IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV-2008-404-8354
[2013] NZHC 844

UNDER	Sections 27, 30 and 80 of the Commerce Act 1986
BETWEEN	THE COMMERCE COMMISSION Plaintiff
AND	THAI AIRWAYS INTERNATIONAL PUBLIC COMPANY LIMITED Defendant

Hearing: 19 February 2013

Appearances: Mr J C L Dixon and Mr E Rutherford for the plaintiff
Mr T C Weston QC and Mr A W Lear for the defendant

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, Thai Airways International Public Company Ltd (Thai Airways) has admitted breaches of Part 2 of the Commerce Act 1986 (the Act). The plaintiff now asks the court to impose a pecuniary penalty under the Act. The Commerce Commission (the Commission) and Thai Airways are agreed that, subject to the view of the Court, an aggregate penalty of $2.7 million is appropriate, together with costs totalling $259,079.18.

Background

[2] Thai Airways is an international airline with its global head office in Bangkok, Thailand. It is registered as an overseas company in New Zealand, pursuant to the Companies Act 1993. Throughout the relevant period, it carried on business in New Zealand and elsewhere as a carrier of passengers and cargo by air. During that period, it was approximately the twenty-fifth air cargo carrier in the world in terms of cargo volume, having approximately 25,000 staff, of whom 1,700 worked for the cargo division. It operated in 35 countries approximately.

[3] Throughout the period with which this case is concerned, Thai Airways maintained scheduled passenger services between Bangkok and Auckland (via Sydney and Brisbane respectively) using its own aircraft. Cargo was carried in the bellyhold space on those passenger services.

[4] For the purposes of this proceeding, Thai Airways and the Commissioner are agreed that separate markets existed during the relevant period, including in New Zealand, for air cargo services between Indonesia and Malaysia respectively, and New Zealand. A number of airlines competed with each other to supply air cargo services in these markets.

[5] The Commission's allegations relate to Fuel Surcharge Understandings (FSU) and Security Surcharge Understandings (SSU), entered into with a number of other

airlines in respect of the carriage of air cargo from Indonesia and Malaysia respectively to New Zealand.

Fuel Surcharge Understandings

[6] In October 2001, PT Garuda Indonesia and other members of the Indonesia Air Cargo Representative Board (Indonesia ACRB) reached an agreement regarding the imposition of a fuel surcharge on cargo carried by air from Indonesia to New Zealand. The agreement provided that 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 at meetings of members.

[7] Between October 2001 and February 2006, Thai Airways and other members of the ACRB gave effect to the Indonesia FSU, 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 its fuel surcharge levels in accordance with those assurances.

[8] A similar understanding was reached in January 2000 by members of an inter-airline association operating out of Malaysia with respect to the imposition of a fuel surcharge on cargo carried by air from Malaysia to New Zealand (the Malaysia FSU). Again, that understanding involved the exchange of information as to fuel surcharge intentions, the actual imposition of fuel surcharges in accordance with those intentions, and the adjustment or maintenance of surcharges as agreed at meetings or by email communications between participants to the understanding.

[9] Between February 2000 and February 2006, Thai Airways gave effect to the Malaysia FSU by giving and receiving assurances about the level of fuel surcharges on the carriage of cargo from Malaysia to New Zealand, by increasing, decreasing or maintaining fuel surcharge levels in accordance with those assurances, and by participating in information exchanges about intended plans for fuel surcharges in advance of that information becoming publicly available.

Security Surcharge Understandings

[10] The SSUs followed the events of September 11 2001. Thereafter, security surrounding air travel was greatly tightened, with increased costs for the airlines.

[11] In October 2001 Thai Airways reached an agreement with PT Garuda Indonesia and other airlines operating to and from Indonesia, concerning the imposition of a security surcharge on cargo carried by air from Indonesia to New Zealand (the Indonesia SSU). The Indonesia SSU involved an understanding that the airlines would exchange information as to their security surcharge intentions and would impose agreed security surcharges on cargo carried by air from Indonesia to New Zealand and maintain those charges.

[12] Between October 2001 and February 2006, Thai Airways gave and received assurances that particular security surcharges would be imposed on the carriage of cargo from Indonesia to New Zealand and maintained in accordance with those assurances.

[13] Thai Airways entered into a similar understanding during October 2001 with airlines operating out of Malaysia regarding the imposition of a security surcharge on cargo carried by air from Malaysia to New Zealand. It gave effect to that understanding between October 2001 and February 2006 by giving and receiving assurances that particular security surcharges would be imposed on the carriage of cargo from Malaysia to New Zealand and by maintaining those levels in accordance with those assurances.

The breaches

[14] For the purposes of this proceeding only, Thai Airways accepts that it committed breaches of the Act by entering into each FSU and SSU (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

[15] 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.
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> (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.
>
> …

[16] 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.

[17] 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.

[18] 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.

[19] 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.

(2A) In determining an appropriate penalty under this section, the Court must have regard to all relevant matters, in particular,—

(a) any exemplary damages awarded under section 82A; and

(b) in the case of a body corporate, the nature and extent of any commercial gain.

(2B) The amount of any pecuniary penalty must not, in respect of each act or omission, exceed,—

(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.

[20] 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.

[21] 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.

[22] 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

[23] In *Commerce Commission v Alstom Holdings SA* (*Alstom*),[1] 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:

> [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

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

> 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.

[24] 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.[2] There I said:

> [18] In *Commerce Commission v Alstom Holdings SA,*[3] 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:
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> > [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.
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> [19] I agree with that approach.[4] 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*.[5] 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,[6] be informed by the distinctive character and consequences of anti-competitive conduct.
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> [20] Among the factors which will be relevant are:
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> a. The duration of the contravening conduct;
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> b. The seniority of the employees or officers involved in the contravention;
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> c. The extent of any benefit derived from the contravening conduct;

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[2] *Commerce Commission v Geologistics International (Bermuda) Ltd* HC Auckland CIV-2010-404-5490, 22 December 2010.
[3] *Commerce Commission v Alstom Holdings SA,* above n 1.
[4] *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].
[5] *Commerce Commission v EGL Inc* HC Auckland CIV-2010-404-5474, 16 December 2010 at [13].
[6] *Commerce Commission v Alstom Holdings SA* , above n 1, at [14].

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, and

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

[25] 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.

[26] 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.

[27] In *Commerce Commission v New Zealand Diagnostic Group Ltd,* I noted that:[7]

> 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;*[8] *NW Frozen Foods v Australian Competition & Consumer Commission*.[9] That approach is also adopted in this country. In [*Alstom*] Rodney Hansen J said at [18]:
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> > … 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.

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[7] *Commerce Commission v New Zealand Diagnostic Group Ltd*, above n 5, at [45].
[8] *Australian Competition & Consumer Commission v ABB Power Transmission Pty Ltd*; (2004) ATPR 48,848 at 48,855.
[9] *NW Frozen Foods v Australian Competition & Consumer Commission* (1996) 71 FCR 285.

Penalty assessment

[28] 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.

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

(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.

[30] 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) Ten per cent of turnover from trading within New Zealand if the commercial gain from the breach cannot be readily ascertained.

[31] Here, it is agreed that the defendant's actual commercial gain is not readily ascertainable. Because commercial gain cannot be ascertained, the maximum

penalty for each breach is the greater of $10 million, or 10% of Thai Airways' 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".

[32] 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.[10]

[33] The latest available figures for Thai Airways' New Zealand turnover after the 2011 calendar year, Thai Airways' turnover for 2011 in that year for all passenger and cargo services into and out of (including within) New Zealand was $54.5 million. Consequently, the Commission proceeds on the basis that the maximum penalty that could be imposed for each breach would be $10 million, because 10% of relevant turnover falls well short of that maximum figure.

[34] Under s 80(6) of the Act, no person is liable to more than one pecuniary penalty in respect of the same conduct, but it is agreed that the FSUs and the SSUs arose from separate understandings so they are plainly different conduct. Moreover, entry into and giving effect to the understandings, also constitute distinct conduct and are separate offences under ss 27(1) and (2) of the Act respectively.

[35] Consequently, as Thai Airways is liable for both entering into and giving effect to each of the surcharge understandings, the maximum penalty available in this case is $70 million, comprised of $10 million per breach for six of the eight breaches and $5 million in respect of the remaining two breaches, being the Malaysian FSU entered into and implemented prior to the commencement of the new penalty regime in May 2001.

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

[36] While general and specific deterrence is of primary importance, other matters will be relevant in determining the starting point. They have been summarised in several recent judgments of this Court, and will normally include: [11]

(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.

[37] 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.

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[11] *Commerce Commission v Alstom Holdings SA*, above n 1, 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].

[38] In accordance with those judicial observations, the Commission has adopted a single starting point in respect of both entry into and giving effect to the FSUs and the SSUs.

[39] It is common ground that the defendant's conduct was at the serious end of the spectrum. As a price fixing arrangement, it is deemed to be anti-competitive per se. The surcharges comprised only part of the total charges to customers for air cargo services, but the agreements must inevitably have affected price competition and so impacted upon competitive dynamics in the relevant markets.

[40] International cargo services generally are an important input for goods and services supplied throughout the New Zealand economy. But it is to be borne in mind that the in-bound markets for air cargo between Indonesia and Malaysia on the one hand, and New Zealand on the other, are not especially large. Total surcharge revenue was relatively moderate. I touch upon that issue below.

[41] Having said that, I accept that this was not a one-off transgression, but was part of a sustained course of conduct in both jurisdictions. The breach did not arise from a chance conversation or from the actions of a rogue employee. The breaches arose from planned and methodical initiatives involving employees of Thai Airways in Indonesia and Malaysia respectively. The unlawful conduct ceased only when search warrants were executed by regulatory bodies in the United States and Europe.

[42] On the other hand, while the conduct by the responsible employees was deliberate, it was neither sophisticated nor particularly covert. Nor was it rigorously enforced or implemented. Airlines were not forced to join the understandings, and the conduct was not designed to eliminate all competition between them. Neither is there any suggestion that senior management at head office were involved in any way.

[43] It is also important to note that Thai Airways was not an instigator or leader in the cartel behaviour.

[44] It is necessary in each case to consider the extent of the commercial gain, if any, arising from the impugned conduct. Thai Airways' total fuel surcharge revenue over the relevant period in respect of the Malaysia and Indonesia FSUs combined was approximately $75,000 and for the combined SSUs was approximately $38,000. Mr Weston advises the Court that the relatively small level of surcharge revenue in these countries is largely explained by the fact that all Thai Airways flights to Auckland through this period operated via Sydney or Brisbane and a high proportion of inbound cargo was loaded in Australia. Thai Airways considers that there was little or no commercial gain because freight forwarders and importers did not necessarily pay higher prices for air cargo services from Indonesia and Malaysia to New Zealand than would have been paid but for the understandings. The surcharges constituted only a small component of overall prices. I accept that the commercial gain, if any, in this case is likely to have been minimal.

[45] Despite that, it is important to take account of the overall potential and actual harm caused by any cartel arrangement. The Court is not confined to an analysis of the direct harm, or loss, caused by the conduct of a particular defendant.

[46] It is likely that Thai Airways derived some commercial benefit, and equally likely that customers and consumers who imported goods suffered a corresponding detriment. Moreover, in cases like this, it is proper to infer that there will have been a degree of softening of competition overall, particularly in respect of prices. Thai Airways and other participants were able to impose a surcharge without the need to consider the likely commercial response of competitors.

[47] Further, I accept that even where, as here, commercial gain is difficult to quantify, the Court must bear in mind the need for deterrence, both specific and general. Deterrence is a factor which must be placed at the forefront of any penalty assessment.[12]

[48] Thai Airways' conduct must be assessed in the light of the totality principle. There is a close relationship between entry into and giving effect to each of the FSUs

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[12] *Commerce Commission v Telecom New Zealand Ltd*, above n 11, at [49].

and SSUs. They were entered into by the same personnel and implemented over the same period, in respect of the same air cargo services.

[49] Mr Dixon submits that a starting point of between $2.9 million and $3.5 million is appropriate for all of the breaches considered together.

[50] 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*:[13]

> [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.

[51] Although I do not propose to engage in an extended analysis of all the preceding cases because that has become an unwieldy exercise, I consider that particularly helpful guidance is to be obtained from this Court's earlier judgment in *Commerce Commission v Japan Airlines Co Ltd* (*Japan Airlines*).[14] In that case I approved a pecuniary penalty of $2.275 million after discounting from a starting point of $3.1 to $3.9 million. Japan Airlines had entered into agreements to impose fuel and security surcharges out of the United States, Europe and Asia to New Zealand. The agreements operated over a period of between four and six years. From them, Japan Airlines earned fuel and security surcharge revenue of $823,718.

[52] The understandings entered into by Thai Airways were implemented over a similar time frame but out of only two hubs, Indonesia and Malaysia. Total revenue was about $113,000, but Japan Airlines had a much lower market share in New Zealand than Thai Airways. Its total cargo sales revenue to and from New Zealand

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13 *Telecom Corporation of New Zealand Ltd v Commerce Commission* [2012] NZCA 344 at [62].
14 *Commerce Commission v Japan Airlines Co Ltd* [2012] NZHC 1683.

in the relevant period totalled only $30.5 million compared to about $100 million for Thai Airways. I accept the Commission's argument that a slightly lower starting point should be adopted for Thai Airways to reflect its marginally lower culpability. It relevantly operated in only two markets over a comparable period of time when Japan Airlines was engaged in behaviour affecting three major markets. Market share and surcharge revenue factors largely balance each other out. Thai Airways had a substantially higher New Zealand market share but Japan Airlines generated substantially greater relevant surcharge revenue.

[53] It is convenient also to refer to *Commerce Commission v Malaysia Airlines System Berhad Ltd* (*MASkargo*),[15] delivered contemporaneously with this judgment. There, a starting point of $3.0-$3.7 million was adopted. Slight differences in the scale of New Zealand operations, duration of offending and relevant revenue accounted for the difference in starting point. Both cases are a little less serious than *Japan Airlines.*

[54] From the proposed starting point it is necessary to consider mitigating factors specific to Thai Airways. Like a number of other cartel participants, Thai Airways participated in the so-called stage one hearing, but following the resolution of outstanding procedural matters it sought to resolve the issue prior to trial. For that purpose it has co-operated with the Commission during the course of the investigation but has not provided ongoing co-operation other than responses to follow-up questions or verification of material already supplied.

[55] Notably, Thai Airways has revised its trade practice compliance policies and has instituted a global anti-trust compliance programme. A major anti-trust seminar was held in Bangkok in August 2008.

[56] Thai Airways' acceptance of responsibility for its behaviour and its agreement to pay the pecuniary penalties proposed is an indication of corporate remorse to the extent that that is a valid concept.

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[15] *Commerce Commission v Malaysia Airlines System Berhad Ltd* [2013] NZHC 845.

[57] Thai Airways has not previously been found to have contravened the Act and has not previously been warned by the Commission in respect of conduct likely to breach the Act. Unlike some airlines, Thai Airways has faced only limited regulatory investigations in other jurisdictions but has recently been ordered to pay the sum of AU$6 million in Australia and there has been a recent adverse liability finding in South Korea. But while penalties imposed elsewhere may assist in overall deterrence, Mr Dixon submits that penalties imposed elsewhere are of little relevance here.[16] I agree. Mr Weston does not argue otherwise.

[58] In the light of these mitigating factors, counsel are agreed that a discount of 20 per cent is appropriate. That would reduce the final penalty range to between $2.3 and $2.8 million. The recommended penalty of $2.7 million is within that range. In all the circumstances and in light of the penalties imposed in similar cases, I consider that recommended penalty to be appropriate.

Result

[59] Accordingly, there will be an order approving the recommended penalty and directing the defendant to pay to the Commission the sum of $2.7 million. The defendant is further ordered to pay costs to the Commission of:

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

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

[60] As has been the case with several other airline defendants, Thai Airways has asked for time to pay. Thai Airways, like many major international airlines, is experiencing adverse trading conditions and has embarked on an important and urgent fleet replenishment programme. The Courts have accepted that in appropriate cases it is proper to allow the amount of the pecuniary penalty and cost to be paid over a defined period. [17]

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[16] See *Commerce Commission v Qantas Airways Ltd* HC Auckland CIV-2008-404-8366, 11 May 2011 at [56]-[57], *Commerce Commission v Korean Air Lines Co Ltd* [2012] NZHC 1851 at [70], and *Commerce Commission v Japan Airlines Co Ltd*, above n 16,at [66].

[17] At [71].

[61] In the case of Thai Airways the Federal Court of Australia has allowed time to pay in similar recent proceedings brought in that Court. I am satisfied that it is also appropriate to do so here. Accordingly, with the consent of the Commission, I direct that payment be made in accordance with the following timetable:

(a) Thai Airways is to pay to the Commission $259,079.18 for costs within 30 days of the date of this judgment;

(b) Thai Airways is to pay the pecuniary penalty of $2.7 million in four equal instalments of $675,000 each, on or before the following dates:

(i) 30 days from the date of delivery of this judgment;

(ii) Six months from the date of delivery of this judgment;

(iii) Twelve months from the date of delivery of this judgment, and

(iv) Eighteen months from the date of delivery of this judgment.

No interest is to be payable on any part of the pecuniary penalty or costs.

C J Allan J