provide the product was limited by the need for any such airline to have a presence in the port of origin. The service of taking possession of the cargo in the port of origin with a view to flying it to a destination in Australia could not be performed anywhere but in the port of origin (FC[650], TJ[319]). Each airline at a port of origin carried the majority of cargo to ports of destination on aircraft operated by that airline. However, airlines had the option to, and did, carry freight on aircraft operated by other airlines using a practice known as interlining. An airline that did not operate to a particular destination would carry freight to that destination by interlining (TJ [84]). Leaving aside extremely rare occurrences (typically involving live animals), airlines dealt directly only with freight forwarders situated in the port of origin or in nearby environs, and not shippers (FC[650], TJ[266]).

21. *Pricing and contracting – air cargo services*: Local cargo sales offices of the airlines, at the port of origin, published from time to time standard rates as "tariff" or "rate" sheets or schedules. Contract and other rates (as opposed to standard rates) were negotiated between freight forwarders and staff of airlines at the local sales office, at the airport of origin (FC[650], TJ[94] – [99], [107]).

22. The contractual relationship for the carriage of cargo by air was between the airline and the freight forwarder. The airline and the freight forwarder were the parties to the air waybill whose terms govern the carriage of cargo. In every case the freight forwarder cut or raised the air waybill as a hardcopy, paper document at the airport of origin and signed it on behalf of the person sending the freight (which in the case of consolidation was the freight forwarder itself) (FC[650]; TJ[111] – [115]).

23. In most cases the freight forwarder at the airport of origin was obliged to pay the airline for air cargo transport charges. A freight forwarder's obligation to pay the charges for air cargo transport was not conditional upon it receiving payment from the consignor or consignee (FC[650]; TJ[121] – [123]).

24. *Location of market*: The relevant markets were in Hong Kong, Indonesia and (in the case of Air New Zealand) Singapore (TJ [338]). The relevant consumer choices were at the airport of origin (TJ [336]; FC[653]).

25. *Contracting – freight forwarder services*: Where a consignee initiated a shipment they contacted either a freight forwarder at the place of origin or the place of destination to negotiate and contract for the acquisition of freight forwarder services, including - but not limited to - the carriage by air (TJ[46] – [50]).

Part VI: The Appellant's Argument

A. MARKET

"Market in Australia"

26. In Australian competition law the concept of "market" is accepted to be 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.[2]

27. Every market has a physical location: what the economists call the "geographic dimension" or "geographic market".[3]

28. The phrase "market in Australia" refers to a geographic relationship between the market in question and Australia as a place. The relationship is that the geographical location of the market is, wholly or partly, in a place which is within Australia.

Authority supports the location of a market being its geographic dimension

29. The geographic location of markets has been routinely determined under the *Trade Practices Act* as a question of fact – being the location/s of substitution of the sources of supply: the location of the flour markets in *QCMA*[4] were in Queensland and the Northern Rivers of NSW, the market for fattened cattle was in Northern Queensland in *Australian Meat Holdings,*[5] the market for grocery product supply to retailers was in Queensland and Northern New South Wales in *QIW Retailers v Davids Holdings (No 3),*[6] and the market for concrete masonry products was in Victoria or Melbourne in *Boral Besser.*[7] In *Taprobane* the geographic market for sale of packaged island holidays was Australia wide.[8]

30. In other jurisdictions, the geographic location of markets is determined as a question of fact, governed by the economic concept of substitutability:

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[2] *Re Queensland Cooperative Milling Association Limited; Re Defiance Holdings Limited* (1976) 25 FLR 169 (***QCMA***) at 190 approved and applied in *Queensland Wire Industries Pty Limited v Broken Hill Proprietary Company Limited* [1989] HCA 6; (1988 – 1989) 167 CLR 177 at 188 [16] (per Mason CJ and Wilson J); at 199 [3] (per Dawson J); at 210 [19] (per Toohey J), *Boral Besser Masonry Limited v Australian Competition and Consumer Commission* [2003] HCA 5; (2003) 215 CLR 374 at 422 [133] (per Gleeson CJ and Callinan J); at 454 [248] and 455 [252] (per McHugh J), *Betfair Pty Limited v Racing New South Wales* [2012] HCA 12; (2012) 249 CLR 217 at [116] (per Kiefel J).

[3] *Singapore Airlines v Taprobane Tours WA Pty Limited* (1991) 33 FCR 158 at 178.9 – 179.2 (***Taprobane***).

[4] *QCMA* at 190.2

[5] *Australian Meat Holdings* at 50,090 and 50,107

[6] (1993) 42 FCR 255 at 267.7, 272.6 upheld on appeal entitled *Davids Holdings v Attorney General (Cwth)* (1994) 49 FCR 211 at 213D, 227G – 228D and 245C

[7] *Boral Besser* at 396 [20]; 401 [36]; 402 [44]; 423 [134]; 435 [174]; 436 [176]; 445 [211]; 514 [435]

[8] At page 182.5.

a. In the US, markets are geographically defined as the market area in which the seller operates and to which the purchaser can *practically* turn for supplies (emphasis added).[9]
b. In Canada, geographic markets are exclusively defined based on economic substitution.[10]
c. In the European Union, the area in which a product or service was marketed was once one of the components of the test for geographically defining markets (along with substitutability of sources of supply),[11] but since the late 1990s the Commission and the European courts define markets by reference to substitution of sources of supply only.[12] The evidence on substitutability when defining the geographic market can lead, depending on the case, to the relevant geographic market being worldwide, Europe-wide, national, or even as local as one port in one country within Europe.[13]

31. The European case of *Atlantic Container Line AB v Commission* (2005) 4 CMLR 20 was relied on by the majority below (FC[138]-[147]), without reference to it in argument. In that case the Commission's decision which was the subject of the appeal, mentioned marketing in a discussion concerning the geographic market (at [519] of the Commission's decision). The Court of First Instance came to the same conclusion concerning geographic definition, by reference to substitution of sources of supply (at [853]).

Authority requires restraint in construing "in Australia"

32. As the facts of this case illustrate the construction of the phrase "market in Australia" in section 4E, together with section 5 of the *Trade Practices Act*, determines the

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[9] *United States v. Phillipsburg National Bank & Trust Co.*, 399 U.S. at 357-358; *United States v. Philadelphia National Bank*, 374 U.S. at 359; *Tampa Electric Co. v. Nashville Coal Co.*, 365 U.S. 320 at 327 (the first formulation of the substitution of sources of supply test). Note that *United States v. Grinnell Corp.*, 384 U.S. 563 (1966), another case which dealt specifically with geographic markets, has long been considered incorrectly decided on this issue, with the reasoning of the two dissenting judges (basing their reasoning exclusively on substitution of sources of supply) now preferred: *Heerwagen v Clear Channel Communications* 435 F 3d 219 (2nd Circuit 2006)

[10] The leading Canadian Competition Tribunal case, in which the geographic boundary of the market was crucial to the decision, is *Commissioner of Competition v. Superior Propane Inc.*, 2000 CACT 15, at [84] (where expert empirical evidence based on the Hypothetical Monopolist Test was accepted). For a list of the major cases dealing with market definition in Canada, see page 18 of the Canada chapter of *Competition Laws Outside the United States, Volume 1*, edited by H Stephen Harris, American Bar Association (2001), at footnote 78. See also sections 4.17-4.18 of the *Merger Enforcement Guidelines* (2011) of the Canadian Competition Bureau.

[11] The first case on market definition did list where 'the product is marketed' as a factor: see Case 27/76 *United Brands v Commission* [1978] ECR 207, paragraph 11. However, arising out of the modernisation project, the Commission's Market Definition Notice no longer states that requirement, being based solely on substitution of sources of supply, see Commission Notice on the definition of the relevant market for the purpose of Community competition law, OJ 1997 C 372/5 at para 8; Wesseling, *The Modernisation of EC Antitrust Law*, (2000) Hart Publishing. While not law, the Market Definition Notice has been referred to approvingly by the European courts: See eg Case T-321/05 *AstraZeneca v Commission* [2010] ECR II-000, [2010] 5 CMLR 1585, para 86; Case T-427/08 *Confédération européenne des associations d'horlogers-réparateurs (CEAHR) v Commission* [2010] ECR II-000, [2010] 5 CMLR 1585, paras 68–70; Whish and Bailey, *Competition Law* (7 ed) (2012) OUP at page 30, footnote 153

[12] Case T-65/96 *Kish Glass v Commission* [2000] ECR II-1885, paragraph 81 – 82; *Atlantic Container Line AB v Commission* (2005) 4 CMLR 20 at paragraphs 853-856. See generally O'Donoghue and Padilla, *The Law and Economics of Article 82EC* (2006) Hart Publishing, at page 91, section 2.4.1.

[13] *Sea Containers v Stena Sealink - Interim measures*, OJ 1994 L 15/8, at paras 62–65 (port in Ireland the limit of the geographic market, because the only other potential competing port was unrealistically distant).

extent to which Australian competition law proscribes the conduct of foreigners occurring wholly outside Australia: including that of the Government owned and controlled airline of Indonesia engaging in conduct only within Indonesia.

33. This Court has considered the extraterritorial reach of Australian anti-trust law once. It adopted a strict approach to construction based on the "*general rule that if any construction otherwise be possible, an Act will not be construed as applying to foreigners in respect to acts done by them outside the dominions of the sovereign power enacting*"[14] with section 5 limits.

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34. The words "in Australia" in section 4E are limiting words.[15] The limits of extraterritorial operation of the *Trade Practices Act* are marked out by section 4E and 5(1) construed strictly in accordance with their terms.[16]

35. Contrary to the reasoning at FC[156] and [158] reference to the objects of the Act in section 2 does not assist. The phrase "market in Australia" in section 4E limits the "competition" which section 2 states is to be promoted. The effect of section 45(3), read with section 4E, is that section 45 regulates understandings between parties that are in competition, but only when that competition is "in a market in Australia". The
20 Act does not, by section 45, seek to promote competition which is not in a market in Australia. The majority's reasoning inverted the required construction and thereby committed the error referred to in *Alcan (NT) Alumina Pty Limited v Commissioner of Territory Revenue.*[17]

The reasoning below

36. The majority found error in the conclusion that markets in Hong Kong, Indonesia and Singapore (TJ[338]) were not "in Australia".

37. That conclusion was based on a distinction between the "identification" or
30 "definition" of a market and the determination of whether a market so identified is "in Australia" (FC[72], [73] and [151]). The majority's cardinal error was that the determination of whether the market was "in Australia" involved a separate question, additional to identification, called by the majority "characterisation."

38. There is nothing in the text of section 4E to indicate that it poses a question to be answered by reference to characterisation. Courts do not generally approach the question of whether a thing is "in" a location as a question of characterisation.[18]

39. There is nothing complex or difficult in answering the question of whether a market
40 is in Australia as a matter of evidence. The boundaries of any market may be imprecise, including the geographic boundaries. If, in some future case, that results

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[14] *Meyer Heine Pty Limited v China Navigation Company Limited* (1966) 115 CLR 10 at 23 per Kitto J, McTiernan and Windeyer JJ agreeing.

[15] *Mark Lyons v Bursill* (1987) 75 ALR 581 at 588; *SA Brewing Holdings Ltd v Baxt* (1989) 23 FCR 357 at 374.

[16] *Bray v Hoffman-La Roche Ltd* (2002) 118 FCR 1 at 16 [50]; *Norcast v Bradken (No 2)* (2013) 219 FCR 14 at [229] – [231].

[17] [2009] HCA 41; (2009) 239 CLR 27 at [51] – [53]; see also *Victims Compensation Fund Corporation v Brown* [2003] HCA 54; (2003) 77 ALJR 1797 at [33].

[18] See Fullagar J in *Livingstone v Commissioner of Stamp Duties (Qld)* (1960) 107 CLR 411 at 435.

in uncertainty whether a market extends into Australia the ordinary principles of onus and standard of proof will apply.

40. The approach of "characterisation" leads to uncertain and unpredictable results.

41. So in this case, even with the hindsight benefit of the majority's reasons it is impossible to determine at what point the facts became sufficient for the Australian Court to conclude that the proscriptions of Australian competition law extended to conduct by foreigners wholly outside Australia.

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42. The verbal formulation of the test applied by the majority is of no assistance, even in hindsight:

> *"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'."* (FC[156])

43. It is clear from the reasons that the fact that a significant part of the suite of services
20 was delivered in Australia was insufficient to conclude that the conduct in issue was in a market in Australia (FC[158] and [159]). It is equally clear that that fact was the third matter which led to the conclusion that the conduct was in a "market in Australia" (FC[164] and 165]).

44. Further matters are identified by the majority as resulting in that conclusion.

45. The first two (FC[162] and [163]) concern the effect of the legislation and say nothing of the facts in issue. Even if they were correct (and the second is not) they cannot rationally bear upon the question whether the market was in Australia.

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46. The fourth concerns barriers to entry to Australia referred to at FC[166]. There was no evidence or finding of any economic consequence of any barrier to entry and the reasons do not indicate anything about the weight given to the question.

47. The fifth matter mentioned by the majority was the presence of customers in Australia capable of constraining prices in the market in issue. The reasoning involved a finding of fact not made by the trial judge. The trial judge's finding is at TJ[309(d)]. It was limited to the theoretical possibility of the presence of shippers in Australia who might constrain pricing. On the assumption that such customers *were*
40 present in Australia, the question was immaterial to the identification of the geographic dimension because:

a. Switching decisions are made by customers.
b. The target of a switching decision is the source of supply.
c. The effect of a switching decision by a customer is that the customer switches from one source of supply to a (substitute) source of supply.
d. The location of the *effect* of a switching decision, that is, the location of sources of (substitutable) supply, is the focus of geographic market definition.[19] This is

[19] See TJ[321] and [323], which states the globally orthodox position.

because the market definition exercise is purposive.[20] The purpose is to assess (and regulate) the anti-competitive effects of *market power*.[21]

48. The location of a decision to switch suppliers is irrelevant to assessing or regulating market power. If there be market power, it will be where sellers are located and buyers may turn to obtain supply of the product in issue. It mattered not whether a shipper was located in Sydney or New York when deciding to switch from Qantas to Garuda for carriage from Jakarta to Perth. If such a decision was made, the shipper instructed a freight forwarder in Jakarta who dealt with the local sales office of Garuda at the airport in Jakarta to agree a price and went to the airport in Jakarta to contract for and acquire the service (TJ [38], [94] – [99], [113] – [115] and [267] – [269]). If the making or possibility of the making of such decisions constrained Qantas' market power it was its market power in Jakarta; and where the decision was made was immaterial.

49. The sixth matter at FC[168] refers back to factual matters taken into account in the third and fifth matters in the characterisation exercise but indicates there is a further evaluative step in that exercise. What that step is, is left unexplained.

50. The seventh matter at FC[169], that the conclusion that a market is in Australia is consistent with the conclusion of Courts of other jurisdictions on similar facts, cannot rationally support a conclusion on the statutory question posed by the Australian legislation. We have referred above to the European decision relied upon by the majority. Its reasoning was based squarely upon orthodox economic analysis based on substitution.

51. The majority in *Melway Publishing Pty Limited v Robert Hicks Pty Limited*[22] preferred a construction of the Act *"to enable the monopolist, before he enters upon a line of conduct, to know with some certainty whether or not it is lawful."*[23]

52. The reasons and decision of the majority below mean people engaged in commerce throughout the world cannot know whether Australian competition law applies to their conduct until an "evaluative conclusion" (FC[168]) has been reached by an Australian Court. This Court would not adopt a construction with that effect unless the terms of the legislation compelled that construction, which section 4E does not.

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[20] *Taprobane* at [43]-[44] per French J; *Queensland Wire* at [15] per Mason CJ and Wilson J.

[21] *United States v. E.I. du Pont de Nemours & Co.*, 351 U.S. 377, 391-92 (1956); Areeda and Turner, *Antitrust Law* (1978) at ¶518, 347 and also at ¶525a, 370 ("We note again the economic definition of a market: any producer with, or any group of producers which if combined would have, some degree of power over price."); *Queensland Wire* at [15] per Mason CJ and Wilson J ("In identifying the relevant market, it must be borne in mind that the object is to discover the degree of the defendant's market power."); Hay et al, *Geographic Market Definition in an International Context* (1988) 64 Chicago-Kent Law Review 711 at 712-713; Kaplow, *Why (Ever) Define Markets?*, (2010) Vol 124 Harvard Law Review, 437-517 ("[The] market definition process involves choosing from among candidate markets which most accurately depict the extent of market power."); Blanco, *Market Power in EU Antitrust Law* (2011) Bloomsbury Publishing, at pages 1-2; Kaplow, *Market Definition, Market Power,* 43 International Journal of Industrial Organization 148-16 at 149. See also TJ[216].

[22] [2001] HCA 13; (2001) 205 CLR 1.

[23] Id at 10 – 11 [8] (per Gleeson CJ, Gummow, Hayne and Callinan JJ).

53. Yates J was correct to focus on the single question: Where was the field of actual or potential transactions between buyers and sellers of the product located (FC[651])? He restated it as: What was the geographic area in which the market product was bought and sold (FC[656])? The question could also be stated as Drummond J had put it (quoted by the majority at FC[130]): Where is the geographic area or areas in which sellers of the particular product operate and to which purchasers can practicably turn for such goods or services? Whichever way the question is expressed, the answer on the facts was "at the airports of origin".

Application to the facts

54. The market as found has inflexible aspects. These inflexible aspects reflect in part the pervasive influence of the Warsaw Conventions for the Unification of Certain Rules Relating to International Carriage by Air.[24] This results in airlines and freight forwarders uniformly organising the international carriage of cargo in accordance with the provisions of the Warsaw Conventions, as described by McHugh ACJ in *Siemens Limited v Schenker International*.[25]

55. An important inflexibility is that airlines only supply services from airport to airport (FC[21]; TJ[252] – [256]). Freight forwarders supply carriage to and from the airports (TJ[38]). For every shipment there is an exchange of a hard copy contractual document (the air waybill) at the airport of origin (TJ[111] – [115]). Ordinarily, the freight forwarder issues its own house air waybill to the shipper while the airline issues its master air waybill to the freight forwarder (TJ[118]-[120]).

56. Pricing of the service supplied by the airlines occurs at the airport of origin in transactions between freight forwarders and airlines (TJ[94] – [99], [107]). Those prices are incurred by freight forwarders (TJ[121] – 123]). Freight forwarders supply to shippers the service demanded by them - door to door carriage, including the service supplied by the airlines to the freight forwarders (TJ[29], [267] – 269]). Freight forwarders and shippers negotiate the pricing of the door to door service (TJ[46] – [50]).

57. At FC[96] and [97] the majority downplayed the practical and commercial significance of airlines taking possession of cargo at the airport of origin. The inflexible aspects to which we refer above mean that that was the point at which the contract to carry that cargo was formed between the airline and freight forwarder, the risks of loss or damage to the cargo shifted from the freight forwarder to the airline and the airline became entitled and responsible to have the cargo delivered to the consignee (usually the freight forwarder at the airport of destination) along with the air waybill. The trial judge was therefore right to conclude at TJ[319] that it was only the range of airlines who had a physical presence at the airport of origin and could

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[24] Convention for the Unification of Certain Rules Relating to International Carriage by Air open for signature at Warsaw on 12 October 1929; the Warsaw Convention as amended at The Hague, 1955; the Convention, supplementary to the Warsaw Convention, for the Unification of Certain Rules Relating to International Carriage by Air Performed by a Person other than the Contracting Carrier open for signature at Guadalajara on 18 September 1961; the Warsaw Convention as amended at The Hague, 1955, and by Protocol number 4 of Montreal, 1975; and the 1999 Montreal Convention each of which has force of law in Australia pursuant to the *Civil Aviation Carriers Liability Act 1959* (Cth). English versions are annexed to that Act.

[25] (2004) 216 CLR 418 at 427 to 431 [18] to [33].

take possession of the cargo who were suppliers or potential suppliers in the market in question. The trial judge was also correct at TJ[321] to reason that if true substitutes were available in Sydney that would entail the giving of possession of the cargo to the airline in Sydney.

58. The majority found that the service of carriage of cargo could only be supplied by an airline which could fly into the destination port (FC[38] and [165]). That was inconsistent with primary facts found at trial concerning interlining (TJ[84]). Competition in the market was between all airlines at the origin airport, including those airlines not flying to the destination airport. Actual and potential substitution occurred between all of those airlines due to interlining.

59. The market has an inflexible aspect because planes fly between airports. Unlike many land transport markets, substitution is impossible along the length of the route because, unlike a train or truck, a plane en-route cannot stop to pick up or set down cargo.[26]

60. These facts led Yates J to conclude that the trial judge was correct to hold that the relevant markets were at the airports of origin and not in Australia (FC[651] and [656]).

B. INCONSISTENCY

61. The trial judge held that the practical operation and effect of sections 12 and 13 of the *Air Navigation Act* operating with Australia's Air Services Agreements (**ASAs**) was to require airlines *"to comply with the terms of any relevant ASA"*[27] and to require "*collusive behaviour by the two airlines of the very kind prohibited by Part IV.*"[28] The *Air Navigation Act* was thereby inconsistent with sections 45 and 45A of the *Trade Practices Act*.[29]

62. That conclusion was correct:

    a. The *Air Navigation Act* sections 12 and 13 required conformance by foreign airlines with the terms and conditions of the applicable Air Services Agreement (ASA), including with an ASA made after enactment of those provisions;
    b. Indonesia's obligations under the Australia-Indonesia ASA were the terms and conditions with which Garuda was required to conform;
    c. Article 6(2) of that ASA required that tariffs including cargo rates and surcharges be agreed between airlines if agreement was possible.

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[26] cf *Australian Competition and Consumer Commission v Cement Australia Pty Ltd* [2013] FCA 909 at [1147]-[1201]; *In the matter of Fortescue Metals Group Limited* [2010] ACompT 2 at [789] (discussion of 'point to point' and 'all points' services in rail transportation); de Palma, Lindsey, Quinet and Vickerman, *A Handbook of Transport Economics* (2011)Edward Elgar Publishing at pages 542-543; Button, *Transport Economics* (2010) (3rd ed) Edward Elgar Publishing at page 130; Vasigh and Fleming, *Introduction to Air Transport Economics: From Theory to Applications* (2016) Routledge at page 384.

[27] TJ[152].

[28] TJ[165].

[29] TJ[185].

63. As a result the *Air Navigation Act* and the proscription in sections 45 and 45A of the *Trade Practices Act* on making agreements concerning prices with competitors were practically and operatively inconsistent.

64. That conflict was to be resolved by reading down the *Trade Practices Act*, which was the general enactment, in favour of the *Air Navigation Act* which was the more specific enactment. As a consequence sections 45 and 45A did not reach to any of Garuda's conduct as found.

10 65. That conclusion provides a reason, additional or alternative to the question concerning "market in Australia" for dismissal of the whole of the proceeding. Garuda could only fly to Australia pursuant to the Australia-Indonesia ASA. When it carried cargo from Hong Kong to Australia it did so pursuant to the Indonesia-Hong Kong ASA (TJ [413] to [414]) from Hong Kong to Denpasar and the Australia-Indonesia ASA from Denpasar into Australia.

Historical context - International legal framework

66. The International framework is uncontentious and described at TJ[131] to [148].

20 67. As that reasoning shows, the Agreement between the United States and United Kingdom Relating to Air Services signed 11 February 1946,[30] and known as Bermuda I became the model for implementation of scheduled international air services.

68. Paragraph (b) of Annexure 2 to Bermuda I contemplated implementation of tariffs as agreed through IATA (TJ[138]). Haanappel described the effect of that paragraph as "*a delegation by both the USA and the UK to IATA to set rates and fares for air transportation between the two countries, subject to Government approval*".[31]

30 69. Following Bermuda I, ASAs generally provided for tariffs to be agreed between the designated airlines concerned through IATA (or a Tariff Conference of airlines) if possible; if agreement through IATA was not possible tariffs were to be agreed between the designated airlines concerned; and if no agreement was possible then tariffs were to be determined in accordance with other provisions of the article.[32]

70. Clause 6 of the Australia-Indonesia ASA made in 1969 was to that effect.[33]

71. By the time of the enactment of the *Trade Practices Act* in 1974 Australia had 25 ASAs, 23 of which contained a provision for the agreement of tariffs through IATA
40 and if not through IATA directly between the airlines in substantially the same terms as Article 6(2) of the Australia-Indonesia ASA.[34]

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[30] 3 UNTS 253.

[31] Haanappel pages 28 – 29.

[32] Australia's first such agreement was with Canada, by an exchange of notes concluded on 11 June 1946 [1951] ATS 17; see also Bin Cheng page 446.

[33] [1969] ATS 4.

[34] The ASAs with Canada, Pakistan, India, Ceylon, The Netherlands, Egypt, Lebanon, Japan, Ireland, Great Britain, Federal Republic of Germany, Thailand, New Zealand, Italy, Malaysia, France, Iran, Austria, Singapore, Indonesia, Nauru, Greece and the Philippines were to that effect.

72. Following enactment of the *Trade Practices Act* Australia concluded ASAs to the same effect with a further six countries.[35]

Historical context – Domestic law

73. In 1960 the *Air Navigation Act* was amended to, among other things, enact as part of the Act sections 11 to 14 which were substantially to the same effect as Regulations 255, 257 and 258 which had been made in 1947.[36] By that time Australia had 13 ASAs which required that tariffs be agreed through IATA (or a Tariff Conference) and otherwise between the airlines concerned.

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74. In the month following entry into force of the last of Australia's ASAs providing for tariffs to be agreed between the airlines[37] the *Air Navigation Amendment Act (No 2) 1984* substantially amended section 13 of the *Air Navigation Act* to expand the scope for cancellation or suspension of a foreign international airline's licence, including for the reason that the Australian government sought to preserve or promote fair competition between airlines.

75. By the *Transport and Communications Legislation Amendment Act 1992* section 13(b) of the *Air Navigation Act* was amended so that the power to cancel or suspend
20 an international airline's licence for a failure to conform with the terms and conditions of a relevant ASA was extended to apply to the licences of Australian international airlines.[38] By that amendment Qantas and other licensed Australian international airlines were exposed to cancellation of their licence if they were to provide scheduled international air services to or from another country not in conformance to the terms and conditions of the ASA pursuant to which those services were provided.

A two stage process

76. Determination of the legal effect of the *Air Navigation Act* will follow a two stage
30 process. *First*, the Court will "ascertain, with precision, how much of an international instrument Australian law requires to be implemented, a process which will involve the ascertainment of the extent to which Australian law..... adopts, qualifies or modifies the instrument". *Secondly*, the Court will engage in "construction of so much only of the instrument, and any qualifications or modifications of it, as Australian law requires".[39] Starting with an interpretation of the treaty provision "inverts the proper order of inquiry".[40]

Construing the Air Navigation Act

77. From 1960 to 2001 section 12(1) of the *Air Navigation Act* prohibited the operation
40 of scheduled international air services over or into Australian territory by an

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[35] With Yugoslavia on 31 October 1975; Burma on 23 September 1976; Papua New Guinea on 8 December 1980; Fiji on 24 March 1982 and Peoples Republic of China on 7 September 1984.

[36] Act No 39 of 1960 sections 11 to 14; Statutory Rule 112 of 1947.

[37] That with the Peoples' Republic of China on 7 September 1984.

[38] See section VI of Act No 82 of 1992.

[39] *NBGM v Minister for Immigration and Multicultural Affairs* (2006) 231 CLR 52 (***NBGM***) at [61] (Callinan, Heydon and Crennan JJ, Gummow ACJ generally agreeing at [1]); *Plaintiff M47/2012 v Director-General of Security* (2012) 251 CLR 1 (***Plaintiff M47***) at [11] (French CJ).

[40] *Plaintiff M47* at [200] (Hayne J); *NGBM* at [61] ((Callinan, Heydon and Crennan JJ).

international airline of a country other than Australia except in accordance with a licence. In 2001 that prohibition was extended to Australian international airlines.

78. At all times section 12(2) prescribed a precondition to the issue of a licence to an international airline of a country other than Australia. It was that there existed an agreement or arrangement between that country and Australia providing for scheduled international air services "of that other country" to be operated over or into Australian territory and which provided that those services were operated "subject to the agreement or arrangement". By these provisions section 12(2) ensures that when services are operated into Australia there is an agreement with the other country obliging it to have the services operated in accordance with its terms.

79. The agreements and arrangements to which reference was made in section 12(2) were not limited to those which existed at the time that the equivalent regulations were replaced by sections 11 to 14 in 1960. They include ASAs that were made after that date because:

    a. if that were not so the operation of section 12 would be absurd: it would prohibit operation of any scheduled international air services to or from Australia by any airline without a licence in 1960; and prohibit the grant of a licence to the airlines of any country other than the 15 with which ASAs had been reached by 1960; and
    b. the question posed by the subsection arises at the time at which consideration is given to the grant of a licence; and in each case that was necessarily at a point in time after the enactment of the subsection.

80. When it came into force in 1969 the Australia-Indonesia ASA was an agreement to which reference was made in section 12(2) of the *Air Navigation Act* because:

    a. it provided for scheduled international air services of Indonesia to be operated over or into Australian territory by Article 2(1) read with Article 1(1)(e) which in turn imported the definition of "international air service" from Article 96 of the Chicago Convention; and
    b. it provided by Article 3(1) to (4) for Indonesia to designate one of its airlines to operate the services and by Article 2(2)(c) for that airline to operate agreed services for traffic purposes "subject to the provisions of the present agreement"; and
    c. by Article 3(6) it provided for the airline's right to operate services for trafiic purposes to be revoked if it failed to operate in accordance with the conditions prescribed by the Agreement; and
    d. it therefore followed that it was "an agreement...under which scheduled international air services of [the] other country may, subject to the agreement...be operated over or into Australian territory."

81. At all times since 1960, section 13(b) of the *Air Navigation Act* has authorised suspension or cancellation of a licence in the event of a failure to *comply with* the *Air Navigation Act* or its regulations or to *comply with* or to *conform to* a term or condition of the relevant international agreement referred to in section 12. Section 13(b) was to be given its ordinary meaning. The term *conform to* meant more than *comply with*. It meant that the power to suspend or cancel was conditioned upon the

airline's failure to conform to the terms and conditions for operation of the other country's scheduled international air services.

82. Further, each of the amendments made to section 13 in 1984 and 1992 touched on the consequence for airlines' licences if there was a failure by the airlines concerned to agree their tariffs. In both 1984 and 1992, section 13 was to be construed as speaking continuously in the present.[41] The references to applicable agreements in sections 12 and 13 at those dates extended to each of the agreements which had come into force by those dates, including the Australia-Indonesia ASA.

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83. By the requirement in section 12(2) that a licence not issue unless the operation of any service was "subject to the agreement or arrangement" and the provision in section 13(b) for suspension or cancellation of any licence when an airline fails to conform to or comply with "any term or condition of the relevant agreement or arrangement," the *Air Navigation Act* required that the operation of scheduled international air services by airlines from countries other than Australia be in conformance to the terms and conditions applying to the other country's scheduled international air services.[42]

20 84. That is not to say that sections 12 and 13 operate to import into domestic law applying to Garuda's licence Australia's obligations under the ASA. Rather, they are concerned with the obligations attaching to the operation of the "scheduled international air services of [the] other country", in this case Indonesia. The reasoning at FC[205] was in error in focusing on Australia's obligations: Garuda was licensed to conduct Indonesia's scheduled international air services and the Act was concerned to ensure that in doing so Garuda conformed not to Australia's obligations but with Indonesia's.

85. The reasoning of the majority at FC[190] that "the Australia-Indonesia ASA could
30 not itself create a new duty imposed upon an entity like Garuda who is not a party to it" was correct but beside the point. The requirement imposed by sections 12 and 13 of the *Air Navigation Act* was to conform to the terms and conditions of the relevant agreement or arrangement in operating the scheduled international air services of Indonesia over or into Australian territory.

86. The ASA provided content to that requirement. Its terms and conditions were criteria for operation of the duty imposed by sections 12(2) and 13(b). No question of subsequent State practice arose which may have altered the meaning of the domestic law. Rather the domestic law in its operation and effect provided for conformance to
40 the terms and conditions of ASAs, including ASAs which were to be made after enactment of the relevant domestic provisions. The reasoning upon which the majority relied from *Maloney v R*[43] did not engage with legislative provisions to the

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[41] *Muin v Refugee Review Tribunal* (2002) 76 ALJR 966 at 986 [104].

[42] In a similar fashion to how the *Migration Act 1958* had once focused upon the definition in Article 1 of the Refugees Convention as the criterion of operation for its protection visa system: see McHugh and Gummow JJ in *Minister for Immigration and Multicultural Affairs v Khawar* (2002) 210 CLR 1 at [45] (***Khawar***) approved by Gummow ACJ, Callinan, Heydon and Crennan JJ in *Minister for Immigration and Multicultural Affairs v QAAH/2004* (2006) 231 CLR 1 at [34].

[43] (2013) 252 CLR 168 at 182 [15].

effect of sections 12 and 13 of the *Air Navigation Act*, which contemplated operation by reference to treaty provisions made after enactment.

87. Further, the requirement was, in effect, re-enacted by the 1984 and 1992 amendments referred to above. The Australia-Indonesia ASA was in force when those amendments were made.

Construing the Australia-Indonesia ASA

88. It is sufficient to notice the following aspects of the Australia-Indonesia ASA:

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a. by Article 2(2) rights are expressed to be conferred on the airline designated by each Contracting Party. Sub-paragraphs (a) and (b) concern rights to conduct non-traffic flights in Australian territory, recalling that Indonesia is not a party to the Air Transit Agreement;
b. the right to conduct scheduled international air services is conferred on the airline by Article 2(2) paragraph (c). That right of the airline is expressed to be "subject to the provisions of the present Agreement";
c. Article 3(1) to (4) provides for each Contracting Party to nominate its designated airline;
d. Article 3(5) provides that an airline so designated may begin to operate the agreed services "provided that a service shall not be operated unless a tariff is in force in respect thereof established in accordance with the provisions of Article 6 of the present Agreement";
e. Article 3(6) provided for revocation of the rights conferred by Article 2(2) if Garuda failed to operate in accordance with the conditions of the ASA;
f. Article 6(2) to (4) provided a cascading process for the setting of tariffs. The first was that tariffs were to be agreed through IATA if possible. The second, to apply only if agreement through IATA was not possible, was that they were to be agreed between the designated airlines concerned. The remaining processes were only to apply if the designated airlines concerned could not agree on the tariffs.

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89. Garuda would fail to conform with Articles 3(5) and 6 of the ASA by operating services to Australia without agreeing tariffs with other airlines (if consensus was possible) and its rights under Article 2(2) could then be revoked. Garuda's right to operate scheduled international air services into Australian territory under Article 2(2)(c) was expressly subject to, inter alia, Articles 3(5) and 6.

90. Indonesia is not a party to the Vienna Convention on the Law of Treaties. The Australia-Indonesia ASA was therefore to be construed in accordance with customary international law. Nevertheless, regard may be had to the Vienna Convention as reflecting those customary rules.[44] The ASA is to be construed in accordance with the ordinary meaning to be given to its terms "in their context and in the light of its object and purpose".

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91. That context did not support the majority's reasoning. It was described in the report of Professor Dempsey who was not cross examined. He said:

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[44] Per McHugh J in *Thiel v Federal Commissioner of Taxation* (1990) 171 CLR 338 at 356.6.

> *"The Indonesia Australia bilateral Air Transport Agreement ... was negotiated in the context of aviation relations in 1969, before the introduction of 'open skies' free market competition. Under the bilaterals concluded during that period, governments protected their airlines from 'destructive competition' by creating an environment in which air carriers could earn a reasonable return on investment. Anti-trust and competition laws were no part of the equation, as carriers were explicitly permitted – indeed, expected – to consult and agree on issues involving pricing either under IATA auspices, or directly with competing carriers on the routes in question. To this day, Indonesia has steadfastly resisted the efforts, even within ASEAN, to embrace an 'open skies' aviation regime."*[45]

92. Tariff agreements through IATA were, at that time, the bedrock upon which scheduled international air services operated. So it was that, as late as 1978, this Court found no error in the Secretary of the Department taking regulatory steps to prevent Malaysian Airlines, which operated under the ASA with Malaysia which contained an IATA tariff clause[46] from supplying Australian university students with travel to London at prices less than the tariff agreed between the airlines through IATA and applied by all 24 airlines that operated services from Australia to London.[47]

93. There was nothing in the text of the ASA to support the majority's reasoning at FC[203] that Article 6(2) was to be read down to impose no more than a reasonable steps obligation on Garuda to reach agreement on tariffs. The finding was made without taking into account Articles 2(2), 3(5) and 3(6) and is inconsistent with the reasoning and conclusion at FC[208] that the clear meaning of Article 6(2) is to impose an obligation upon Garuda to reach agreement through IATA if possible and otherwise to do so with Qantas.

The terms and conditions to which Section 13(b) is directed

94. The reasoning at FC[204] and [205] which would restrict the terms and conditions in the ASA of relevance to a decision to cancel or suspend a licence should not be accepted. The distinction between breaches of terms and conditions by Indonesia and breaches by Garuda is not consistent with the scheme of the Act in which section 12(2) contemplates that the services operated by Garuda are the scheduled international air services of Indonesia nor is it consistent with the reference in section 13(b) to <u>any</u> term or condition of the relevant Agreement. We have dealt with above the error at FC[205] which focused upon potential breach by Australia of its obligations by reason of conduct by Garuda where the relevant question was whether Indonesia might thereby be in breach of its obligations.

***Trade Practices Act* section 51**

95. *Air Navigation Act outside scope of operation of section 51*: The paragraph relevantly engaged is section 51(1)(a). It concerns "anything which is specified in and specifically authorized by" other Commonwealth laws. It operates so that if the other

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[45] Report of Professor Dempsey page 12; see also Haanappel at pages 37 and 38.
[46] [1973] ATS 5 Art. IX.
[47] *R v Halton. Ex p AUS Student Travel Pty Ltd* (1978) 138 CLR 201: see Stephen J's summary of the facts at 205.5

law meets the requirements of section 51(1C) the thing authorized "must be disregarded" in deciding whether a contravention of Part IV of the *Trade Practices Act* has occurred.

96. If section 51 operates at all to mediate conflicts with other Commonwealth laws, its field of operation is limited to conflicts between provisions of Part IV of the *Trade Practices Act* that apply to anything authorized by a law and the law which authorizes that thing.

97. The *Air Navigation Act* is not such a law. It relevantly imposes a requirement on Garuda, when it flies into Australian airspace as part of its operating Indonesia's scheduled international air services to Australia, to conform to the terms and conditions of the Australia-Indonesia ASA. In so doing the *Air Navigation Act* did not authorize anything. Garuda did not need, or have, any authorization or permission from Australia or pursuant to any Australian law, to conform to Indonesia's obligations under the ASA.

98. At FC [228] the majority described the distinction between a law which requires and a law which authorizes as "semantic" and rejected it. To reject the distinction was an error. The *Air Navigation Act* sections 12 and 13 did not relevantly authorize anything that might be done by Garuda in operating Indonesia's air services and those provisions were beyond the scope of operation of section 51.

99. *General intent to pre-empt permissive laws:* At FC [228] to [230] the majority below reasoned that section 51 of the *Trade Practices Act,* at least since its amendment in 1995, evinced a legislative intention that a statute which makes no reference to the *Trade Practices Act* and which provides no express requirement or authority could not permit conduct contrary to Part IV of the *Trade Practices Act.* At FC [228] it is said that that provides a reason, in addition to the rejection of Garuda's semantic distinction, why section 51 operated to preempt the *Air Navigation Act.*

100. The repugnancy between the *Air Navigation Act* and section 45 of the *Trade Practices Act* is not addressed by the legislative intention as found because the *Air Navigation Act* does not permit conduct, and on no view did Garuda require permission under Australian law to agree its tariffs in Indonesia and Hong Kong. The reasoning at FC [228] to [230] adds nothing to the rejection of Garuda's semantic distinction.

101. *No implied repeal:* The reasoning at FC [230] refers to the legislative intention of statutes other than the *Trade Practices Act.* It was open to the Parliament to enact an interpretation provision applicable to other legislation which may have had the effect of altering the meaning of other statutes[48] but section 51 is not concerned with interpretation of other laws.

102. If section 51 operated to resolve any inconsistency it could only have done so by impliedly repealing, in whole or in part, sections 12 and 13 of the *Air Navigation Act.*

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[48] As was done in the provision at s. 12(c) considered in *Kocic v Commissioner of Police (NSW)* (2014) 88 NSWLR 159; [2014] NSWCA 368 per Basten JA at [25] and [26] and Leeming JA at [86]

103. Partial repeal of an earlier statute by a later statute will only be inferred "on very strong grounds."[49] Those grounds do not exist in this case.

104. *First*, the *Competition Policy Reform Act 1995* (No 88 of 1995) which inserted section 51(1C) and the *Transport Legislation Amendment Act (No 2) 1995* (No 89 of 1995) each received assent on 20 July 1995. The *Transport Legislation Amendment Act (No 2)* amended section 12 of the *Air Navigation Act* by inserting a criminal offence for operating an aircraft into Australian territory except in accordance with a licence. By that amendment, coincident with the insertion of section 51(1C) the Parliament re-enacted, or in any event reaffirmed the effect of, sections 12 and 13 of the *Air Navigation Act*.

105. *Secondly,* the legislative intention found at FC[230] operates by reference to permitting conduct which contravenes Part IV. That may be sufficient to impliedly repeal a provision which permitted conduct which constituted, *per se*, a contravention of Part IV. The *Air Navigation Act* does not authorise or permit conduct which *per se* would contravene Part IV.

106. *Thirdly,* implied repeal will not be found without construction of, and close attention, to both statutes in question.[50] The broadly stated "legislative intention" referred to at FC [230] is based on one only of those statutes. The implied repeal of sections 12 and 13 of the *Air Navigation Act* generally, or of the requirement imposed by those sections that international airlines conform to the terms and conditions of an applicable ASA, could not be effected by section 51: that would give to section 51 an effect extending beyond the scope, object and purpose of the *Trade Practices Act*. Nor could implied repeal alter the terms and conditions of an ASA. Implied repeal therefore does not provide a mechanism to resolve the inconsistency between laws in this case.

107. *Fourthly*, section 51(1C) paragraphs (c) and (d) preclude implied repeal of laws because of the potential that things authorized by them may be had regard to in deciding whether a contravention of the *Trade Practices Act* occurred. Those paragraphs operate so that section 51(1) requires that things that occur during the first two years during which certain regulations are in force be disregarded in proceedings for contravention of the *Trade Practices Act*; while those same things that occur later in time are, like things authorized by the *Air Navigation Act*, not to be disregarded because of section 51(1). The regulations, however, are regarded as valid and effective from the date that they are made. Section 51 including sub-section (1C) cannot operate to impliedly repeal those regulations at any time. There is no reason for it to be construed as impliedly repealing other laws because they authorize or permit conduct to which regard may be had in proceedings for contravention of the *Trade Practices Act*.

The conflict and its resolution

108. Sections 12 and 13 of the *Air Navigation Act* operated to require that the airlines agree tariffs. From 1992 that was a requirement imposed on both foreign and domestic international airlines. The imposition of that requirement was inconsistent

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[49] *Ferdinands v Commissioner of Police (SA)* (2006) 225 CLR 130; [2006] HCA 5 (*Ferdinands*) per Gleeson CJ at 134 [4]; Gummow and Hayne JJ at 138 [18]

[50] *Ferdinands* per Gummow and Hayne JJ at 138[18]

with sections 45 and 45A of the *Trade Practices Act* when they were enacted in 1974 and 1977, and in the case of scheduled international air services of Indonesia the inconsistency remains today.

109. That inconsistency is to be resolved so that the *Air Navigation Act* and *Trade Practices Act* operated harmoniously together.[51] That was to be achieved by applying the presumption that the general enactment (sections 45 and 45A) was not intended to interfere with the special provisions (sections 12 and 13) unless it manifested that intention very clearly.[52] As a result, sections 45 and 45A of the *Trade Practices Act* did not apply to the agreement of tariffs for Scheduled International Air Services supplied by international airlines operating under treaties which provided for those tariffs to be agreed by those airlines and a competitor.

110. *Unreasonableness*: The majority below reasoned that the inconsistency between the *Air Navigation Act* and *Trade Practices Act* did not arise because the power to cancel or suspend was limited by the requirement of legal reasonableness and that "it would not be reasonable to cancel a licence where the failure consisted of complying with the requirements of Australian law" (FC[200]). Implicit in that reasoning is the conclusion that enactment of the *Trade Practices Act* amended the content of the power to cancel or suspend a licence under section 13(b). That conclusion was speculation[53] and the reasoning was a misuse of the concept of legal reasonableness to address a conflict between laws, which was to be done by application of the principles in *Eaton*.

111. The legal reasonableness of the exercise of a statutory discretion is to be assessed by reference to the scope, object and purpose of the statutory provision in question.[54] The enactment of sections 45 and 45A of the *Trade Practices Act* did not affect the scope, object or purpose of the power conferred by section 13(b) of the *Air Navigation Act*. It was an error to reason that it did, and inconsistent with other recent decisions of the Full Court.[55]

112. *Textual constraints on reading down*: At FC[223] and [224] the majority declined to construe sections 45 and 45A so that they did not conflict with the *Air Navigation Act*. Consistent with *Eaton* they were to be read down in a manner directly analogous to that found by Deane J in *Refrigerated Express*.[56]

C. FOREIGN STATE COMPULSION

113. Garuda did not make or give effect to the 2002 Hong Kong Lufthansa Methodology Understanding (TJ[595]) and was found to have made the Hong Kong Imposition Understanding "conscious that it was obliged to charge the relevant surcharge and

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[51] *Eaton* at 18 [45] (per Crennan, Kiefel and Bell JJ) and at 33 and 34 [98] and [99] (per Gageler J).
[52] *Eaton* at 19 [46] (per Crennan, Kiefel and Bell JJ) and at 11 [21] (per Hayden J).
[53] *Eaton* at 28 [79]
[54] *Minister for Immigration v Li* [2013] HCA 18; (2013) 249 CLR 332 ('Li') at 350 [26] (per French CJ), 363 – 364 [67] (per Hayne, Kiefel and Bell JJ), 370 – 371 [90] (per Gageler J); see also *Klein v Domus Pty Limited* [1963] HCA 54; (1963) 109 CLR 467 at 473.7 (per Dixon CJ).
[55] *Minister for Immigration v Singh* [2014] FCAFC 1; (2014) 231 FCR 437 at 447 [48]; *Minister for Immigration and Border Protection v Stretton* [2016] FCAFC 11 at [5], [9]-[12],[15],[23],[61]-[62],[92]; *Minister for Immigration and Border Protection v Eden* [2016] FCAFC 28 at [63]-[65].
[56] *Refrigerated Express Lines (A/Asia) Pty Ltd v Australian Meat and Livestock Corporation* (1979) 44 FLR 455 at 471.9.

that other airlines were likewise bound."(TJ[650]) Garuda adopts Air New Zealand's submissions on Foreign State Compulsion in proceeding S110 of 2016 which for the same reasons as Air New Zealand did not make it, demonstrate that Garuda did not make the Hong Kong Imposition Understanding.

Part VII: Statutory provisions annexed

114. *Trade Practices Act 1974* (Cth) sections 2, 4E, 5, 45(2), 45(3), 45A and 51;

115. *Air Navigation Act 1920* (Cth) sections 12, 13 and 22;

116. Agreement between the Government of the Commonwealth of Australia and the Government of the Republic of Indonesia for Air Services Between and Beyond their Respective Territory (Sydney, 7 March 1969) ATS No 4 of 1969 Articles 1, 2, 3 and 6; and

117. *Convention on International Civil Aviation*, signed on 7 December 1944, ICAO Doc 7300 Articles 1, 6 and 96.

Part VIII: Orders Sought

118. The Appellant seeks the following orders:
    a. Orders 1 to 6 of the Full Court of the Federal Court of Australia made in proceeding NSD1330/2014 on 30 March 2016 be set aside.
    b. In lieu thereof, it be ordered:
        ii. The appeal to that Court be dismissed;
        iii. The Appellant in that Court pay the costs of the Respondent in that Court.
    c. The Respondent pay the Appellant's costs of the appeal.

Part IX: Oral Argument

119. The Appellant estimates the presentation of its oral argument will take 2 hours.

Dated: 18 November 2016

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ANNEXURE A – RELEVANT STATUTORY AND TREATY PROVISIONS

***Trade Practices Act 1974* (Cth)**

Section 2

As in force from 17 August 1995

The object of this Act is to enhance the welfare of Australians through the promotion of competition and fair trading and provision for consumer protection.

Section 4E

As in force from 1 July 1990

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.

Section 5

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

(1A) In addition to the extended operation that section 46A has by virtue of subsection (1), that section extends to the engaging in conduct outside Australia by:

(a) New Zealand and New Zealand Crown corporations; or

(b) bodies corporate carrying on business within New Zealand; or

(c) persons ordinarily resident within New Zealand.

(2) In addition to the extended operation that sections 47 and 48 have by virtue of subsection (1), those sections extend to the engaging in conduct outside Australia by any persons in relation to the supply by those persons of goods or services to persons within Australia.

(3) Where a claim under section 82 is made in a proceeding, a person is not entitled to rely at a hearing in respect of that proceeding on conduct to which a provision of this Act extends by virtue of subsection (1) or (2) of this section except with the consent in writing of the Minister.

(4) Where person other than the Minister or the Commission is not entitled to make an application to the Court for an order under subsection 87(1) or (1A) in a proceeding in respect of conduct to which a provision of this Act extends by virtue of subsection (1) or (2) of this section except with the consent in writing of the Minister.

(5) The Minister shall give a consent under subsection (3) or (4) in respect of a proceeding unless, in the opinion of the Minister:

(a) the law of the country in which the conduct concerned was engaged in required or specifically authorised the engaging in of the conduct; and

(b) it is not in the national interest that the consent be given.

Subsection 45(2)

As in force from 1 October 1974

A corporation shall not -

(a) make a contract or arrangement, or enter into an understanding, in restraint of trade or commerce; or

(b) give effect to a contract, arrangement or understanding to the extent that it is in restraint of trade or commerce, whether the contract or arrangement was made or the understanding was entered into before or after the commencement of this sub- section.

As in force from 1 July 1977

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.

Subsection 45(3)

As in force from 1 October 1974

A contract, arrangement or understanding having the purpose or effect of fixing, controlling or maintaining the price for, or any discount, allowance or rebate in relation to, any goods or services supplied by the parties to the contract, arrangement or understanding, or by any of them, in competition with each other to persons not being parties to the contract, arrangement or understanding is not in restraint of trade or commerce for the purposes of this Act if the restraint has such a slight effect on competition between the parties to the contract, arrangement or understanding, and on competition between those parties or any of them and other persons, as to be insignificant.

As in force from 1 July 1977

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.

Subsection 45A(1)

As in force from 1 July 1977

(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 relation to 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.

Section 51

As in force from 1 October 1974

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

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

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

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

(2) In determining whether a contravention of a provision of this Part other than section 48 has been committed, regard shall not be had–

(a) to any act done, or to any provision of a contract, in relation to the remuneration, conditions of employment, hours of work or working conditions of employees, or to any act done by employees or by an organisation of employees not being an act done in the course of the carrying on of a business of the employer of those employees or of a business of that organisation;

(b) to any provision of a contract, being a contract of service or a contract for the provision of services, under which a person, not being a body corporate, agrees to accept restrictions as to the work, whether as an employee or otherwise, in which he may engage during, or after the termination of, the contract;

(c) to any provision of a contract, or any arrangement or understanding, obliging a person to comply with or apply standards of dimension, design, quality or performance prepared or approved by the Standards Association of Australia or by a prescribed association or body;

(d) to any provision of a contract, or any arrangement or understanding, between partners none of whom is a body corporate in relation to the terms of the partnership or the conduct of the partnership business or in relation to competition between the partnership and a party to the contract, arrangement or understanding while he is, or after he ceases to be, a partner;

(e) in the case of a contract for the sale of a business or of shares in the capital of a body corporate carrying on a business–to any provision of the contract that is solely for the protection of the purchaser in respect of the goodwill of the business;

(f) to any acts done, otherwise than in the course of trade or commerce, in concert by ultimate users or consumers of goods or services against the suppliers of those goods or services; or

(g) to any act or thing that relates exclusively to the export of goods from Australia or to the supply of services outside Australia, being an act or thing done in pursuance of an agreement of which full and accurate particulars were furnished to the Commission before the act or thing was done.

(3) In determining whether a contravention of a provision of this Part other than section 46 or 48 has been committed, regard shall not be had–

(a) in the case of a contract for or in respect of–

(i). a licence granted or to be granted by the proprietor, licensee or owner of a patent, a registered design or a copyright or by a person who has applied for a patent or for the registration of a design; or

(ii). an assignment of a patent, a registered design or a copyright or of the right to apply for a patent or for the registration of a design,

to any condition of the licence or assignment relating exclusively to–

(iii). the invention to which the patent or application for a patent relates or articles made by the use of that invention;

(iv). goods in respect of which the design is or is proposed to be registered and to which it is applied; or

(v). the work or other subject matter in which the copyright subsists;

(b) in the case of a contract authorizing the use of a certification trade mark–to any provision included in the contract in accordance with rules applicable under Part XI of the Trade Marks Act 1955–1973; or

(c) in the case of a contract between the registered proprietor of a trade mark other than a certification trade mark and a person authorized by the contract to use the trade mark subject to registration as a registered user under Part IX of the Trade Marks Act 1955–1973–to any provision of the contract with respect to the kinds, qualities or standards of goods bearing the mark that may be produced or supplied.

As in force from 1 July 1977

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

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

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

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

(2) In determining whether a contravention of a provision of this Part other than section 45D or 48 has been committed, regard shall not be had–

(a) to any act done in relation to, or to any provision of a contract, arrangement or understanding to the extent that the provision relates to, the remuneration, conditions of employment, hours of work or working conditions of employees;

(b) to any provision of a contract of service or of a contract for the provision of services, being a provision under which a person, not being a body corporate,

agrees to accept restrictions as to the work, whether as an employee or otherwise, in which he may engage during, or after the termination of, the contract;

(c) to any provision of a contract, arrangement or understanding, being a provision obliging a person to comply with or apply standards of dimension, design, quality or performance prepared or approved by the Standards Association of Australia or by a prescribed association or body;

(d) to any provision of a contract, arrangement or understanding between partners none of whom is a body corporate, being a provision in relation to the terms of the partnership or the conduct of the partnership business or in relation to competition between the partnership and a party to the contract, arrangement or understanding while he is, or after he ceases to be, a partner;

(e) in the case of a contract for the sale of a business or of shares in the capital of a body corporate carrying on a business–to any provision of the contract that is solely for the protection of the purchaser in respect of the goodwill of the business; or

(g) to any provision of a contract, arrangement or understanding, being a provision that relates exclusively to the export of goods from Australia or to the supply of services outside Australia, if full and accurate particulars of the provision (not including particulars of prices for goods or services but including particulars of any method of fixing, controlling or maintaining such prices) were furnished to the Commission before the expiration of 14 days after the date on which the contract or arrangement was made or the understanding was arrived at, or before 8 September 1976, whichever was the later.

(2A) In determining whether a contravention of a provision of this Part other than section 48 has been committed, regard shall not be had to any acts done, otherwise than in the course of trade or commerce, in concert by ultimate users or consumers of goods or services against the suppliers of those goods or services.

(3) A contravention of a provision of this Part other than section 46 or 48 shall not be taken to have been committed by reason of–

(a) the imposing of, or giving effect to, a condition of–

(i). a licence granted by the proprietor, licensee or owner of a patent, of a registered design or of a copyright or by a person who has applied for a patent or for the registration of a design; or

(ii). an assignment of a patent, of a registered design or of a copyright or of the right to apply for a patent or for the registration of a design,

to the extent that the condition relates to–

(iii). the invention to which the patent or application for a patent relates to articles made by the use of that invention;

(iv). goods in respect of which the design is, or is proposed to be, registered and to which it is applied; or

(v). the work or other subject matter in which the copyright subsists;

(b) the inclusion in a contract, arrangement or understanding authorizing the use of a certification trade mark of a provision in accordance with rules applicable under Part XI of the Trade Marks Act 1955, or the giving effect to such a provision; or

(c) the inclusion in a contract, arrangement or understanding between–

(i). the registered proprietor of a trade mark other than a certification trade mark; and

(ii). a person registered as a registered user of that trade mark under Part IX of the Trade Marks Act 1955 or a person authorized by the contract to use the trade mark subject to his becoming registered as such a registered user,

of a provision to the extent that it relates to the kinds, qualities or standards of goods bearing the mark that may be produced or supplied, or the giving effect to the provision to that extent.

(4) This section applies in determining whether a provision of a contract is unenforceable by reason of sub-section 45 (1), or whether a covenant is unenforceable by reason of sub-section 45B (1), in like manner as it applies in determining whether a contravention of a provision of this Part has been committed.

As in force from 1 July 1999

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

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

(i). an Act (not including an Act relating to patents, trademarks, designs or copyrights); or

(ii). regulations made under such an Act;

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

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

(ii). regulations made under such an Act;

(c) anything done in the Australian Capital Territory, if the thing is specified in, and specifically authorised by:

(i). an enactment as defined in section 3 of the Australian Capital Territory (Self-Government) Act 1988; or

(ii). regulations made under such an enactment;

(d) anything done in the Northern Territory, if the thing is specified in, and specifically authorised by:

(i). an enactment as defined in section 4 of the Northern Territory (Self-Government) Act 1978; or

(ii). regulations made under such an enactment;

(e) anything done in another Territory, if the thing is specified in, and specifically authorised by:

(i). an Ordinance of that Territory; or

(ii). regulations made under such an Ordinance.

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

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

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

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

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

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

(1B) Subsections (1) and (1A) apply regardless of when the Acts, State Acts, enactments, Ordinances, regulations or instruments referred to in those subsections were passed, made or issued.

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

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

(b) subparagraph (1)(a)(ii) and paragraphs (1)(b), (c), (d) and (e) do not apply in deciding whether a person has contravened section 50 or 50A;

(c) regulations referred to in subparagraph (1)(a)(ii), (b)(ii), (c)(ii), (d)(ii) or (e)(ii) do not have the effect of requiring a particular thing to be disregarded if the thing happens more than 2 years after those regulations came into operation;

(d) regulations referred to in subparagraph (1)(a)(ii), (b)(ii), (c)(ii), (d)(ii) or (e)(ii) do not have the effect of requiring a particular thing to be disregarded to the extent that the regulations are the same in substance as other regulations:

(i). referred to in the subparagraph concerned; and

(ii). that came into operation more than 2 years before the particular thing happened;

(e) paragraphs (1)(b) to (d) have no effect in relation to things authorised by a law of a State or Territory unless:

(i). at the time of the alleged contravention referred to in subsection (1) the State or Territory was a party to both the Competition Principles Agreement and the Conduct Code Agreement; or

(ii). all of the following conditions are met:

(A) within 12 months before the alleged contravention referred to in subsection (1) the State or Territory ceased to be a party to the Conduct Code Agreement or to the Competition Principles Agreement;

(B) the thing authorised was the making of a contract, or an action under a contract, that existed immediately before the State or Territory ceased to be a party;

(C) the law authorising the thing was in force immediately before the State or Territory ceased to be a party;

(f) subsection (1) does not apply to things that are covered by paragraph (1)(b), (c), (d) or (e) to the extent that those things are prescribed by regulations made under this Act for the purposes of this paragraph.

(2) In determining whether a contravention of a provision of this Part other than section 45D, 45DA, 45DB, 45E, 45EA or 48 has been committed, regard shall not be had–

(a) to any act done in relation to, or to the making of a contract or arrangement or the entering into of an understanding, or to any provision of a contract, arrangement or understanding, to the extent that the contract, arrangement or understanding, or the provision, relates to, the remuneration, conditions of employment, hours of work or working conditions of employees;

(b) to any provision of a contract of service or of a contract for the provision of services, being a provision under which a person, not being a body corporate, agrees to accept restrictions as to the work, whether as an employee or otherwise, in which he may engage during, or after the termination of, the contract;

(c) to any provision of a contract, arrangement or understanding, being a provision obliging a person to comply with or apply standards of dimension, design, quality

or performance prepared or approved by Standards Australia International Limited or by a prescribed association or body;

(d) to any provision of a contract, arrangement or understanding between partners none of whom is a body corporate, being a provision in relation to the terms of the partnership or the conduct of the partnership business or in relation to competition between the partnership and a party to the contract, arrangement or understanding while he is, or after he ceases to be, a partner;

(e) in the case of a contract for the sale of a business or of shares in the capital of a body corporate carrying on a business–to any provision of the contract that is solely for the protection of the purchaser in respect of the goodwill of the business; or

(g) to any provision of a contract, arrangement or understanding, being a provision that relates exclusively to the export of goods from Australia or to the supply of services outside Australia, if full and accurate particulars of the provision (not including particulars of prices for goods or services but including particulars of any method of fixing, controlling or maintaining such prices) were furnished to the Commission before the expiration of 14 days after the date on which the contract or arrangement was made or the understanding was arrived at, or before 8 September 1976, whichever was the later.

(2A) In determining whether a contravention of a provision of this Part other than section 48 has been committed, regard shall not be had to any acts done, otherwise than in the course of trade or commerce, in concert by ultimate users or consumers of goods or services against the suppliers of those goods or services.

(3) A contravention of a provision of this Part other than section 46, 46A or 48 shall not be taken to have been committed by reason of–

(a) the imposing of, or giving effect to, a condition of–

(i). a licence granted by the proprietor, licensee or owner of a patent, of a registered design, of a copyright or of EL rights within the meaning of the Circuit Layouts Act 1989, or by a person who has applied for a patent or for the registration of a design; or

(ii). an assignment of a patent, of a registered design, of a copyright or of such EL rights, or of the right to apply for a patent or for the registration of a design,

to the extent that the condition relates to–

(iii). the invention to which the patent or application for a patent relates to articles made by the use of that invention;

(iv). goods in respect of which the design is, or is proposed to be, registered and to which it is applied;

(v). the work or other subject matter in which the copyright subsists; or

(vi). the eligible layout in which the EL rights subsist.

(b) the inclusion in a contract, arrangement or understanding authorizing the use of a certification trade mark of a provision in accordance with rules applicable under Part XI of the Trade Marks Act 1955, or the giving effect to such a provision; or

(c) the inclusion in a contract, arrangement or understanding between–

(i). the registered proprietor of a trade mark other than a certification trade mark; and

(ii). a person registered as a registered user of that trade mark under Part IX of the Trade Marks Act 1955 or a person authorized by the contract to use the trade mark subject to his becoming registered as such a registered user,

of a provision to the extent that it relates to the kinds, qualities or standards of goods bearing the mark that may be produced or supplied, or the giving effect to the provision to that extent.

(4) This section applies in determining whether a provision of a contract is unenforceable by reason of sub-section 45 (1), or whether a covenant is unenforceable by reason of sub-section 45B (1), in like manner as it applies in determining whether a contravention of a provision of this Part has been committed.

(5) In the application of subsection (2A) to section 46A, the reference in that subsection to trade or commerce includes trade or commerce within New Zealand.

Air Navigation Act 1920 **(Cth)**

Section 12

As in force from 19 August 1960

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

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

As in force from 3 December 1974

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

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

As in force from 30 June 1992

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

(1A) If an aircraft is flown in contravention of this section:

(a) the owner, the operator and the hirer of the aircraft; and

(b) the pilot in command and any other pilot of the aircraft; are guilty of an offence. Penalty:

(a) in the case of an individual – imprisonment for 7 years; or

(b) in the case of a body corporate – $500,000.

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

As in force from 2 October 2001

(1) Subject to subsection (1B), an international airline shall not operate a scheduled international air service over, into or out of Australian territory except in accordance with an international airline licence issued by the Secretary in accordance with the regulations.

(1A) If an aircraft is flown in contravention of subsection (1), the operator of the aircraft is guilty of an offence punishable on conviction by imprisonment for a period of not more than 7 years.

Note: Subsection 4B(2) of the *Crimes Act 1914* allows a court to impose in respect of an offence an appropriate fine instead of, or in addition to, a term of imprisonment. If a body corporate is convicted of an offence, subsection 4B(3) of that Act allows a court to impose a fine of an amount that is not greater than 5 times the maximum fine that could be imposed by the court on an individual convicted of the same offence.

(1AA) Subsection (1A) does not apply if the operator has a reasonable excuse.

Note: A defendant bears an evidential burden in relation to the matter in subsection (1AA) (see subsection 13.3(3) of the *Criminal Code*).

(1B) Subsection (1) does not apply to the operation of a scheduled international air service by an international airline if it is operated in accordance with:

(a) an agreement, between the international airline and the holder of an international airline licence, that:

(i). has been approved in writing by the Secretary; and

(ii). provides for the airline to operate the service for which the licence was issued; and

(b) the conditions (if any) imposed by the Secretary in giving the approval referred to in subparagraph (a)(i).

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

(3) The meanings of 'air service' and 'international air service' given by subsection 3(1) do not apply to this section.

Section 13

As in force from 19 August 1960

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

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

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

As in force from 30 December 1992

The Minister may vary, suspend or cancel an international airline licence issued to an international airline if and only if–

(a) the airline or any aircraft operated by the airline fails to comply with a provision of this Act, the regulations, the Civil Aviation Act 1988, the regulations made under that Act, or the terms of its licence;

(b) the airline fails to conform to, or comply with, any term or condition of the relevant agreement or arrangement referred to in section 12;

(c) in the opinion of the Minister–

(i). the airline or an aircraft operated by the airline is likely to fail to comply with this Act, the regulations, the Civil Aviation Act 1988, the regulations made under that Act, or the terms of its licence; or

(ii). adequate provision has not been made by the relevant authority to ensure that the airline and aircraft operated by the airline substantially conform to and comply with the standards, practices and procedures set out in the Chicago Convention and the Annexes to that Convention, and, in the opinion of the Minister, the likely failure or the lack of provision is likely to affect the safety of air navigation in relation to Australia; or

(d) in the opinion of the Minister it is necessary or desirable to do so for the purpose of preserving or promoting fair competition in international air transport services.

As in force from 10 March 2005

The Minister may vary, suspend or cancel an international airline licence issued to an international airline if and only if–

(a) the airline or any aircraft operated by the airline fails to comply with a provision of this Act, the regulations, the Civil Aviation Act 1988, the regulations made under that Act, the Aviation Transport Security Act 2004, the regulations made under that Act, or the terms of its licence;

(b) the airline fails to conform to, or comply with, any term or condition of the relevant agreement or arrangement referred to in section 12;

(c) in the opinion of the Minister–

(i). the airline or an aircraft operated by the airline is likely to fail to comply with this Act, the regulations, the Civil Aviation Act 1988, the regulations made under that Act, the Aviation Transport Security Act 2004, the regulations made under that Act, or the terms of its licence; or

(ii). adequate provision has not been made by the relevant authority to ensure that the airline and aircraft operated by the airline substantially conform to and comply with the standards, practices and procedures set out in the Chicago Convention and the Annexes to that Convention, and, in the opinion of the Minister, the likely failure or the lack of provision is likely to affect the safety of air navigation in relation to Australia; or

(d) in the opinion of the Minister it is necessary or desirable to do so for the purpose of preserving or promoting fair competition in international air transport services.

Section 22

As in force from 1 December 1966

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

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

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

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

(a) if the offence is prosecuted summarily– a fine not exceeding Four hundred pounds or imprisonment for a term not exceeding six months, or both; or

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

(5) Proceedings for the commitment of a person for trial on indictment for an offence against this Act shall not be instituted except with the consent in writing of the Director-General.

(6) Proceedings for the summary prosecution of an offence against this Act shall not be instituted except with the consent in writing of the Director-General or a person authorized by the Director-General, by writing under his hand, to give such consents.

(7) Notwithstanding the preceding provisions of this section, the regulations may make provision for or in relation to other consequences (in addition to punishment for an

offence) of contravention of, or failure to comply with, a provision of this Act or the regulations or to ensure compliance with a provision of this Act or the regulations.

As in force from 3 December 1974

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

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

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

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

(a) if the offence is prosecuted summarily– a fine not exceeding Four hundred pounds or imprisonment for a term not exceeding six months, or both; or

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

(5) Proceedings for the commitment of a person for trial on indictment for an offence against this Act shall not be instituted except with the consent in writing of the Secretary.

(6) Proceedings for the summary prosecution of an offence against this Act shall not be instituted except with the consent in writing of the Secretary or a person authorized by the Secretary, by writing under his hand, to give such consents.

(7) Notwithstanding the preceding provisions of this section, the regulations may make provision for or in relation to other consequences (in addition to punishment for an offence) of contravention of, or failure to comply with, a provision of this Act or the regulations or to ensure compliance with a provision of this Act or the regulations.

As in force from 30 June 1992

Section 22 of the Principal Act is repealed.

Territories, **signed 7 March 1969, [1969] ATS 4 (entered into force 7 March 1969) ('the Australia-Indonesia ASA')**

Article 1

(1) For the purpose of the present Agreement, unless the context otherwise requires:

(a) the term "the Convention" means the Convention on International Civil Aviation opened for signature at Chicago on the seventh day of December 1944 and includes any Annex adopted under Article 90 of that Convention and any amendment of the Annexes or Convention under Articles 90 or 94 thereof;

(b) the term "aeronautical authorities" means, in the case of the Commonwealth of Australia, the Director General of Civil Aviation and any person or body authorised to perform the functions exercised by the Director General of Civil Aviation or similar functions and, in the case of the Republic of Indonesia, the Minister of Communications and any person or body authorised to perform any function at present exercised by the Minister of Communications or similar functions;

(c) the term "designated airline" means the airline which one Contracting Party shall have designated, by written notification to the other Contracting Party, in accordance with Article 3 of the present Agreement, for the operation of air services on the routes specified in such notification;

(d) the term "territory" in relation to a State has the meaning assigned to it in Article 2 of the Convention except that for the word "mandate" therein there is substituted the word "trusteeship";

(e) the terms "air service", "international air service", "airline" and "stop for non-traffic purposes" have the meanings respectively assigned to them in Article 96 of the Convention.

(2) To the extent to which they are applicable to the air services established under this present Agreement, the provisions of the Convention shall remain in force in their present form as between the Contracting Parties for the duration of this present Agreement as if they were incorporated herein, unless both Contracting Parties ratify any amendment to the Convention which shall have come into force, in which case the Convention as amended shall remain in force as aforesaid.

(3) The Annex to the present Agreement forms an integral part of the Agreement, and all reference to the "Agreement" shall be deemed to include reference to the Annex except where otherwise provided.

Article 2

(1) Each Contracting Party grants to the other Contracting Party the rights specified in the present Agreement to enable its designated airline to establish and operate international air services on the routes specified in the appropriate Section of the Annex thereto (hereinafter called "the agreed services" and "the specified routes").

(2) The airline designated by each Contracting Party shall enjoy the following rights:

(a) to fly without landing across the territory of the other Contracting Party;

(b) to make stops in the said territory for non-traffic purposes; and

(c) while operating an agreed service on a specified route, and subject to the provisions of the present Agreement, to make stops in the said territory at the points specified for that route in the Annex to the present Agreement for the purpose of putting down and of taking on international traffic in passengers, cargo and mail.

(3) Nothing in paragraph (2) of this Article shall be deemed to confer on the airline of one Contracting Party the right of taking up, in the territory of the other Contracting Party, passengers, cargo or mail destined for another point in the territory of that other Contracting Party.

(4) Notwithstanding the provisions of paragraphs (1) and (2) of this Article, the operation of agreed services in areas of hostilities or military occupation, or in areas affected thereby, shall, in accordance with Article 9 of the Convention, be subject to the approval of the competent military authorities.

Article 3

As in force from 1969

(1) Each Contracting Party shall designate in writing to the other Contracting Party, in respect of any specified route, an airline to operate an agreed service on that route.

(2) On receipt of the designation, the other Contracting Party shall, subject to the provisions of paragraphs (3) and (4) of this Article, without delay grant to the airline designated the appropriate operating authorisation.

(3) The aeronautical authorities of one Contracting Party may require the airline designated by the other Contracting Party to satisfy them that it is qualified to fulfil the conditions prescribed under the laws and regulations normally applied by them in conformity with the provisions of the Convention to the operation of international commercial air services.

(4) Each Contracting Party shall have the right to refuse to accept the designation of the airline, or to impose such conditions as it may deem necessary on the exercise by the airline of those rights, in any case where it is not satisfied that substantial ownership and effective control of that airline are vested in the Contracting Party designating the airline or in nationals of that Contracting Party.

(5) At any time after the provisions of paragraphs (1) and (2) of this Article have been complied with, the airline so designated and authorised may begin to operate the agreed services, provided that a service shall not be operated unless a tariff is in force in respect

thereof established in accordance with the provisions of Article 6 of the present Agreement.

(6) Each Contracting Party shall have the right to revoke, or suspend the exercise by the airline of, the rights specified in paragraph (2) of Article 2 of the present Agreement or to impose such conditions as it may deem necessary on the exercise by that airline of those rights, if at any time it is not satisfied that substantial ownership and effective control of the airline are vested in the Contracting Party designating the airline or in nationals of that Contracting Party or if at any time the airline fails to comply with the laws or regulations of the Contracting Party granting those rights or otherwise fails to operate in accordance with the conditions prescribed in the present Agreement; provided that, unless immediate revocation, suspension or imposition of conditions is essential to prevent further infringements of laws or regulations, this right shall be exercised only after consultation with the other Contacting Party.

Article 6

As in force from 1969

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

(2) Agreement on the tariffs shall, whenever possible, be reached by the designated airlines concerned through the rate-fixing machinery of the International Air Transport Association. When this is not possible, tariffs in respect of each of the specified routes shall be agreed upon between the designated airlines concerned. In any case the tariffs shall be subject to the approval of the aeronautical authorities of both Contracting Parties.

(3) If the designated airlines concerned cannot agree on the tariffs, or if the aeronautical authorities of either Contracting Party do not approve the tariffs submitted to them in accordance with the provisions of paragraph (2) of this Article, the aeronautical authorities of the Contracting Parties shall endeavour to reach agreement on those tariffs.

(4) If agreement under paragraph (3) of this Article cannot be reached, the dispute shall be settled in accordance with the provisions of Article 9 of this Agreement.

(5) No new or amended tariff shall come into effect unless it is approved by the aeronautical authorities of both Contracting Parties or is determined by a tribunal of arbitrators under Article 9 of this Agreement. Pending determination of the tariffs in accordance with the provisions of this Article, the tariffs already in force shall apply.

***Convention on International Civil Aviation*, signed on 7 December 1944, ICAO Doc 7300 ('Chicago Convention')**

Article 1

The contracting States recognize that every State has complete and exclusive sovereignty over the airspace above its territory.

Article 6

As in force from 4 April 1947

No scheduled international air service may be operated over or into the territory of a contracting State, except with the special permission or other authorization of that State, and in accordance with the terms of such permission or authorization.

Article 96

As in force from 4 April 1947

For the purpose of the Convention the expression:

"Air service" means any scheduled air service performed by aircraft for the public transport of passengers, mail or cargo.

"International air service" means an air service which passes through the air space over the territory of more than one State.

"Airline" means any air transport enterprise offering or operating an international air service.

"Stop for non-traffic purposes" means a landing for any purpose other than taking on or discharging passengers, cargo or mail.

ANNEXURE B – RELEVANT PROVISIONS IN CURRENT FORM

Commonwealth Consolidated Acts

COMPETITION AND CONSUMER ACT 2010 - SECT 2

Object of this Act

The object of this Act is to enhance the welfare of Australians through the promotion of competition and fair trading and provision for consumer protection.

Commonwealth Consolidated Acts

COMPETITION AND CONSUMER ACT 2010 - SECT 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.

Commonwealth Consolidated Acts

COMPETITION AND CONSUMER ACT 2010 - SECT 5

Extended application of this Act to conduct outside Australia

(1) Each of the following provisions:

(a) Part IV;

(b) Part XI;

(c) the Australian Consumer Law (other than Part 5-3);

(f) the remaining provisions of this Act (to the extent to which they relate to any of the provisions covered by paragraph (a), (b) or (c));

extends to the engaging in conduct outside Australia by:

(g) bodies corporate incorporated or carrying on business within Australia; or

(h) Australian citizens; or

(i) persons ordinarily resident within Australia.

(1A) In addition to the extended operation that section 46A has by virtue of subsection (1), that section extends to the engaging in conduct outside Australia by:

(a) New Zealand and New Zealand Crown corporations; or

(b) bodies corporate carrying on business within New Zealand; or

(c) persons ordinarily resident within New Zealand.

(2) In addition to the extended operation that sections 47 and 48 have by virtue of subsection (1), those sections extend to the engaging in conduct outside Australia by any persons in relation to the supply by those persons of goods or services to persons within Australia.

(3) Where a claim under section 82, or under section 236 of the Australian Consumer Law, is made in a proceeding, a person is not entitled to rely at a hearing in respect of that proceeding on conduct to which a provision of this Act extends by virtue of subsection (1) or (2) of this section except with the consent in writing of the Minister.

(4) A person other than the Minister, the Commission or the Director of Public Prosecutions is not entitled to make an application to the Court for an order under subsection 87(1) or (1A), or under subsection 237(1) or 238(1) of the Australian Consumer Law, in a proceeding in respect of conduct to which a provision of this Act extends by virtue of subsection (1) or (2) of this section except with the consent in writing of the Minister.

(5) The Minister shall give a consent under subsection (3) or (4) in respect of a proceeding unless, in the opinion of the Minister:

(a) the law of the country in which the conduct concerned was engaged in required or specifically authorised the engaging in of the conduct; and

(b) it is not in the national interest that the consent be given.

Commonwealth Consolidated Acts

COMPETITION AND CONSUMER ACT 2010 - SECT 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, ***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.

(6A) The following conduct:

(a) the making of a dual listed company arrangement;

(b) the giving effect to a provision of a dual listed company arrangement;

does not contravene this section if the conduct would, or would apart from subsection 88(8B), contravene section 49.

(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.

(8A) Subsection (2) does not apply to a corporation engaging in conduct described in that subsection if:

(a) the corporation has given the Commission a collective bargaining notice under subsection 93AB(1) describing the conduct; and

(b) the notice is in force under section 93AD.

(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).

Commonwealth Consolidated Acts

COMPETITION AND CONSUMER ACT 2010 - SECT 51

Exceptions

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

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

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

(ii) regulations made under such an Act;

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

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

(ii) regulations made under such an Act;

(c) anything done in the Australian Capital Territory, if the thing is specified in, and specifically authorised by:

(i) an enactment as defined in section 3 of the *Australian Capital Territory (Self-Government) Act 1988* ; or

(ii) regulations made under such an enactment;

(d) anything done in the Northern Territory, if the thing is specified in, and specifically authorised by:

(i) an enactment as defined in section 4 of the *Northern Territory (Self-Government) Act 1978* ; or

(ii) regulations made under such an enactment;

(e) anything done in another Territory, if the thing is specified in, and specifically authorised by:

(i) an Ordinance of that Territory; or

(ii) regulations made under such an Ordinance.

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

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

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

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

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

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

(1B) Subsections (1) and (1A) apply regardless of when the Acts, State Acts, enactments, Ordinances, regulations or instruments referred to in those subsections were passed, made or issued.

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

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

(b) subparagraph (1)(a)(ii) and paragraphs (1)(b), (c), (d) and (e) do not apply in deciding whether a person has contravened section 50 or 50A;

(c) regulations referred to in subparagraph (1)(a)(ii), (b)(ii), (c)(ii), (d)(ii) or (e)(ii) do not have the effect of requiring a particular thing to be disregarded if the thing happens more than 2 years after those regulations came into operation;

(d) regulations referred to in subparagraph (1)(a)(ii), (b)(ii), (c)(ii), (d)(ii) or (e)(ii) do not have the effect of requiring a particular thing to be disregarded to the extent that the regulations are the same in substance as other regulations:

(i) referred to in the subparagraph concerned; and

(ii) that came into operation more than 2 years before the particular thing happened;

(e) paragraphs (1)(b) to (d) have no effect in relation to things authorised by a law of a State or Territory unless:

(i) at the time of the alleged contravention referred to in subsection (1) the State or Territory was a fully-participating jurisdiction and a party to the Competition Principles Agreement; or

(ii) all of the following conditions are met:

(A) the Minister published a notice in the *Gazette* under subsection 150K(1) in relation to the State or Territory, or the State or Territory ceased to be a party to the Competition Principles Agreement, within 12 months before the alleged contravention referred to in subsection (1);

(B) the thing authorised was the making of a contract, or an action under a contract, that existed immediately before the Minister published the notice or the State or Territory ceased to be a party;

(C) the law authorising the thing was in force immediately before the Minister published the notice or the State or Territory ceased to be a party;

(f) subsection (1) does not apply to things that are covered by paragraph (1)(b), (c), (d) or (e) to the extent that those things are prescribed by regulations made under this Act for the purposes of this paragraph.

(2) In determining whether a contravention of a provision of this Part other than section 45D, 45DA, 45DB, 45E, 45EA or 48 has been committed, regard shall not be had:

(a) to any act done in relation to, or to the making of a contract or arrangement or the entering into of an understanding, or to any provision of a contract, arrangement or understanding, to the extent that the contract, arrangement or understanding, or the provision, relates to, the remuneration, conditions of employment, hours of work or working conditions of employees;

(b) to any provision of a contract of service or of a contract for the provision of services, being a provision under which a person, not being a body corporate, agrees to accept restrictions as to the work, whether as an employee or otherwise, in which he or she may engage during, or after the termination of, the contract;

(c) to any provision of a contract, arrangement or understanding, being a provision obliging a person to comply with or apply standards of dimension, design, quality or performance prepared or approved by Standards Australia or by a prescribed association or body;

(d) to any provision of a contract, arrangement or understanding between partners none of whom is a body corporate, being a provision in relation to the terms of the partnership or the conduct of the partnership business or in relation to competition between the partnership and a party to the contract, arrangement or understanding while he or she is, or after he or she ceases to be, a partner;

(e) in the case of a contract for the sale of a business or of shares in the capital of a body corporate carrying on a business--to any provision of the contract that is solely for the protection of the purchaser in respect of the goodwill of the business; or

(g) to any provision of a contract, arrangement or understanding, being a provision that relates exclusively to the export of goods from Australia or to the supply of services outside Australia, if full and accurate particulars of the provision (not including particulars of prices for goods or services but including particulars of any method of fixing, controlling or maintaining such prices) were furnished to the Commission before the expiration of 14 days after the date on which the contract or arrangement was made or the understanding was arrived at, or before 8 September 1976, whichever was the later.

(2A) In determining whether a contravention of a provision of this Part other than section 48 has been committed, regard shall not be had to any acts done, otherwise than in the course of trade or commerce, in concert by ultimate users or consumers of goods or services against the suppliers of those goods or services.

(3) A contravention of a provision of this Part other than section 46, 46A or 48 shall not be taken to have been committed by reason of:

(a) the imposing of, or giving effect to, a condition of:

(i) a licence granted by the proprietor, licensee or owner of a patent, of a registered design, of a copyright or of EL rights within the meaning of the *Circuit Layouts Act 1989* , or by a person who has applied for a patent or for the registration of a design; or

(ii) an assignment of a patent, of a registered design, of a copyright or of such EL rights, or of the right to apply for a patent or for the registration of a design;

to the extent that the condition relates to:

(iii) the invention to which the patent or application for a patent relates or articles made by the use of that invention;

(iv) goods in respect of which the design is, or is proposed to be, registered and to which it is applied;

(v) the work or other subject matter in which the copyright subsists; or

(vi) the eligible layout in which the EL rights subsist;

(b) the inclusion in a contract, arrangement or understanding authorizing the use of a certification trade mark of a provision in accordance with rules applicable under Part XI of the *Trade Marks Act 1955* , or the giving effect to such a provision; or

(c) the inclusion in a contract, arrangement or understanding between:

(i) the registered proprietor of a trade mark other than a certification trade mark; and

(ii) a person registered as a registered user of that trade mark under Part IX of the *Trade Marks Act 1955* or a person authorized by the contract to use the trade mark subject to his or her becoming registered as such a registered user;

of a provision to the extent that it relates to the kinds, qualities or standards of goods bearing the mark that may be produced or supplied, or the giving effect to the provision to that extent.

(4) This section applies in determining whether a provision of a contract is unenforceable by reason of subsection 45(1), or whether a covenant is unenforceable by reason of subsection 45B(1), in like manner as it applies in determining whether a contravention of a provision of this Part has been committed.

(5) In the application of subsection (2A) to section 46A, the reference in that subsection to trade or commerce includes trade or commerce within New Zealand.

Commonwealth Consolidated Acts

AIR NAVIGATION ACT 1920 - SECT 12

Requirement to hold international airline licence

(1) Subject to subsections (2) and (3), an international airline must not operate a scheduled international air service over, into or out of Australian territory except in accordance with an international airline licence granted by the Secretary in accordance with the regulations.

(1A) If an international airline contravenes subsection (1), the airline commits an offence punishable on conviction by imprisonment for a period of not more than 7 years.

Note: Subsection 4B(2) of the *Crimes Act 1914* allows a court to impose in respect of an offence an appropriate fine instead of, or in addition to, a term of imprisonment. If a body corporate is convicted of an offence, subsection 4B(3) of that Act allows a court to impose a fine of an amount that is not greater than 5 times the maximum fine that could be imposed by the court on an individual convicted of the same offence.

(1AA) Subsection (1A) does not apply if the international airline has a reasonable excuse.

Note: A defendant bears an evidential burden in relation to the matter in subsection (1AA) (see subsection 13.3(3) of the *Criminal Code*).

(2) Subsection (1) does not apply to a scheduled international air service if it is operated in accordance with a permission under section 15D.

(3) The Secretary may, by legislative instrument, determine that subsection (1) does not apply in relation to a category of scheduled international air services. The determination has effect accordingly.

(4) For the purposes of this section:

(a) an international airline may operate a scheduled international air service even if it does not operate the aircraft used to operate the service; and

(b) an international airline does not operate a scheduled international air service merely because it operates the aircraft used to operate the service.

Commonwealth Consolidated Acts

AIR NAVIGATION ACT 1920 - SECT 13

Licensing of scheduled international air services

(1) Without limiting section 26, the regulations may provide for or in relation to the licensing of scheduled international air services operated over, into or out of Australian territory.

(2) In particular, the regulations may provide for or in relation to the following:

(a) the granting of international airline licences by the Secretary;

(b) the imposition of conditions on international airline licences by the Secretary;

(c) the variation, suspension and cancellation of international airline licences by the Secretary;

(d) the surrender to the Secretary of international airline licences.

(3) An international airline licence must not be granted to an international airline of a country other than Australia unless that country and Australia are parties to:

(a) the Air Transit Agreement; or

(b) some other agreement or arrangement, whether bilateral or multilateral, under which scheduled international air services of that other country may, subject to the agreement or arrangement, be operated over or into Australian territory.

(4) Subsection (3) does not limit subsection 12(3).