IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY
COMMERCIAL LIST

CIV-2008-404-8350
[2013] N ZHC 845

UNDER	Sections 27, 30 and 80 of the Commerce Act 1986
BETWEEN	THE COMMERCE COMMISSION Plaintiff
AND	MALAYSIA AIRLINES SYSTEM BERHAD LIMITED First Defendant
AND	MASKARGO SDN. BHD. Second Defendant

Hearing: 21 February 2013

Appearances: Mr J C L Dixon and Mr L M Mills for the plaintiff
Mr J Land and Ms I-R Sheerin for the defendants

Judgment: 22 April 2013

JUDGMENT OF ALLAN J

In accordance with r 11.5 I direct that the Registrar endorse this judgment with the delivery time of 3.30 pm on Monday 22 April 2013.

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Introduction

[1] The defendant, MASkargo Sdn. Bhd. (MAS), has admitted certain breaches of Part 2 of the Commerce Act 1986 (the Act). The Court is asked to impose a pecuniary penalty under the Act. The Commerce Commission (the Commission) and MASkargo are agreed that, subject to the view of the Court, an aggregate penalty of $2.6 million is appropriate, together with costs of the proceeding of $259,079.18 and a further contribution of $400,000 towards the Commission's investigation costs.

Background

[2] MASkargo is a company registered in Malaysia and is a wholly owned subsidiary of Malaysia Airline System Berhad (MAS). MASkargo has operated the cargo business of the Malaysia Airlines Group since 1994, using its own freighters and the bellyhold space on passenger aircraft operated by MAS.

[3] During the relevant period, MASkargo carried on business as a carrier of air cargo, having an average market share of approximately 3.5% for all cargo carried from overseas points of origins to New Zealand and a market share of approximately 2.3% for all cargo carried from New Zealand to points of destination overseas. It employs about a thousand staff and currently operates in 25 countries.

[4] Throughout the period with which this case is concerned, MAS maintained scheduled air services between Kuala Lumpur and Auckland using its own aircraft. At all material times, MASkargo, and indeed other airlines, charged their customers a price for air cargo services that consisted of a base rate and various surcharges and fees, including a fuel surcharge, and from late October 2001, a security surcharge.

[5] For the purposes of this proceeding MASkargo and the Commission are agreed that separate markets existed during the relevant period for air cargo services

between Indonesia and Switzerland respectively, and New Zealand.[1] A number of airlines competed with each other to supply air cargo services in these markets.

[6] The Commission's allegations related to fuel surcharge agreements (FSA) and security surcharge agreements (SSA) entered into with a number of other airlines in respect of the carriage of air cargo from Indonesia and Switzerland respectively to New Zealand.

Fuel surcharge agreements

[7] In April 2002, MASkargo and other international airlines, including in particular Garuda Indonesia, reached an agreement as members of the Indonesian Air Cargo Representative Board (known as the Indonesia ACRB) to impose charges of specified amounts described as fuel surcharges in respect of the supply of air cargo services from Indonesia to New Zealand (the Indonesia FSA).

[8] The Indonesia FSA provided that airline members would exchange information as to their fuel surcharge intentions, charge fuel surcharges in accordance with those expressed intentions and adjust or maintain their fuel surcharges on cargo carried by air from Indonesia to New Zealand as agreed between them.

[9] Between April 2002 and October 2005, MASkargo and other airline members gave effect to the Indonesia FSA by giving and receiving assurances that particular fuel surcharges would be imposed on the carriage of cargo from Indonesia to New Zealand, and maintaining or increasing their fuel surcharge levels in accordance with those assurances.

[10] A similar agreement was entered into by members of the Airline Cargo Council of Switzerland (known as the ACCS). In October 2000, MASkargo reached an agreement or understanding with other members of the ACCS that they would impose charges of specified amounts described as fuel surcharges in respect of the

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1 *Commerce Commission v Air New Zealand Ltd* HC Auckland CIV-2008-404-8352, 24 August 2011.

supply of air cargo services from Switzerland to New Zealand (the Switzerland FSA). The Switzerland FSA also involved an agreement to exchange information as to fuel surcharge intentions, the actual imposition of fuel surcharges in accordance with those intentions and the adjustment or maintenance of such surcharges.

[11] Between October 2000 and January 2004, MASkargo and other members of the ACCS exchanged information with other airlines party to the Switzerland FSA as to the amount and timing of fuel surcharges to be imposed on air cargo services from Switzerland to New Zealand at ACCS meetings. MASkargo further participated in email information exchanges between members of the ACCS about airlines' intended plans for fuel surcharges in advance of that information becoming publicly available and it imposed fuel surcharges on such air cargo services in accordance with the Switzerland FSA.

Security surcharge agreements

[12] During October 2001, MASkargo reached an agreement or understanding with Garuda Indonesia and other members of the Indonesia ACRB to the effect that MASkargo and its competitors would impose charges of specified amounts described as security surcharges in respect of the supply of air cargo services from Indonesia to New Zealand (the Indonesia SSA).

[13] The Indonesia SSA involved an agreement to exchange information as to the airline's respective security surcharge intentions on cargo carried by air from Indonesia to New Zealand, to charge the security surcharge on cargo carried by air from Indonesia to New Zealand in accordance with those expressed intentions, and to adjust or maintain those security surcharges as agreed at various meetings of the airlines concerned.

[14] Between October 2001 and October 2005, MASkargo and other members of the Indonesia ACRB gave effect to the Indonesia SSA by exchanging information with other member airlines as to the amount and timing of security surcharges to be imposed under the Indonesia SSA and by imposing security surcharges as agreed at meetings of the Indonesia ACRB.

[15] Also in October 2001, MASkargo reached an agreement or understanding with other members of the ACCS that they would impose charges of specified amounts described as security surcharges in respect of the supply of air cargo services from Switzerland to New Zealand (the Switzerland SSA). The Switzerland SSA contained provisions to the effect that, among other things, the airlines would exchange information as to their security surcharge intentions on cargo carried by air from Switzerland to New Zealand, would charge a security surcharge on cargo so carried in accordance with those expressed intentions, and adjust or maintain their security surcharges on cargo carried by air from Switzerland to New Zealand, as agreed at various meetings of the airlines concerned.

[16] Between October 2001 and January 2004, MASkargo and other members of the ACCS gave effect to the Switzerland SSA by giving and receiving assurances that particular security surcharges would be mutually imposed on the carriage of cargo by air from Switzerland to New Zealand and by each imposing its security surcharge on the carriage of such cargo in accordance with those assurances.

The breaches

[17] For the purposes of this proceeding only, MASkargo accepts that it committed breaches of the Act by entering into the Indonesia FSA and SSA and the Switzerland FSA and SSA (in breach of s 27(1) of the Act via s 30) and by giving effect to each agreement (in breach of s 27(2) via s 30).

Legislation

[18] Section 27 of the Act relevantly provides:

> **27 Contracts, arrangements, or understandings substantially lessening competition prohibited**
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> (1) No person shall enter into a contract or arrangement, or arrive at an understanding, containing a provision that has the purpose, or has or is likely to have the effect, of substantially lessening competition in a market.

(2) No person shall give effect to a provision of a contract, arrangement, or understanding that has the purpose, or has or is likely to have the effect, of substantially lessening competition in a market.

…

[19] Section 30 of the Act provides:

> **30 Certain provisions of contracts, etc, with respect to prices deemed to substantially lessen competition**
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> (1) Without limiting the generality of section 27 of this Act, a provision of a contract, arrangement, or understanding shall be deemed for the purposes of that section to have the purpose, or to have or to be likely to have the effect, of substantially lessening competition in a market if the provision has the purpose, or has or is likely to have the effect of fixing, controlling, or maintaining, or providing for the fixing, controlling, or maintaining, of the price for goods or services, or any discount, allowance, rebate, or credit in relation to goods or services, that are—
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> (a) Supplied or acquired by the parties to the contract, arrangement, or understanding, or by any of them, or by any bodies corporate that are interconnected with any of them, in competition with each other; or
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> (b) Resupplied by persons to whom the goods are supplied by the parties to the contract, arrangement, or understanding, or by any of them, or by any bodies corporate that are interconnected with any of them in competition with each other.
>
> (2) The reference in subsection (1)(a) of this section to the supply or acquisition of goods or services by persons in competition with each other includes a reference to the supply or acquisition of goods or services by persons who, but for a provision of any contract, arrangement, or understanding would be, or would be likely to be, in competition with each other in relation to the supply or acquisition of the goods or services.

[20] Under s 30 of the Act, the admitted conduct is per se illegal because price fixing agreements restrict competition and are detrimental to economic welfare without any beneficial effects. By co-ordinating behaviour, competitors can achieve monopolistic outcomes in a market that would otherwise be subject to market forces.

[21] It is often said that, where cartel behaviour is identified, punishments must be condign. That is because it is necessary both to ensure that the participant is stripped of any profits derived from the illegal behaviour, and to serve as an appropriate

deterrent in a class of case where, because illegal behaviour is often covert, detection will sometimes be avoided.

[22] Those considerations are reflected to some extent in s 80 of the Act, which confers on the Court jurisdiction to impose pecuniary penalties for breaches of Part 2. Section 80, as now constituted, provides:

> **80 Pecuniary penalties**
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> (1) If the Court is satisfied on the application of the Commission that a person—
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> (a) Has contravened any of the provisions of Part 2 of this Act; or
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> (b) Has attempted to contravene such a provision; or
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> (c) Has aided, abetted, counselled, or procured any other person to contravene such a provision; or
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> (d) Has induced, or attempted to induce, any other person, whether by threats or promises or otherwise, to contravene such a provision; or
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> (e) Has been in any way, directly or indirectly, knowingly concerned in, or party to, the contravention by any other person of such a provision; or
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> (f) Has conspired with any other person to contravene such a provision,—
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> the Court may order the person to pay to the Crown such pecuniary penalty as the Court determines to be appropriate ….
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> (2) The Court must order an individual who has engaged in any conduct referred to in subsection (1) to pay a pecuniary penalty, unless the Court considers that there is good reason for not making that order.
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> (2A) In determining an appropriate penalty under this section, the Court must have regard to all relevant matters, in particular,—
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> (a) any exemplary damages awarded under section 82A; and
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> (b) in the case of a body corporate, the nature and extent of any commercial gain.
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> (2B) The amount of any pecuniary penalty must not, in respect of each act or omission, exceed,—
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> (a) in the case of an individual, $500,000; or
>
> (b) in the case of a body corporate, the greater of—

(i) $10,000,000; or

(ii) either—

(A) if it can be readily ascertained and if the Court is satisfied that the contravention occurred in the course of producing a commercial gain, 3 times the value of any commercial gain resulting from the contravention; or

(B) if the commercial gain cannot be readily ascertained, 10% of the turnover of the body corporate and all of its interconnected bodies corporate (if any).

(3) *Repealed.*

(4) Repealed.

(5) Proceedings under this section may be commenced within 3 years after the matter giving rise to the contravention was discovered or ought reasonably to have been discovered. However, no proceedings under this section may be commenced 10 years or more after the matter giving rise to the contravention.

(6) Where conduct by any person constitutes a contravention of 2 or more provisions of Part 2 of this Act, proceedings may be instituted under this Act against that person in relation to the contravention of any one or more of the provisions; but no person shall be liable to more than one pecuniary penalty under this section in respect of the same conduct.

[23] Prior to its amendment in May 2001, the section required the Court to determine an appropriate penalty, subject to the statutory maximum, by having regard to all relevant matters, including:

(a) the nature and extent of the act or omission;

(b) the nature and extent of any loss or damage suffered by any person as a result of the act or omission;

(c) the circumstances in which the act or omission took place, and

(d) whether or not the person had previously been found by the court in proceedings under Part 6 of the Act, to have engaged in any similar conduct.

[24] Since May 2001, s 80 has required the Court to determine an appropriate penalty, subject to the statutory maximum, by:

(a) having regard to all relevant factors, and

(b) having particular regard to the nature and extent of any commercial gain.

[25] It is well established that the reference to "all relevant factors" will bring to account all those factors previously set out in s 80(1).

Sentencing Principles

[26] In *Commerce Commission v Alstom Holdings SA* (*Alstom*),[2] , Rodney Hansen J discussed the significant public interest in bringing about the prompt resolution of penalty proceedings, and the role of the Court in ensuring the efficacy of negotiated resolutions. His Honour stated that: [3]

> [18] Finally, in discussing the general approach to fixing penalty, I acknowledge the submission that the task of the Court in cases where penalty has been agreed between the parties is not to embark on its own enquiry of what would be an appropriate figure but to consider whether the proposed penalty is within the proper range – see the judgment of the Full Federal Court in *NW Frozen Foods v ACCC* (1996) 71 FCR 285. As noted by the Court in that case and by Williams J in *Commerce Commission v Koppers*, there is a significant public benefit when corporations acknowledge wrongdoing, thereby avoiding time-consuming and costly investigation and litigation. The Court should play its part in promoting such resolutions by accepting a penalty within the proposed range. A defendant should not be deterred from a negotiated resolution by fears that a settlement will be rejected on insubstantial grounds or because the proposed penalty does not precisely coincide with the penalty the Court might have imposed.

[27] In *Commerce Commission v Geologistics International (Bermuda) Ltd* (*Geologistics International*), I also noted His Honour's analysis of the place of ordinary criminal sentencing principles in the context of cases under the Act.[4] There I said:

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2 *Commerce Commission v Alstom Holdings SA* [2009] NZCCLR 22 (HC).

3 At [18].

4 *Commerce Commission v Geologistics International (Bermuda) Ltd* HC Auckland CIV-2010-

[18] In *Commerce Commission v Alstom Holdings SA*,[5] Rodney Hansen J confirmed that criminal sentencing principles provide an appropriate framework for the assessment of a proposed penalty under the Commerce Act. His Honour said:

> [14] The parties invite me to consider the proposed penalty, broadly by reference to orthodox sentencing principles. That requires assessing the seriousness of the offending, identifying relevant aggravating and mitigating factors to determine an appropriate starting point and, finally, having regard to any factors specific to the defendant that may warrant an uplift in, or reduction from, the starting point. I accept that approach is appropriate. It is consistent with the statute and is endorsed by practice in New Zealand and other jurisdictions.

[19] I agree with that approach.[6] But while the analogy with sentencing in the ordinary criminal jurisdiction provides broad assistance, a degree of caution is advisable, as Rodney Hansen J pointed out in *Commerce Commission v EGL Inc*.[7] The two jurisdictions serve markedly different ends. The primary purpose of pecuniary penalties for anti-competitive conduct is deterrence, but a range of other factors will be relevant as well. The identification of those factors and the weighting to be accorded them when fixing pecuniary penalties must, as Rodney Hansen J observed,[8] be informed by the distinctive character and consequences of anti-competitive conduct.

[20] Among the factors which will be relevant are:

a. The duration of the contravening conduct;

b. The seniority of the employees or officers involved in the contravention;

c. The extent of any benefit derived from the contravening conduct;

d. The degree of market power held by the defendant;

e. The role of the defendant in the impugned conduct;

f. The size and resources of the defendant;

g. The degree of co-operation by the defendant with the Commission;

h. The fact that liability is admitted;

404-5490, 22 December 2010.

5 *Commerce Commission v Alstom Holdings SA*, above n 2.

6 *New Zealand Bus Ltd v Commerce Commission* [2008] 3 NZLR 433 (CA) at [197], *Commerce Commission v Koppers Arch Wood (NZ) Ltd* (2006) 11 TCLR 581 (HC) at [18], and *Commerce Commission v New Zealand Diagnostic Group Ltd* HC Auckland CIV-2008-404-4321, 19 July 2010 at [15].

7 *Commerce Commission v EGL Inc* HC Auckland CIV-2010-404-5474, 16 December 2010 at [13].

8 *Commerce Commission v Alstom Holdings SA*, above n 2, at [14].

i. The extent to which a defendant has developed and implemented a compliance programme.

[28] I continued:

> [37] Ultimately, it is the final figure which the Court is asked to approve. The identification of appropriate starting points and discounts for mitigating factors are simply tools aimed at producing a result which is in accordance with the ends of justice and which properly reflects the aims and objectives of the Act.

[29] It follows that, provided I am satisfied that the ultimate penalty falls within the appropriate available range, the Court ought to accept the penalty proposed by the parties.

[30] In *Commerce Commission v New Zealand Diagnostic Group Ltd*, I noted that:[9]

> The general approach of the Court is to accept and impose a penalty which has been agreed between the parties, so long as it is within the Court determined permissible range: *Australian Competition & Consumer Commission v ABB Power Transmission Pty Ltd;*[10] *NW Frozen Foods v Australian Competition & Consumer Commission*.[11] That approach is also adopted in this country. In [*Alstom*] Rodney Hansen J said at [18]:
>
> > … there is a significant public benefit when corporations acknowledge wrongdoing, thereby avoiding time-consuming and costly investigation and litigation. The Court should play its part in promoting such resolutions by accepting a penalty within the proposed range. A defendant should not be deterred from a negotiated resolution by fears that a settlement will be rejected on insubstantial grounds, or because the proposed penalty does not precisely coincide with the penalty the Court might have imposed.

Penalty assessment

[31] The relevant conduct commenced under the pre-2001 penalty regime and continued under the post-2001 regime. It is necessary, therefore, to consider both statutory maxima.

[32] I have earlier noted in *Geologistics International*, the established approach to penalty assessment under s 80 is to:

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9 *Commerce Commission v New Zealand Diagnostic Group Ltd*, above n 7, at [45].

10 *Australian Competition & Consumer Commission v ABB Power Transmission Pty Ltd* (2004) ATPR 48,848 at 48,855.

11 *NW Frozen Foods v Australian Competition & Consumer Commission* (1996) 71 FCR 285.

(a) determine the maximum penalty;

(b) establish an appropriate starting point aimed at achieving the principal object of deterrence in the light of relevant factors, including available information about commercial gain; and

(c) adjust the starting point for defendant specific factors.

[33] Prior to May 2001, the statutory maximum prescribed by s 80 for companies was $5 million for each breach. After May 2001 the maximum penalty for companies increased significantly. Section 80 now provides that the statutory maximum for each breach is the greater of:

(a) $10 million; or

(b) Either:

(i) three times the commercial gain from the breach if it can be readily ascertained, or

(ii) 10% of turnover from trading within New Zealand if the commercial gain from the breach cannot be readily ascertained.

[34] Thus the maximum penalty for each breach after May 2001 is the greater of $10 million, or 10% of MASkargo's relevant turnover. The Commission says that the relevant commercial gain is not readily ascertainable for the purposes of s 80.

[35] Mr Land for MASkargo submits that there was no commercial gain at all because the relevant cargo markets are highly competitive, and there is no evidence that overall charges to customers were increased in order to take into account the relevant surcharges. Moreover, neither fuel nor security surcharges recovered the full extent of the additional costs incurred by the airline. That may be so, but because commercial gain cannot be readily ascertained, the maximum penalty for each breach is the greater of $10 million or 10% of MASkargo's relevant turnover.

"Turnover" is defined in s 2 of the Act as "the gross revenues (exclusive of any tax required to be collected) received or receivable by a body corporate in an accounting period as a result of trading by the body corporate within New Zealand".

[36] The statute is silent as to the specific accounting period or periods over which turnover is to be measured. This Court has previously considered a single year's accounting period in order to ascertain turnover and calculate the maximum available penalty.[12]

[37] The relevant turnover figure for s 80 purposes is agreed to be MASkargo's turnover figure for the 2011 calendar year, being the most recent figure available. MASkargo's turnover for 2011 for cargo services into and out of (including within) New Zealand was $31,264,895.38. Ten per cent of that figure is a little over $3 million. Consequently the maximum penalty that could be imposed for each breach of the Act after May 2001 would be $10 million. Under s 80(6) of the Act, no person is liable for more than one pecuniary penalty in respect of the same conduct, but the different SFAs and SSAs arose from separate agreements and were plainly different conduct. Moreover, entry into and giving effect to those agreements, was also different conduct and gives rise to separate offences.

[38] In consequence, MASkargo is liable for a maximum pecuniary penalty of $10 million per breach for six of the eight breaches and for a pecuniary penalty of $5 million for each of the remaining two breaches, being the SFAs entered into before the commencement of the new penalty regime in May 2001. So the maximum available penalty in this case, at least in theory, is $70 million.

[39] In the course of penalty assessment the Court must take into account the degree (if any) of commercial gain, but that is not the sole or even the primary consideration. The primary consideration is deterrence, and penalties are to be set at a level that achieves both specific and general deterrence.[13]

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12 *Commerce Commission v Telecom Corporation of New Zealand Ltd* (2011) 13 TCLR 270 (HC) at [47].

13 *Telecom Corporation of New Zealand Ltd v Commerce Commission* [2012] NZCA 344 at [28].

[40] Other relevant factors will normally include: [14]

(a) the nature and seriousness of the contravening conduct;

(b) whether it was deliberate or not;

(c) the duration of the conduct;

(d) the seniority of the employees or officers involved in the contravention;

(e) the extent of any benefit derived from the conduct;

(f) the extent of any loss of damage suffered by any person as a result of the conduct;

(g) the degree of market power held by the defendant;

(h) the role of the defendant in the impugned conduct.

[41] Where a defendant has admitted a number of separate breaches of the Act, it will generally be convenient to view the contravening behaviour as a single related course of conduct. Adopting that course facilitates the determination of penalty and enables the Court to maintain consistency between cases. That course has been adopted in most recent cases including those involving airline defendants in cargo cases.[15]

[42] In accordance with that approach, the parties have joined in adopting a single starting point in respect of both entry into and giving effect to the FSAs and SSAs.

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[14] *Commerce Commission v Alstom Holdings SA*, above n 2, at [20], *Commerce Commission v Carter Holt Harvey Building Products* (2000) 9 TCLR 636 (HC) at [15], *Commerce Commission v Ophthalmological Society* [2004] 3 NZLR 689 (GCA) at [17] and *Commerce Commission v New Zealand Bus Limited (No.2)* (2006) 3 NZCCLR 854 (HC) at [20].

[15] See for example *Commerce Commission v Korean Air Lines Co Ltd* [2012] NZHC 1851 at [42], *Commerce Commission v Singapore Airlines Cargo Pty Ltd* [2012] NZHC 3583 at [38].

[43] This case involves price fixing arrangements which (as I have observed earlier) is the type of conduct considered to be so serious that it is deemed to be anti-competitive per se. I accept that the surcharges comprised only part of the total charges to customers for air cargo services, and also that the total surcharge revenue for Indonesia was relatively modest (less than $10,000 in total), but in my view the agreements and their implementation must inevitably have affected price competition and so impacted upon competitive dynamics in the relevant markets.[16]

[44] It is important to bear in mind also the fact that international cargo services generally are an important input for goods and services supplied throughout the New Zealand economy.

[45] It is common ground that this was not a one-off transgression but rather was part of a sustained course of conduct in both jurisdictions. The breaches did not arise from a chance conversation or from the actions of a rogue employee. Rather, they arose from planned and methodical initiatives involving employees of MASkargo in Indonesia and Switzerland respectively.

[46] However, while the conduct of the responsible employees was deliberate, it was neither sophisticated nor particularly covert. Neither was it rigorously enforced or implemented. Airlines were not forced to join the agreements, and the conduct was not designed to eliminate all competition between them. Importantly, there is no suggestion that senior management at head office were involved in any way. Nor is it suggested that MASkargo was an instigator or a leader of the cartel behaviour among the participating airlines.

[47] The scale of the offending in financial terms is a factor to be taken into account. In that respect Mr Land points out that MASkargo's total cargo revenue during the relevant periods was $165,753 for cargo transported from Indonesia to New Zealand, and $2,549,877 for cargo transported from Switzerland to New Zealand. As I have earlier noted, the total surcharge revenue for the Indonesia to New Zealand market was less than $10,000. In respect of cargo carried from

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16 *Commerce Commission v Japan Airlines Co Ltd* [2012] NZHC 1683 at [44].

Switzerland to New Zealand, it was of the order of $220,000. Mr Land submits, correctly, that these figures are significantly lower than in some other air cargo cases.

[48] I take Mr Land's submission into account in a general way, but of course the Court is bound to have regard to the overall potential and actual harm caused by cartel arrangements generally, and not just direct harm or loss caused by the conduct of a particular party in a particular case. Moreover, as I have noted earlier, commercial gain is relegated in importance to the need for both general and specific deterrence.

[49] I turn to the assessment of an appropriate starting point. It is common ground that in the light of well settled totality principles it is appropriate to consider MASkargo's behaviour as a single sustained course of conduct. There is a close relationship between entry into and giving effect to each of the FSAs and SSAs. They were entered into by the same personnel and implemented over broadly the same period, in respect of the same air cargo services.

[50] Mr Dixon submits that a starting point of between $3.0 and $3.7 million is appropriate in respect of both entering into and giving effect each FSA and SSA.

[51] Eight airline cargo cartel penalty judgments have been delivered before delivery of this judgment. In the previous cases, the levels of penalty imposed in earlier cases were analysed in order to ensure that a measure of consistency was maintained. But it is important to bear in mind the observations of the Court of Appeal in *Telecom Corporation of New Zealand Ltd v Commerce Commission*:[17]

> [62] Assessments of penalty in analogous cases may provide guidance to the court to ensure that there is parity of treatment in similar circumstances. However, while pecuniary penalties imposed in one case may provide a guide, that guide will seldom be able to be used mechanically. Changes in circumstance will affect the appropriate penalty in a case, such as differing circumstances of the conduct, size, market power and responsibility for the contraventions. These factors, among others (including mitigating factors), complicate any attempt to compare penalties imposed in one case with those imposed in another.

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[17] *Telecom Corporation of New Zealand Ltd v Commerce Commission*, above n 14, at [62].

[52] Close analysis of all of the previous authorities is therefore unlikely to be of significant assistance. Nevertheless, counsel are agreed that particularly helpful guidance is to be obtained from this Court's earlier judgment in *Commerce Commission v Japan Airlines Co Ltd* (*Japan Airlines*).[18] In *Japan Airlines*, I approved a pecuniary penalty of $2.275 million after discounting from a starting point of $3.1 million to $3.9 million. Japan Airlines had entered into agreements to impose fuel and security surcharges from the United States, Europe and Asia to New Zealand and from New Zealand to Asia. Its conduct was therefore geographically more extensive than that of MASkargo. Japan Airlines also gave effect to the fuel and security surcharge agreements for longer than MASkargo. Moreover, its relevant fuel and security surcharge revenue of $823,718 was significantly higher than that of MASkargo ($228,031).

[53] On the other hand, Japan Airlines' New Zealand cargo sales revenue during the relevant period was $30.5 million. The Commission estimates this to be about half that of MASkargo.

[54] In summary, Japan Airlines had a substantially smaller presence in New Zealand than MASkargo. The agreements into which it entered inured for much longer, were of much greater geographic scale and derived a higher surcharge revenue. On that footing, the Commission submits that MASkargo's conduct merits a slightly lower starting point range than in the case of Japan Airlines.

[55] Mr Land for the defendant agrees that *Japan Airlines* provides the closest comparison among the airline cargo cartel cases. He agrees in principle with the Commission's approach.

[56] It is convenient also to refer to *Commerce Commission v Thai Airways International Public Company Ltd*,[19] a judgment delivered contemporaneously with this judgment. There, a starting point of $2.9-$3.5 million was adopted. Slight differences of scale in New Zealand operations, duration of offending, and relevant

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18 *Commerce Commission v Japan Airlines Co Ltd*, above n 18.

19 *Commerce Commission v Thai Airways International Public Company Ltd* [2013] NZHC8 844.

revenue accounted for the difference in starting point. Both cases are a little less serious than *Japan Airlines.*

[57] I am satisfied that the Commission's proposed starting point of $3.0 million to $3.7 million is justifiable and appropriate. From that starting point it is necessary to consider mitigating factors specific to MASkargo.

[58] This proceeding was filed in December 2008. MASkargo sought to resolve matters in early 2012 and the parties had advanced their agreement sufficiently by September 2012 that the Commission was not required to serve its briefs on MASkargo. The defendant has provided a degree of assistance to the Commission by way of answering follow-up questions or confirmation requests regarding information already supplied but it has not proffered assistance on the same scale as that provided by airlines such as Qantas.

[59] Mr Land raises one matter which requires separate attention. MASkargo was not a defendant in this proceeding when it was launched in 2008. It has been joined only recently on the footing that when this judgment is delivered, its parent company MAS will be dropped from the proceeding by the filing of a notice of discontinuance. Mr Land says that the involvement of MASkargo is voluntary and prompted by a desire to see that the Commission proceeds against the correct party. By agreeing to become substituted as a defendant, MASkargo has foregone the opportunity of arguing that the claims against it are out of time. However, Mr Land says most of the causes of action pleaded against it are in any event time-barred. By agreeing to the pecuniary penalty now before the Court for approval, MASkargo is foregoing its opportunity to plead limitation defences and also to take on appeal recent jurisdictional rulings in this Court in this proceeding. The latter point is common to all air cargo claim defendants and needs no special consideration. However, I take into account, in a general sense, Mr Land's point regarding defendant substitution, although in doing so, I note Mr Dixon's contention that the Commission may well have succeeded against MAS in any event because it considers that it would be able to establish at trial that MAS controlled MASkargo.

[60] A further important mitigating factor is the extent to which MASkargo has enhanced its anti-trust and competition compliance policies following the discovery of this offending. At the time of the conduct it was not illegal under the laws of Malaysia to engage in cartel behaviour. The Malaysian Competition Act 2010 came into force only on 1 January 2012. Having said that, MASkargo accepts its responsibility to ensure compliance with the laws of all countries in which it operates.

[61] Since discovery of the contravening conduct, MAS has fully revised its trade practice compliance policies by developing and allocating educational and managerial responsibilities, including the potential for staff dismissal for any anti-trust violations. Staff attendance at an annual refresher training on anti-trust compliance has been introduced in order to instil a culture of compliance at an institutional level.

[62] As I have discussed in earlier judgments, it is appropriate to acknowledge MASkargo's acceptance of responsibility for its market behaviour as an indication of corporate remorse to the extent that is a valid concept.

[63] The defendant has not previously been found to have contravened the Act. It has not previously been warned by the Commission in respect of conduct likely to breach the Act.

[64] A penalty of AU$6 million was imposed on MASkargo in 2012 for similar conduct in Australia. That circumstance may be taken into account only to a minor degree in my view.[20]

[65] The penalty currently sought is for deterrence and potential and actual harm with respect to New Zealand and not overseas jurisdictions.

[66] Mr Dixon submits that in light of all these mitigating factors, a discount of 25 per cent is appropriate, resulting in a final penalty range of $2.25 million – $2.775 million.

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[20] See for example *Commerce Commission v Qantas Airways Ltd* HC Auckland CIV-2008-404-8366, 11 May 2011 at [57], *Commerce Commission v Japan Airlines Co* Ltd, above n 18 at [66].

[67] Without wishing to disturb the agreed pecuniary penalty in any way, Mr Land submits that MASkargo ought to be entitled to a higher discount than that. He suggests 33 per cent. In order to give effect to that submission, it would be necessary of course to amend the proposed starting point range. Mr Land does not want to do that, but he argues that the totality of the mitigating factors to which MASkargo is able to point justifies a higher discount as a matter of principle.

[68] Among the factors which inevitably receive the highest weighting for discount calculation purposes is that of co-operation and assistance with the Commission. Discounts of between 33 and 40 per cent were allowed in *Korean Air Lines,*[21] *Japan Airlines,*[22] *Commerce Commission v British Airways PLC,*[23] and *Commerce Commission v Qantas Airways Ltd.*[24] *Commerce Commission v Cargolux Airlines International SA* also involved a discount of 33 per cent, although there was no special co-operation in that case. The discount was justified because it indicated to the Commission at the outset and before proceedings were issued that it wished to settle.[25]

[69] In the case of MASkargo there has been a degree of ongoing co-operation, but not to the same extent as for those airlines which received higher discounts (leaving Cargolux out of account). To some degree those airlines which indicated a desire to settle and co-operate first, had the greatest opportunities to provide assistance and so have ended up with the highest co-operation based discounts.

[70] I am satisfied that Mr Dixon's suggested discount is appropriate. It is the same as the 25 per cent discount allowed in the case of *Commerce Commission v Emirates*.[26] It is higher than that allowed in *Commerce Commission v Singapore Airlines Cargo Pty Ltd, Commerce Commission v Thai Airways International Public Company Ltd,* and *Commerce Commission v Cathay Pacific Airways Ltd*. Each of

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21 *Commerce Commission v Korean Air Lines Co Ltd*, above n 17, at [75] allowing a discount of 33%.

22 *Commerce Commission v Japan Airlines Co Ltd*, above n 18, at [69] allowing a discount of 35%.

23 *Commerce Commission v British Airways PLC* HC Auckland CIV-2008-404-8347, 5 April 2011 at [36] allowing a discount of 40%.

24 *Commerce Commission v Qantas Airways Ltd*, above n 21, at [43] allowing a discount of 40%.

25 *Commerce Commission v Cargolux Airlines International SA* HC Auckland CIV-2008-404-8355, 5 April 2011 at [48].

26 *Commerce Commission v Emirates* [2012] NZHC 1858.

those airlines concerned received a 20 per cent discount.[27] A discount of 25 per cent produces a final range of $2.25–$2.775 million. The recommended penalty of $2.6 million is within that range. In all the circumstances and in the light of the penalties imposed in similar cases I consider that recommended penalty to be appropriate.

Result

[71] Accordingly, there will be an order approving the recommended penalty and directing the defendant to pay to the Commission the sum of $2.6 million. The defendant is further ordered to pay costs to the Commission of:

(a) $159,079.18 for the stage one hearing;

(b) $100,000 for the Commission's other Court costs, and

(c) $400,000 towards the Commission's other investigation costs.

[72] In common with a number of other major airlines MAS is experiencing difficult trading conditions that carry adverse financial consequences. It seeks time to pay the agreed penalties. That course has already been adopted in certain airline cargo cartel cases in this country and MASkargo itself was allowed time to pay in the Australian penalty proceedings to which I referred earlier. I am satisfied that it is appropriate to allow the defendant time to pay. There will accordingly be the following directions:

(a) The costs of $259,079.18 are to be payable to the Commission within 14 days from the date of delivery of this judgment, and

(b) Both the pecuniary penalty and the investigation costs of $400,000 are to be paid to the Commission in four equal instalments, payable respectively 14 days, six months, one year and 18 months from the

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[27] *Commerce Commission v Singapore Airlines Cargo Pty Ltd*, above n 17, at [63], *Commerce Commission v Thai Airways International Public Company Ltd* [2013] NZHC 844 and *Commerce Commission v Cathay Pacific Airways Ltd* [2013] NZHC 843. The judgment in each of the *Thai Airways* and *Cathay Pacific* cases was delivered contemporaneously with this judgment.

date of delivery of this judgment. For the avoidance of doubt, those instalments will be of $750,000 each.

C J Allan J