IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY **NO S248 OF 2016**

BETWEEN: **PT GARUDA INDONESIA LTD (ARBN 000 861 165)**
Appellant

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

SUBMISSIONS OF THE RESPONDENT

(to be read with the Respondent's submissions in S 245 of 2016)

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PART I FORM OF SUBMISSIONS

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

PART II ISSUES

2. The issues may be divided into three categories.

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

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

5. **Foreign State compulsion**. This issue (AS [113], adopting NZS [2(c)], [5]) proceeds on two factual premises: (a) the administrative practice of the foreign State gave rise to a requirement to act; and (b) the appellant acted by reason of that requirement. However the Courts below have made coordinate findings that neither foreign law nor practice required the conduct constituting the contravention, namely the understandings to impose approved surcharges, and that the appellant acted in accordance with its own desires, and not the dictates of a foreign regulator. These findings are not contested. As such, this issue does not arise.

6. **Inconsistency**. The issues identified at AS [4]-[5] proceed on the false premise that reaching agreement on tariffs constituted the conduct that comprised the relevant contraventions of s 45 of the TPA. That is not so. The relevant understandings were to implement approved fuel surcharges, in circumstances where the approvals did not compel the airline to charge the surcharge. Agreement on the implementation of tariffs was not required by the provisions of the *Air Navigation Act 1920* (Cth) (**ANA**), nor, by extension, the 1969 Australia-Indonesia Air Services Agreement (**ASA**). As such, no conflict could arise in the present case. Furthermore, in the event of any inconsistency between the provisions of the ANA, on the one hand, and Pt IV of the TPA, on the other, the clear legislative intent is that the provisions of Pt IV of the TPA prevail.

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

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

PART IV FACTS

8. The ACCC relies upon its statement of facts in its submissions in matter S245 of 2016 (**ACCC Air NZ subs**) at [8]-[17]. It does not repeat that statement here but makes the following submissions in relation to Garuda's factual summary with respect to market, and Air NZ's factual summary with respect to foreign State compulsion.

Market

9. As to AS [11], it is apt to mislead to say that the "conduct in issue" all occurred in Indonesia and Hong Kong, That statement is only accurate to the extent it refers to the fixing of surcharges. A wide range of competitive "conduct", pertinent to the question of whether the market was in Australia, occurred in Australia: see the ACCC Air NZ subs at [13].

10. The first sentence of AS [24] merely recites the conclusion of the trial judge on the primary issue in question on the appeal: namely, whether the markets (as found) were "in Australia" for the purposes of s 4E.

Foreign State compulsion

11. In relation to NZS [16]-[18], for the reasons given below, the respondent takes issue with: (a) the description of the practice of the Hong Kong Civil Aviation Department (**HK CAD**) outlined in NZS [16(e)-(g)], and [17]-[18], as "requirements"; and (b) the nature and extent of the "different types of application" in the HK CAD approval process outlined in NZS [16(g)], which were held to be "not as stark as Air NZ submitted" (FC [244]). The Court below did not accept that the administrative practice of the HK CAD was tantamount to a requirement to do anything (FC [247]). Rather, it was accepted, as a matter of Hong Kong domestic law, that: (a) if the airlines were going to impose a fuel or insurance surcharge or a customs fee, they needed to obtain approval (TJ [418], [447]; FC [236(2)]); and (b) the only surcharges that could be imposed were the ones that had been approved by the regulator (TJ [419], FC [236(3)]).

PART V LEGISLATIVE PROVISIONS

12. The ACCC relies upon Garuda's statement of legislative provisions, and supplements it by reference to ss 45(5)-(9) and 88(1), and Part X of the TPA.

PART VI ARGUMENT

A – Market "in Australia"

13. The ACCC's primary submissions on "market" issues are contained in its ACCC Air NZ subs at [19]-[105]. It does not repeat that material here and deals below only with arguments put by Garuda that are not also put by Air NZ.

A1 - Defining the market

14. Far from assisting Garuda, the examples given in AS [29] highlight the errors in their approach to market definition. In none of the examples given was the geographic area of the market confined to the locations of the suppliers. Rather, they extended to the area in which the relevant substitutable products would, or were capable of being, physically supplied to customers. In *Queensland Co-*

operative Milling Association Ltd,[1] the market was not confined to the location of the millers but extended to the area in which flour from relevant mills was despatched to customers (which extended across Queensland and the Northern Rivers of NSW). In *Australia Meat Holdings Pty Ltd v Trade Practices Commission*,[2] the market for fattened cattle was not confined to the locations of producers but extended to the area in which cattle were supplied to customers (principally abattoirs). In *QIW Retailers Ltd v Davids Holdings Pty Ltd [No 3]* ***(QIW Retailers)***,[3] the market for grocery products was not confined to the locations of grocery wholesalers but extended to the area in which the products were supplied to independent retailers across Queensland and northern NSW. And in *Boral Besser Masonry Ltd v Australian Competition & Consumer Commission*,[4] the market for concrete masonry products was not confined to the location of the suppliers but extended to the area in which the products were supplied across Victoria and Melbourne.[5]

15. In each of these cases, the court was concerned to identify the "the area of effective competition in which the parties operate"[6] or, as framed by French J in *Singapore Airlines Ltd v Taprobane Tours WA Pty Ltd* ***(Taprobane)***,[7] "the geographic area within which those activities occur".[8] Those areas are normally wider than the location of the substitutable *sources* of supply.

16. In the present case, the geographic area in which the parties operated and within which the relevant activities occurred and the services were marketed clearly extended to Australia having regard to the findings made by the trial judge: see ACCC Air NZ subs at [61], [62], [66].

17. As to AS [30], it is unclear on what basis Garuda seeks to deploy US, Canadian and EU authorities given the significant differences between the law in each of those jurisdictions and the TPA, and given Garuda's later submission that such decisions are irrelevant (see AS [50]).

18. Even if it were appropriate to use those authorities to assist in determining the operation of s 4E of the TPA, they do not speak with one voice. Further, the short form propositions put by Garuda fail accurately to capture the considerations to which the courts in those jurisdictions had regard.

19. For example, Garuda refers to a passage from *United States v Phillipsburg National Bank & Trust Co* 399 US 350 (1970) at 357-8, but ignores a later passage in which the market is geographically defined as the area in which bank customers that are neither very large or very small find it practical to do their banking business[9] – an analysis that pays due regard not merely to the

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1 (1976) 8 ALR 481.

2 (1989) ATPR 40-932.

3 (1993) 42 FCR 255.

4 (2003) 215 CLR 374.

5 As to *Singapore Airlines Ltd v Taprobane Tours WA Pty Ltd* (1991) 33 FCR 158 see ACCC Air NZ subs at [42]-[43], [68], [97].

6 *QIW Retailers* at 267.

7 (1991) 33 FCR 158.

8 *Taprobane* at 174.

9 At 363, referring to the decision of *United States v Philadelphia National Bank* 374 US 321 (1963) at 361.

location of suppliers but also to the area in which suppliers and customers interact. Further, while Garuda asserts that the US cases adopt a "substitution of sources of supply test", none of the cases referred to use that expression. And in *Tampa Electric Co v Nashville Coal Co* 365 US 320 (1961) the Supreme Court cited with approval a definition of the market by reference to the areas in which the services were marketed – a consideration which Garuda and Air NZ assert is irrelevant to that process.[10]

20. As to the European material, Garuda's submissions are again inaccurate. For example, it is not correct that, since the late 1990s, the European Commission and European courts define markets by reference only to substitution of sources of supply: contra AS [30(c)]. In one of the materials Garuda itself cites in support of that proposition, the relevant geographic market is defined as "the area in which the undertakings concerned are involved in the supply and demand of products or services, in which the conditions of competition are sufficiently homogenous and which can be distinguished from neighbouring areas because the conditions of competition are appreciably different in those areas."[11] If adopted, such an approach would comfortably treat the facts of this case as giving rise to a market "in Australia" given the uncontested findings that the airlines were involved in physical supply of air cargo services in Australia and the demand for those services equally existed here. Further, among the relevant "conditions of competition" would be the barriers to entry constituted by Australian regulation.

A2 - Judicial 'restraint'

21. There is no basis for the Court to adopt judicial 'restraint' in applying the TPA so as to encompass conduct outside Australia.

22. *First,* Garuda's reliance on the rule of construction identified in *Meyer Heine Pty Ltd v China Navigation Company Ltd* (1966) 115 CLR 10 at 23 is misplaced. In *XYZ v Commonwealth* (2006) 227 CLR 532 at [5], Gleeson CJ explained the context of the decision:

> Three aspects of that decision should be noted. First, the legislation was enacted in 1906, and amended in 1910, at a time when there was still "an uncertain shadow upon the competence of the Australian Parliament to pass an Act having extra-territorial operation". Secondly, there was in the language of the legislation itself a very clear indication that its operation was territorially confined. That was a decisive consideration in the reasoning of the majority. Thirdly, Taylor J said that the presumption of territoriality was a rule of interpretation only "and, if by a local statute otherwise within power, provision is made 'in contravention of generally acknowledged principles of international law' it is binding upon and must be enforced by the courts of this country'.

23. *Secondly*, to the extent the principle of interpretation continues to be relevant it is inapposite in the context of the TPA as s 5 of the TPA makes express provision for its extra-territorial operation.[12] It makes clear that the Act extends

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10 *Tampa v Nashville* 365 US 320 (1961) at 628, citing *United States v. Columbia Steel Co.*, 334 U.S. 495 (1948).

11 *Commission Notice* OJ 1997 C372/5 at [8].

12 *Bray v F Hoffman-La Roche Ltd* (2002) 118 FCR 1 at [50].

to the engaging in conduct outside Australia by bodies corporate carrying on business within Australia. Section 4E imposes a further territorial limitation - the conduct must affect competition in a market "in Australia". All parties accept that this test can be satisfied even if the market extends beyond Australia: see AS [28]. Further, that limitation is imposed in a context where extra-territorial conduct is, within the limits set by s 5, expressly covered. Each of Garuda and Air NZ are registered pursuant to Part 5B.2 of the *Corporations Act 2001* (Cth) and carry on business in this country.[13]

10 ***A3 - The reasoning below***

24. The majority did not err in defining the market before considering whether the market was "in Australia": *contra* AS [37]-[40]. As the majority observed, in many cases the process of market definition will itself reveal whether the market satisfies the territorial requirement in s 4E: FC [73]. The present is an example where the trial judge's findings in relation to the geographic dimension of the market revealed, inter alia, that competition in the market physically took place in Australia. However, in other cases, it may be necessary to embark on a wider survey of the features of the market in order to conclude whether it is properly
20 characterised as a market "in Australia". The approach of the majority is entirely consistent with the flexible, purposive and evaluative nature of the process of market identification on which the TPA is based: see ACCC Air NZ subs [40]-[46]. Nothing in *Livingston v Commissioner of Stamp Duties (Qld)* (1960) 107 CLR 411 at 435, which relates to the law's technique for attributing location to choses in action, says anything to the contrary.

25. As to AS [41]-[50] see ACCC Air NZ subs [94]-[104]. For the reasons set out there, Garuda's criticisms of the majority are unfounded.

30 26. AS [48] implies that the location of a decision to switch suppliers was the primary factor upon which the majority relied. That is wrong. The majority had regard to a range of matters in addition to the fact that large Australian importers had the ability to determine which airline provided the air cargo services: see FC [162]-[167].

27. AS [51] and [52] ignore a long line of cases in which the evaluative and purposive nature of market definition has been accepted: see ACCC Air NZ subs [40]-[46]. Many other statutory concepts have the same features.[14] The observations of the plurality in *Melway Publishing Pty Ltd v Robert Hicks Pty*
40 *Ltd*[15] were directed at the elements of a substantive provision, s 46, and do not undercut the flexibility inherent in an assessment of the "market". Moreover the spectre of "people engaged in commerce throughout the world" not knowing whether to comply with Australian competition law is overstated. Australian competition law expressly applies to the conduct *anywhere* of a person connected with Australia in the manner provided for by s 5. Persons so connected have good reason to be familiar with that law. And they have good

50 13 *Corporations Act 2001* (Cth), s 601CD.

14 See eg *AusNet Transmission Group Pty Ltd v Federal Commissioner of Taxation* (2015) 255 CLR 439 at [14]; *CGU Insurance Ltd v Blakeley* (2016) 327 ALR 564; (2016) 90 ALJR 272 at [30]; *AstraZeneca AB v Apotex Pty Ltd* (2015) 323 ALR 605; (2015) 89 ALJR 798 at [18].

15 (2001) 205 CLR 1 at [8].

reason not to collude with competitors, not merely or even primarily on account of Australian law.

28. AS [53] conflates a number of different approaches to market definition. To the extent Yates J sought to identify the field of actual or potential transactions between buyers and sellers of the relevant product, his Honour adopted a formulation that the majority had also endorsed. However, Yates J wrongly proceeded on the basis that this field is confined to the geographic area in which "sellers of the product operate" (taken to mean, the port of origin, but overlooking their operations at destination and at all points in between) and to which "buyers can practicably turn for such goods or services" (overlooking the significance of the existence in Australia of market participants who are the recipients of the services here, a source of demand, and who are the object of the suppliers' marketing): FC [656].

29. Yates J's focus was in these ways unduly narrow. It is not consistent with the text or object of the Act to draw a market by reference to the place where goods or services are formally bought and sold if they are provided to a range of customers in a far wider area, in response to demand from those customers. In the context of transnational commerce, such a focus is liable to produce arbitrary or incongruous outcomes. By way of example, in this case the same cartellists might have achieved monopoly returns by agreeing to reduce the quality of their services in Australia, by, *interalia*, restricting collection times ("giving less") or by charging an agreed fee at destination ("charging more"). On the approach of the appellants and the trial judge the market would still not be "in Australia" because any switching still takes effect in Hong Kong and the only substitutable sources of supply are in Hong Kong, and the TPA would not apply. The better approach is to identify the area in which the participants in the market operate, and in which the activities comprising the market occur and to do this comprehensively and practically rather than selectively and formally, the object being to identify, as a matter of practical reality, the nature and level of interaction between buyers and sellers of the product in question: see ACCC Air NZ subs [61]-[68].

A4 - Application to the facts

30. AS [54]-[56] highlight Garuda's desire to ground the market in a legal analysis of the contractual arrangements in place between airlines and freight forwarders. While relevant, those matters fail to capture the practical way in which the markets for air cargo services operated.

31. In particular, Garuda's submissions ignore Perram J's finding that tripartite arrangements were commonly entered into between carriers, freight forwarders *and* shippers (which included exporters and importers): TJ [297]. Garuda's focus on contractual relationships between airlines and freight forwarders also ignores the significance of large Australian importers as participants in each market and the ability of those entities to impact price and determine which airline was to supply the services: see ACCC Air NZ subs at [62]. Further, Perram J found that the airlines themselves viewed large importers (including large Australian importers) as their clients and whose custom "the airlines tousled to obtain": see ACCC Air NZ subs [14]–[15]. In this context, to focus solely on the contractual relationships between airlines and freight forwarders is neither accurate nor appropriate. Indeed, this is a paradigm example of why

courts take a "pragmatic, factual approach to the definition of the relevant market and not a formal, legalistic one"; the geographic area of the market must also "correspond to the commercial realities" of the industry.[16]

32. As to AS [57], it is undoubtedly correct that only those airlines who had a physical presence at the airport of origin could provide the relevant air cargo services. However, the same point applies equally at the port of destination: only airlines which had a physical presence at those ports could deliver the cargo and provide the ground handling and enquiry services that comprised the suite of services identified by Perram J. In determining whether a market was "in Australia", there is no logical basis for only having regard to the first matter and wholly ignoring the second.

33. The possibility of 'interlining' does not assist the Appellant: *contra* AS [58]. Perram J found that "[a]irlines carry the majority of freight by air using aircraft operated by that airline": TJ [84]. His Honour made no findings as to the extent (if any) of interlining engaged in by Garuda (or Air NZ) and expressly noted that he was unaware of whether Garuda had, in fact, entered into any interlining arrangements with other airlines: TJ [398]. As a result, there is not a sufficient factual foundation for concluding that interlining arrangements may have affected the markets for air cargo between ports of origin and destination. In any event it remains the case that a provider of air freight services in Hong Kong must have (by themselves or a by arrangement with another) the presence necessary in Australia to provide the full suite of services.

34. AS [59] helps the ACCC not Garuda. A key feature of the air cargo transportation services at issue in this case is that they must be provided at *both* the ports of origin and at the ports of destination in Australia. There is no market for the mere commencement of transportation of cargo. Rather, customers pay for the goods to be *delivered*. These features of the services only serve to highlight the appropriateness of concluding that the markets for such services were "in Australia".

B - Foreign State Compulsion

35. The appellants contend that their conduct in making and implementing the 2002 Hong Kong Lufthansa Methodology Understanding (in relation to Air NZ only), the First Hong Kong Extension Understanding (in relation to Garuda only), and the Hong Kong Imposition Understanding, was compelled by the law of Hong Kong (Garuda Notice of Appeal, para 12; Air NZ Notice of Appeal, para 3(a); AS [113]; NZS [59]).

B1 - No requirement to lodge a joint application for a fuel index mechanism

36. Air NZ's contention that it was a "requirement" of the Hong Kong regulator that all airlines seeking approval of an index mechanism file a joint application (NZS [5]) is inconsistent with the factual findings below. They were that the HK CAD did not require a joint application for any fuel index mechanism (TJ [446]). Indeed, the evidence did not support a conclusion that the administrative practice of the HK CAD, by its policy, "imposed any *requirement* at all", even in relation to variable (index based) surcharges (FC [247]). While the trial judge

[16] *Brown Shoe Co Inc v. U.S.* 370 US 294 (1962) at 1506, quoted with approval in *Australia Meat Holdings Pty Ltd v Trade Practices Commission* (1989) ATPR 40-932 at 50,105.

was prepared to infer a "practice" on the part of the HK CAD to proceed on the basis of a single application to be submitted by all the airlines (TJ [443]; FC [236]), this was held to constitute an "informal policy ... incapable of rising to the level of a mandatory requirement" (FC [250]).

37. These findings of fact are not challenged. The false premise of a "requirement" infects Air NZ's analysis: NZS [5], [16(e)-(g)], [17]-[18], [54], [57]-[58] and [64].

38. Air NZ contends that the Full Court at [248] "appears to have assumed that the practice was not "mandatory", and that the [HK] CAD "might depart" from it" (NZS [72]). This is not the realm of assumption. This is a finding of fact made by the Full Court on the basis of the findings of fact made by the trial judge (FC [247]-[249]).

39. Air NZ submits that the administrative practices of the HK CAD must be presumed to be valid; that the possibility of departure from it is nowhere supported by the evidence; and that it is no answer to suggest that the airlines should have "agitated for a change" in the practice (NZS [72]). These submissions both miss the point and cavil with the evidence. There is no challenge to the 'validity' of that practice; it is accepted for what it was: namely, an administrative practice that was not mandatory. Accordingly, the possibility of departure from it is simply a corollary of its nature as a non-mandatory policy or practice. It is not a call for the appellants to "agitate for change".

40. In any event, however one characterises the practice of the HK CAD, there is no contest that there was no requirement to *impose* an approved surcharge (TJ [426] [548], [556], [578], [653], [656]), let alone a requirement to *agree to impose* an approved surcharge. In that regard, Air NZ's argument on 'compulsion' does not speak to the conduct that comprised the relevant understandings.

B2 - No compulsion where choice of realistic options to conduct business

41. Air NZ contends that the majority erred in concluding that there was no compulsion in circumstances where the appellant could choose not to impose a surcharge (NZS [5]). This, *in addition to* the factual findings regarding the HK CAD's informal practice or policy, was the basis for rejecting the appellant's submission below that there was a mandatory requirement that compelled any airline to join with other airlines to seek approval of an index based surcharge (FC [251]). Consequently, even if Air NZ were to demonstrate error in the majority's reasoning on this point, the finding regarding the absence of any requirement in relation to index based surcharges remains. To the extent that it remains, it is fatal to Air NZ's argument. An "informal practice" could not give rise to any compulsion, properly so called, on the part of the State.[17]

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[17] The question here is one of construction of s 45(2) of the TPA. While 'foreign State compulsion' is not recognised as a self-standing defence to any action under Australian competition law, to the extent that guidance is sought from other jurisdictions in which the defence is recognised, it is noted that in the United States, the "defence of foreign government compulsion is in general available only when the other state's requirements are embodied in binding laws or regulations subject to penal or other severe sanctions; it is not available when the second state's orders are given in the form of 'guidance', informal communications, or the like." American Law Institute, *Restatement of the Law (Third): Foreign Relations Law of the United States* (1987), §441(c). Martyniszyn, M., "A Comparative Look at Foreign State Compulsion as a Defence in Antitrust Litigation" (2012) 8 *The Competition Law Review* 143 at 147-148.

42. Air NZ submits that the "legal requirement" must be assessed at the point at which it is imposed (NZS [58]). Air NZ contends that, in the present case, that is the point at which the appellant *chose* to pursue the "lawful and legitimate" objective of imposing a fuel surcharge calculated by reference to an index mechanism (NZS [59], [61]).

43. Three things may be said about this submission. *First,* it calls for identification of the "legal requirement" to which the appellant refers. This, in the context of: (a) the concession that that Hong Kong law contained no general requirement that an airline impose a fuel surcharge (either at all or by reference to an index mechanism) (NZS [54]); and (b) the finding below that the administrative practice of the HK CAD imposed no requirement at all (FC [247]). *Secondly,* the assessment of the existence of a requirement at the point at which the requirement is imposed arbitrarily selects a point that is not referable to the point in time at which the contravening conduct is alleged to have taken place.

44. *Thirdly*, the coincidence of desire (to impose a surcharge by reference to a common index mechanism) and "compulsion" (to do the same) undermines the proposition that any pressure applied by the Hong Kong regulator induced the appellant to reach the relevant understandings.[18] The evidence indicates the contrary. In relation to the 2002 Hong Kong Lufthansa Methodology Understanding, the trial judge found that (at TJ [598], emphasis added):[19]

> ... each airline, including Air NZ, ***had decided*** to use the revised Lufthansa Methodology because they ***actively wished to do so***; that the HK CAD approval did not require them to levy the surcharge; that the decision to do so was a collective one between the airlines; and that the approval had bound them, once that decision was made, to do no more than they wished to do. .... ***Firms who procure the creation of foreign legal requirements as a cloak for their own motives do not take themselves outside of s 45***.

45. Similarly, in relation to the Hong Kong Imposition Understanding, the trial judge found (at TJ [651]-[652], emphasis added):

> ...Air NZ was not compelled to do anything. It did not have to include itself within the HK CAD filing. It chose to do that because it wished to impose the surcharge using the index mechanism. The ***HK CAD approval thereafter merely provided it with the permission to act in accordance with its own desires***.
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> ... Rather than being the entity which made the arrangement, the ***application to the HK CAD was the device by which the airlines facilitated their own collusive behaviour***.

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18 In the context of an assessment of duress, see *Westpac Banking Corporation v Cockerill* (1998) 152 ALR 267 at 289-292 (Kiefel J, as her Honour then was), in which case, the trial judge had found the pressure by the appellant to be a *significant or substantial* cause inducing the respondents to enter into the contract; and *Crescendo Management Pty Ltd v Westpac Banking Corporation* (1988) 19 NSWLR 40 at 45-46 (McHugh JA).

19 Citing W. L. Fugate, 'Antitrust Jurisdiction and Foreign Sovereignty' (1963) 49 *Virginia Law Review* 925 at 932: "The real question is *whose* acts are the subject of inquiry. If the acts are those of the foreign government within its own jurisdiction, then the antitrust exception applies. The situation is the same if the foreign government through its laws, regulations, or orders, *requires* private parties to perform the anticompetitive acts. If, on the other hand, the acts complained of are in reality those of private parties who seek to hide behind the cloak of foreign law, the courts will attach antitrust liability."

46. His Honour concluded (at [657], emphasis added) that: "The process revealed by the various changes in index levels ***does not reveal a group of airlines slavishly obeying the dictates of a regulator***. Rather, it reveals a group of airlines using the notification process as the ***springboard for collusive behaviour***."

47. None of these findings is challenged by the appellants. Each finding undermines the contention that the airlines were compelled by the HK CAD to reach understandings collectively to ***impose*** the approved surcharges.

48. Air NZ postulates alleged benefits to customers of flexibility and transparency of an index mechanism, in an attempt to establish a "legitimate commercial objective" for imposing an index-based surcharge (NZS [63]). If accepted, this only highlights a motivation for the conduct independent of the requirements of the HK CAD. But in seeking to explain the alleged attraction of an index mechanism (see also NZS [68]), Air NZ omits "valuable context" (TJ [534]) as outlined at TJ [520]-[533], which assists to explain the desire of the airlines to agree to impose common fuel surcharges. In that regard, the rejection by the US Department of Transportation (**DoT**) of IATA resolution 116ss (which proposed a uniform industry-wide index mechanism) as "fundamentally flawed" (see TJ [10]-[11], [144], [501]), is instructive. The DoT considered that the proposed mechanism failed to adjust as quickly for price falls as for price rises; and overlooked the impact of carriers' fuel price hedging programmes.[20] Further, such an agreement removes any incentive to reduce fuel consumption by innovation in service or technology.

49. As indicated above, it is wrong to suggest that the Courts below accepted that the HK CAD required a collective application to charge fuel surcharges in accordance with an index mechanism (NZS [63]). The Courts below found that individual airlines had the option of applying for a static surcharge (applying their own index mechanism), that this was not a fundamentally different form of business from one involving a variable (index based) surcharge, and that while this involved some "commercial inconvenience", it was not as stark as Air NZ submitted (TJ [446], [447(d)]; FC [244]-[245]).

50. Air NZ's submission that the choices available to airlines (NZS [64]-[66]) yielded "fundamentally different outcomes", which differences went well beyond "commercial inconvenience" (NZS [67]-[70]), faces these difficulties.

51. *First,* the considerations of timing, flexibility and transparency that are said to inform choices are not apt to amount to compulsion.

52. *Secondly*, the commercial inconvenience was exaggerated (FC [244]). The evidence was that approvals might be obtained within approximately 30 days,[21] and in an urgent case, within 8 days. This is in contrast to the 60 to 90 day period cited by the appellant (cf. NZS [67(a)]; [16(g)(i)]). Further, the majority

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20 Document entitled United States of America Department of Transportation office of the Secretary Washington DC issued by the DoT on 14 March 2000. AB 1821-1825.

21 FC [244]. As Air NZ notes (NZS, fn 2), this particular finding was made in relation to *insurance and security* surcharges. It is not evident that the type of surcharge sought would yield a difference in outcome, and this finding would appear to be the basis of a (reasonable) inference in relation to fuel surcharges.

indicated that the period of validity of the approved surcharge might not be as small as Air NZ has suggested (cf. NZS [67(b)]; [16(g)(ii)]).[22]

53. *Thirdly*, the submissions ignore the finding that the airlines were not presented with a binary choice between static and variable surcharges, but also had the "realistic options" of absorbing an increase in fuel prices, or increasing their prices without a separate fuel surcharge amount (FC [245]).

54. *Fourthly*, even if the inconvenience amounted to compulsion, it does not establish that the airlines were compelled to agree to ***impose*** a fuel surcharge, which is the conduct in contravention of s 45 of the TPA.[23] As the majority held, there was no duty imposed upon the airlines to choose to conduct their business in a manner that infringed the TPA (FC [246]).

B3 - The appellants arrived at an understanding, by voluntary conduct

55. On the basis of the finding that there was no mandatory requirement that compelled any airline to make a joint application for HK CAD's approval of a variable surcharge, the Courts below found that it was **not necessary to consider** whether, ***on the premise that some mandatory effect could be identified***, such effect would have the consequence that: (i) the airlines did not "make" an arrangement or "arrive at an understanding"; or (ii) any arrangement or understanding did not have the "purpose" or have been likely to "have the effect" of fixing, controlling or maintaining the price of goods or services within the meaning of s 45A (TJ [449]; FC [251]).

56. Air NZ's submissions at [73]-[90] are predicated on foreign law requiring the conduct in question (NZS [73(b)]). The Courts below have determined as a matter of fact that there is no such requirement. In the event that this Court does not accept this finding, the respondent makes the following submissions.

57. Even if foreign law required the conduct in question:

    57.1. it is not the case that conduct is not voluntary for the purposes of s 45(2) of the TPA merely because it is required by foreign law (cf. NZS [75]);

    57.2. when a person chooses to pursue a particular objective in a particular legal environment, that person can properly be said voluntarily to have chosen to act in accordance with the requirements of the law attached to that pursuit (cf. NZS [76]).

58. As for the first proposition, this is not to take issue with the observation of the District Court in *Interamerican Refining Corp v Texaco Maracaibo Inc* 307 F Supp 1291(1970) (***Texaco Maracaibo***) at 1298 (NZS [80]), but rather to accept that desire and requirement may coincide. The desire to comply with law does not necessarily negate the proscribed purpose (cf NZS [88]). As both the District Court in *Texaco Maracaibo* (at fn 18) and the trial judge acknowledged (at TJ [598]), the real question is *whose* acts are the subject of inquiry. The premise in

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22 It is not evident on what basis Air NZ limits this finding to insurance and security surcharges (AS, fn 4), given the majority's reliance, in part, on Art 7 of the Hong-Kong-New Zealand ASA, and Art 8 of the Hong-Kong Indonesia ASA (FC [244]; TJ [413]), which provisions are of general application.

23 Relevantly, **2002 Hong Kong Lufthansa Methodology Understanding** (Air NZ only): TJ [544(c)-(d)], [555], [559]-[560], [577]-[580]; FC [314], [317]-[318], [321]-[322]; **First Hong Kong Extension Understanding** (Garuda only): TJ [665]; FC [348]-[349]; **Hong Kong Imposition Understanding**: TJ [650], [651], [653], [656]; FC [357], [367], [376].

NZS [73(b)] assumes the conclusion: namely, that the understanding was reached "by reason of" the requirement of foreign law. But that is a question of fact to be answered in the individual case. Notably, in *Texaco Maracaibo*, the desire and requirement were not coincident. The District Court found that the anticompetitive practice (a boycott) was compelled by the State, "the uncontradicted evidence" demonstrated that the defendants were eager to sell to the plaintiffs (at 1304).

59. The second proposition relates to the question posed by Air NZ (at NZS [77]) regarding a choice between *means* of achieving an end or objective. That does not engage with the relevant conduct said to be in contravention of s 45(2) of the TPA, namely, the agreement to impose a tariff - did Air NZ have a choice whether or not to agree to impose a tariff? Air NZ accepts that it did have a choice but says that once it made this choice it did not have a say as to the means by which its choice might be realised (NZS [78], [83], [84]). For the reasons given above at [49]-[54], this is not correct as a matter of fact. And even if the *means* was in truth compelled, there is no reason to treat s 45(2) as inapplicable for that reason. The choice was a voluntary one, and amounted to a choice to engage in conduct that contravened the TPA.

60. Finally, it is artificial to say that the regulator fixes the price because no price can be charged without approval (cf. NZS [90]). The approval is a reaction; it is instigated by the applicant. In any event, the (approved) price need not be imposed. The fact that the approval grants the imprimatur of law does not mean that the law has the object of fixing the price. Nor does it mean that the applicant does *not* have the relevant purpose.

C Inconsistency

61. The ACCC submits that:

61.1. There is no inconsistency between ss 12 and 13 of ANA and ss 45 and 45A of the TPA, as it was known during the relevant period of conduct 2000-2006.

61.2. Even in the event of inconsistency, the legislative intention manifest in s 51 of the TPA is clear: that is, the conflict should be resolved in favour of the provisions of Pt IV of the TPA.

C1 - No inconsistency between the TPA and the ANA

62. The majority of the Full Court held that there is no inconsistency in the ***terms*** of the ANA and the TPA (FC [188], [191]).[24]

63. Additionally, the majority held that there was no conflict between the terms of the TPA and the ***effect or operation*** of the ANA due to Art 6(2) of the ASA (FC [199]-[205]; cf. TJ [165]). Their Honours reasoned that Art 6(2) did not require the airlines to engage in price fixing, so the risk of a licence revocation did not arise (FC [201]-[203]). In any event, they concluded it would not be reasonable for the Minister to cancel an airline's licence for failure to comply with Art 6(2) where the failure was required by Australian law (FC [200]).

[24] Yates J found that it was not necessary to address the matters raised by the airlines in their notices of contention (FC [682]).

Statutory discretion in s 13(b) ANA

64. At all relevant times, s 12(1) provided that 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. Subsection 12(1A) (inserted in 1992) and s 22 (now repealed) provided that the operator of an aircraft flown in contravention of s 12(1) was guilty of an offence.

65. Subsection 13(b) provided that 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, **the airline "fails to conform to, or comply with, any term or condition of the relevant agreement or arrangement"** referred to in s 12, which by virtue of s 12(2) includes a bilateral agreement under which scheduled international air services of the country other than Australia may be operated over or into Australian territory.

66. In the case of Garuda, it is the failure to conform to, or comply with, any term or condition of the ASA that gives rise to the exercise of the Minister's discretion under s 13(b) of the ANA to suspend or cancel its licence.[25] However, Garuda is wrong to submit that this refers to "the terms and conditions for operation of [Indonesia's] scheduled international air services" (AS [81]-[85]). Garuda can only "conform to, or comply with" a term or condition that speaks to it, the airline. In the context of Art 6(2), this equates to taking reasonable steps to reach agreement: FC [203]. Garuda assumes that the expression "conform to" invariably means something other than "comply with" (AS [81]). Whether those expressions are distinguishable or interchangeable will depend on the context in which they are used.

67. This is not to accept that the ASA requires airlines to do anything as a matter of legal obligation; the ASA could not of itself create a duty upon an entity which is not a party to it (FC [190]). Furthermore, s 13(b) does not, in its terms, impose any requirement to comply with any relevant agreement or arrangement. However, exposure to the possible sanction that attaches to a failure to comply with or conform to a relevant term or condition, creates what the trial judge characterised as the "requirement" of s 13(b) to comply with the terms of the ASA (TJ [152]; AS [85]).

Establishment of tariffs in Art 6 ASA

68. Article 6 of the ASA applies in respect of agreed services, which are services operated on routes specified in the Annex. At all relevant times, agreed services were able to be operated on certain routes between points in Indonesia and Sydney, Melbourne, Darwin and Perth (cf. AS [65]).

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[25] The Gaurda relies upon *NBGM v Minister for Immigration and Multicultural Affairs* (2006) 231 CLR 52 (***NBGM***) (AS [76]), but fails to demonstrate that Australian law requires the ASA to be implemented. While s 13(b) empowers the Minister to suspend or cancel a licence for failure to comply with or conform to an international agreement or arrangement to which s 12 makes generic reference, it has not transposed the text of the ASA into the statute or otherwise evinced an intention that it be enacted as part of domestic law: cf. *NBGM* at [11] per Kirby J, citing *Applicant A v Minister for Immigration and Ethnic Affairs (1997)* 190 CLR 225 at 230-231; *Koowarta v Bjelke-Petersen* 153 CLR 168 at 265; *Plaintiff M47/2012 v Director-General of Security* (2012) 251 CLR 1 at [11] (AS [76]); *Maloney v R* (2013) 252 CLR 168 at [15] (AS [86]).

69. Each Contracting Party grants to the other Contracting Party the rights specified in the ASA to enable its designated airline to establish and operate international air services on these routes (Art 2(1)).

70. While operating an agreed service on a specified route, and subject to the provisions of the ASA, the designated airline enjoys the right to make stops in the said territory at the points specified for that route for the purpose of putting down and of taking on international traffic in passengers, cargo and mail (Art 2(2)(c)).

71. Art 6(1) provides that tariffs on any agreed service shall be fixed in accordance with the following provisions of the Article. Those provisions provide for a cascade of contingencies in the event that agreement on the tariffs is not reached. Art (6)2 provides that tariffs shall, *whenever possible*, be reached by the designated airlines through the IATA rate-fixing machinery. *When this is not possible*, tariffs in respect of each of the specified routes shall be agreed upon between the designated airlines concerned. *If the designated airlines cannot agree on the tariffs* or if the tariffs are not approved by the aeronautical authorities of the Contracting Parties, Art 6(3) provides that the aeronautical authorities of the Contracting Parties shall endeavour to reach agreement of those tariffs. *If the aeronautical authorities cannot reach agreement*, Art 6(4) provides that the dispute shall be settled in accordance with Art 9 of the ASA.

72. Even if it were held that designated airlines were *required* under Art 6 to reach agreement on tariffs (which they were not, as explained below), Art 6 says nothing about agreeing to ***implement*** tariffs (see FC [202(2)]), which was the conduct that was found to form the basis of the relevant understandings, which conduct contravened s 45(2).[26] Notwithstanding that, as a matter of Hong Kong domestic law, the only surcharge which could be imposed was the approved one (TJ [419]), the airlines could have chosen not to implement the surcharge at all (TJ [426]).

73. **It cannot be said that the designated airlines are *required* under Art 6(2) to reach agreement on tariffs**, in the sense that the airlines' failure to agree, without more, results in a breach or contravention of the provision by the State parties. The consequence of the designated airlines not agreeing is provided for

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[26] Hong Kong - **2002 Hong Kong Lufthansa Methodology Understanding** (Air NZ only): TJ [544(c)-(d)], [555], [559]-[560], [577]-[580]; FC [314], [317]-[318], [321]-[322]; **First Hong Kong Extension Understanding** (Garuda only): TJ [665]; FC [348]-[349]; **Hong Kong Imposition Understanding**: TJ [650], [651], [653], [656]; FC [357], [367], [376]; **October 2001 Hong Kong Insurance Understanding**: TJ [694], [696]; FC [378], [382]; **December 2002 Hong Kong Insurance Understanding**: TJ [698], [701]; FC [385], [395]-[396].

Indonesia (Garuda only) – **October 2001 Fuel and Security Surcharge Understandings**: TJ [1142], [1147]; FC [421], [455]; **Second and Subsequent Indonesian Fuel and Security Surcharge Understandings (April 2002 Fuel Surcharge Understanding; June 2002 Fuel Surcharge Understanding; September 2002 Fuel Surcharge Understanding; January 2003 Fuel Surcharge Understanding; May 2003 Fuel Surcharge Understanding; September 2004 Fuel Surcharge Understanding; April 2005 Fuel Surcharge Understanding; July 2005 Fuel Surcharge Understanding; September 2005 Fuel Surcharge Understanding; October 2001 Security Surcharge Understanding; January 2003 Indonesia Security Surcharge Understanding; May 2003 Security Surcharge Understanding; September 2004 Security Surcharge Understanding; July 2005 Indonesia Security Surcharge Understanding)**: TJ [1156]-[1157], [1165], [1177]-[1179], [1183], [1207], [1210]-[1211], [1215], [1217], [1224], [1227], [1229]-[1230], [1232], [1234]-[1235]; FC [468]; **September 2005 Fuel Surcharge Understanding**: FC [469]; **2001 Indonesian Price Understanding/October 2001 Air Freight Rate Understanding**: TJ [1149]; FC [470], [476]; **May 2004 Customs Fee Understanding**: TJ [1194], [1197]; FC [478], [482]

in the Article itself (see FC [202(1)]): having failed to agree, the mechanism in Art 9 for settling disputes is activated.

74. The majority below rightly rejected the proposition that Art 6(2) of the ASA imposed a term or condition that *required* (as emphasised at FC [201]) airlines to engage in price fixing contrary to Pt IV of the TPA (FC [202]-[203]). While the ASA focuses upon duties imposed on the State parties (FC [204]), the majority acknowledged that the terms of the ASA might be directed at the conduct of an airline that could cause a State party to be in breach of its obligations under the ASA (at FC [205]). Furthermore, Art 6(2) might be construed to require Garuda to take *reasonable steps* to reach agreement on the tariffs by the Art 6(2) procedure (but that the obligation could not be breached where Garuda failed to take such steps because of the TPA) (FC [203]).

75. Garuda submits that the majority's construction of Art 6 was: (a) not supported by its context (AS [91]); (b) did not take into account Arts 2(2), 3(5) and 3(6) of the ASA (AS [89]); and (c) was inconsistent with the reasoning and conclusion at FC [208] (AS [93]).

76. *First*, Garuda mischaracterises "context" within the meaning of Art 31(1) of the 1969 *Vienna Convention on the Law of Treaties.* This is a reference to the treaty as a whole (including the text, its preamble and annexes, and any agreement or instrument related to the treaty and drawn up in connection with its conclusion).[27] It is not a reference to the broader historical context (cf. AS [91]-[92]). In any event, it is not evident how the 'context' referred to by Garuda reveals any error in the majority's reasoning (cf. AS [91]), which, in any event, did not involve a 'reading down' of Art 6(2) of the ASA (cf. AS [93]).

77. *Secondly*, Garuda contends that it would fail to conform with Articles 3(5) and (6) of the ASA by operating services to Australia without agreeing tariffs with other airlines, in which case its right to operate scheduled international air services into Australian territory under Art 2(2)(c) would be revoked (AS [89]). The ultimate clause in Art 3(5) provides that a service shall not be operated "unless a tariff is ***in force***". Garuda suggests that unless it agreed to impose the fuel surcharge with other airlines, then "a tariff' would not have been ***in force***, and its right to operate the service would have been revoked in accordance with Art 3(6).

78. "Tariff' is not defined in the ASA. However, the trial judge concluded that a tariff includes a surcharge and a customs fee for the purposes of the ASA on the basis that if 'tariff' is construed not to include a component of an overall freight rate, then the entire purpose of the article could be thwarted by breaking overall freight rates into component elements to which Art 6 will not apply (TJ [415]-[417]). On that basis, as long as a tariff is in force established in accordance with Art 6, then Art 3(5) would not require a further or additional "tariff" by way of a fuel surcharge in order for the airline to operate the service.

79. *Thirdly*, the majority's finding at [208] (that Art 6(2) required resort to the IATA rate-fixing machinery "whenever possible", and failing that, agreement amongst the airlines subject to approval by the aeronautical authorities) is not inconsistent with the finding at [203] (concerning a possible obligation to take

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[27] Vienna Convention on the Law of Treaties 1969 [1974] ATS 2, Art 31(2). Crawford, J., *Brownlie's Principles of Public International Law* (8th ed., 2012), p 381.

reasonable steps to "reach agreement"). As the majority said, the impossibility contemplated by Art 6(2) is impossibility due to lack of consensus: FC [209].

80. As for AS [94], it is not clear how a distinction between terms and conditions that apply to Indonesia, on the one hand, and those that refer to conduct of an airline, on the other, is "inconsistent" with a legislative scheme that contemplates that an airline would operate the international air services of a country. The agreement only gives rise to obligations on the part of the Contracting Parties. Moreover, the reference in s 13(b) to "any" term of condition of the relevant agreement should be viewed in context: namely, in conjunction with the expressions, to conform to or comply with, which suggest that the "term or condition" to which the word "any" attaches, is a term or condition that gives rise to an obligation with which the airline must comply or a standard or regulation to which it must conform. Otherwise, the airline would be exposed to suspension or cancellation of its licence for the actions of the Contracting Parties (as distinct from its own actions which expose the Contracting Parties to breach of their obligations: FC [205]). It is wrong to say that Garuda was required, by virtue of ss 12 and 13 of the ANA, to comply with Indonesia's obligations under the ASA (cf. AS [83]-[84]).

81. Furthermore, Garuda's criticism of the majority's reasoning at FC [205] is without foundation: there was no suggestion by the majority that Garuda should conform with Australia's obligations under the ASA (cf. AS [84], [94]). Rather, the majority was addressing Garuda's assumption that Australia was in breach of its obligations under Art 6 by enacting Pt IV of the TPA. Even if this were so, an international airline that complied with the TPA would not cause Australia to be in breach of its ASA obligations – rather, Australia's breach would have already occurred.

C2 -In the alternative, inconsistency resolved in favour of the TPA

82. *Only* if one accepts that Art 6(2) of the ASA requires conduct contrary to Pt IV of the TPA, does a potential inconsistency arise between the prohibition in s 45 of the TPA and the discretionary power in s 13(b) of the ANA. The potential conflict is realised *only* where the Minister exercises his/her discretion (validly)[28] to cancel a licence to operate a scheduled international air service over or into Australian territory for failure to conform to or comply with the terms or conditions of the ASA.

83. The majority found that, even in those circumstances, the TPA could not be construed to exclude matters of international commercial aviation; even if it were necessary to ensure compliance with international law (FC [219], [224]). The majority correctly accepted that the legislative intention manifest in s 51 of the TPA was that conduct contrary to Pt IV of the TPA was excused by another Act only where it specifically authorised or approved that conduct, by express reference to the TPA (FC [226]-[230]; TJ [193]).

[28] The majority reasoned that it would not be reasonable to exercise the discretion to cancel a licence in circumstances where failure to comply with or conform to the relevant agreement was as a consequence of compliance with Australian law: FC [200].

Operation of s 51 within the statutory scheme

84. Section 51(1) provides the mechanism by which legislation which might conflict with the proscriptions in Part IV is addressed. It provides that in determining whether a person has contravened Part IV certain things must be disregarded. After the *Competition Policy Reform Act 1995*, in order to be removed from consideration, relevantly, the thing needed to be "specified in, and specifically authorised" by the Act or regulations made under the Act (s 51(1)(a)). In order to be "specifically authorised" by the other legislation, "the authorising provision must expressly refer to this Act": s 51(1C)(a).

10 85. Parliament's attention to extra-territorial matters in this context is demonstrated by s 51(2)(g) which provides that, *inter alia*, for the purposes of s 45, conduct pursuant to an agreement relating exclusively to exports is to be disregarded.

86. Section 51 is to be read in the context of other provisions of the Act that limit the *prima facie* operation of Part IV, either generally or in particular contexts. So, there are specific exceptions to the prohibition in s 45(2) in subsections 45(5)-(9). Those provisions do not include any exception for circumstances relating to international commercial aviation, nor, for that matter, where a foreign law
20 allows or requires action that would contravene s 45(2).

87. In addition, since 1974, s 88(1) has provided for authorisations to be granted by the Commission in respect of some practices, the effect of which is to remove the prohibition that would otherwise apply by virtue of the TPA, including a price-fixing agreement with respect to services (and, as from 1995, goods) contrary to s 45(2) (see s 45(9)). In the present case, Garuda sought unsuccessfully to rely upon an authorisation obtained by Qantas (FC [500]). Importantly, the authorisation was subject to a condition that the relevant arrangement must not require a carrier (airline) to *charge* the tariffs in Australia
30 that were set pursuant to that arrangement (FC [506]).

88. Furthermore, Pt X of the TPA expressly provides for conference agreements on rates for outbound cargo shipping by sea from Australia, as explained by Deane J in *Refrigerated Express Lines (A/Asia) Pty Ltd v Australian Meat and Livestock Corporation (No 2)* (1980) 44 FLR 455 (***Refrigerated Express***).

89. This careful structure is inconsistent with the provisions of Part IV being disregarded by force of earlier legislation save in accordance with the specific provisions of the TPA. It is *a fortiori* where the earlier legislation does no more
40 than create the risk of the loss of a licence upon a failure to act in a manner that would contravene a provision of Part IV.

90. Garuda accepts that the ANA does not specify or specifically authorise any conduct within the meaning of s 51(1)(a) (AS [97]). By contradistinction, Garuda submits that the ANA imposes a "requirement" on Garuda to conform to the terms and conditions of the ANA. However, a "requirement" to engage in conduct carries with it a necessary authorisation to engage in the conduct. Plainly, the ANA *permitted* conduct in circumstances where the Act provides for the grant of a licence to operate an international air service (a submission to the
50 contrary was characterised by the majority as "semantic": FC [228]; cf. AS [98], [100]). But the point remains that the ANA does not operate specifically to authorise conduct that might contravene Part IV, and it does not specifically refer to the TPA.

91. Garuda's submission assumes that s 51 is directed only to certain kinds of conflicts. This fails to recognise the role and structure of Part IV. Part IV is foundational, national economic regulation. It provides for the conduct that is to be disregarded in determining whether it has been contravened, in particular by s 51. Otherwise, it operates according to its terms. Even apart from the insertion of sub-section(1C), it is clear that s 51 would not have operated to exclude conduct "required" by a licence referred to in the ANA from the operation of Part IV. The later Act would prevail.

92. This position cannot have been affected by the amendment in 1995 of s 12 of the ANA (cf. AS [104]). It would be wrong to construe that amendment as operating to create a new Alsatia as regards compliance with Part IV.

93. Questions of implied repeal do not arise (cf. AS [101]-[107]).

General/specific characterisation is misleading and no answer

94. Garuda submits that ss 12 and 13 of the ANA operate to require Garuda to agree tariffs, which was inconsistent with ss 45/45A of the TPA when they were enacted in 1974 and 1977 (AS [108]). This is distinct from requiring the airlines to agree to implement a tariff in the form of a fuel surcharge agreed by the airlines, which agreement was said to contravene s 45(2) of the TPA.

95. Garuda relies upon the principles in *Commissioner of Police v Eaton* (2013) 252 CLR 1 (***Eaton***) in order to resolve the purported 'inconsistency' between the 'special provisions' of the ANA and the 'general enactment' of the TPA (AS [109], fns 51-52). The majority below correctly rejected that submission, primarily on the basis that there is no inconsistency "at the level of the statutes" in the present case. Further, unlike the position in *Eaton*, there is no language in the ANA which suggests any exclusion of the terms of Pt IV of the TPA, and no internal inconsistency would exist in the ANA if the TPA did not exclude international commercial aviation (FC [192]-[193]). The applicant does not point to any error on the part of the majority in this regard.

96. Next, the provisions for the operation of an international air service in ss 12 and 13 of the ANA, and the proscription of restrictive trade practices in s 45 of the TPA, resist easy characterisation of one as 'general' and the other as 'specific'. The maxim *generalia specialibus non derogant* has little force in this context.

97. Moreover, even if an inconsistency could be demonstrated, the characterisation of terms in separate statutes, one as general, and the other as specific, is not the end of the matter. It is still a matter of legislative intention whether the earlier law is left intact, or is qualified by the later Act.[29] An intention to qualify is evident in the TPA, in s 51 in particular, and was reinforced by the insertion of s 51(1C) in 1995 (TJ [193]; FC [226]-[230]). In the absence of any exclusion in s 45(5)-(9) or satisfaction of the conditions in s 51(1), the provisions of the ANA do not diminish the proscription in s 45(2) of the TPA. This is especially so when the necessary qualification to the operation of the ANA is so slight: in effect, it is only that when considering whether to exercise a power to suspend or cancel a licence under s 13 of the ANA that the Minister could not, acting reasonably,

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[29] *Associated Minerals Consolidated Ltd v Wyong Shire Council* [1975] AC 538 at 553-554, endorsed in *Eaton* by Crennan, Kiefel and Bell JJ at [45].

base that decision on non-compliance with a condition of a licence that was attributable solely to the need not to contravene a provision of Part IV.

98. Finally, Garuda has not suggested how the general words of ss 45/45A of the TPA should be read down, apart from suggesting a wholesale exception for "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" (AS [109]). This is difficult to reconcile with a legislative scheme that provides for exceptions from the proscription in s 45(2) of the TPA (both by way of s 45(5)-(9), Part X and s 51).

No error in the majority's approach

99. Garuda contends that the majority's reasoning that it would not be reasonable to cancel a licence where the failure consisted of complying with the requirements of Australian law (FC [200]) led to a further conclusion that the enactment of the TPA amended the content of the power to cancel or suspend a licence under s 13(b) (AS [110]). That is not so. It is the operation of the principle of legal reasonableness that places a constraint on statutory power. The matters that necessarily inform executive discretions are always liable to change by reference to external developments in the law (eg, *Minister of State for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273).

100. Similarly, the submission that the enactment of ss 45 and 45A of the TPA did not affect the scope, object or purpose of the power[30] conferred by s 13(b) of the ANA (AS [111]), goes nowhere. The majority did not say that provisions of the TPA did so operate, nor did the majority's reasoning imply such a conclusion. As such, no question arises as to inconsistency with recent decisions of the Full Court of the Federal Court (cf. AS [111], fn 55).

101. Garuda submits that, consistent with *Eaton*, ss 45 and 45A of the TPA are to be "read down" in a manner suggested by Deane J in *Refrigerated Express* at 471.9 (AS [112], fn 56). The reasons for not applying *Eaton* have been explained above.

102. In *Refrigerated Express*, Deane J did not accept that s 51(2)(g) operated to completely remove the potential conflict between Pt IV and Pt X of the TPA (at 467) in circumstances of an irreconcilable conflict between the provisions of *one* statute. The present is not such a case. Even so, the question was ultimately one of the proper construction of the TPA, and whether the general provisions of Pt IV were intended to apply in respect of the subject matter of the special provisions of Pt X, which expressly contemplated the making of conference agreements on rates (at 467). His Honour concluded that the provisions of Pt IV were not intended to be applicable to such an agreement (at 468). Section 112 explicitly exempted from the operation of Pt IV conduct which was done pursuant to such an agreement but did not exempt, in terms, the conduct involved in reaching such an agreement. As the trial judge held (at TJ [157]), it was not a difficult conclusion to reach that a set of provisions which exempted conduct pursuant to conference agreements was inconsistent with the operation

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30 The subject-matter, scope and purpose of the statute is described by French CJ in *Minister for Immigration & Citizenship v Li* (2013) 249 CLR 332 at [26]), as defining the framework of rationality. See also Hayne, Kiefel and Bell JJ at [67], and Gageler J at [90], as relied upon by the Gaurda at fn 54.

of Pt IV. However, as the trial judge also held, that is not this case: the ANA regime does not require or authorise conference arrangements at all, which is a "critical distinction" (TJ [158]).

PART VII NOTICE OF CONTENTION

103. Not applicable.

PART VIII ESTIMATED HOURS

104. This matter is being heard together with the related appeal of *Air New Zealand Ltd v ACCC* (S245 of 2016). The ACCC estimates that it will require a combined total of 3 hours for the presentation of oral argument in both matters.

Dated: 9 December 2016

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