IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV 2008-404-8366

BETWEEN	THE COMMERCE COMMISSION Plaintiff
AND	QANTAS AIRWAYS LIMITED Defendant

Hearing: 11 April 2011

Appearances: B Brown QC, J Dixon and F Cuncannon
D Goddard QC, A M Peterson and V Irwin for defendant

Judgment: 11 May 2011

JUDGMENT OF ALLAN J

In accordance with r 11.5 I direct that the Registrar endorse this judgment with the delivery time of 4.45 pm on Wednesday 11 May 2011

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[1] The defendant (Qantas) has admitted breaches of Part 2 of the Commerce Act 1986 (the Act). Accordingly, the Court is asked to impose a pecuniary penalty of $6.5 million, agreed between the Commission and Qantas, and a proposed payment of $100,000 by Qantas towards the costs of the Commission.

[2] At the hearing on 11 April 2011, I indicated to counsel that I was satisfied that the orders sought were appropriate, and that these reasons would follow in due course.

Background

[3] Qantas is a publicly listed company incorporated in Australia. It carries on business in New Zealand and elsewhere as a carrier by air of both passengers and cargo. On any view, it is a significant participant in the airline industry. In terms of passenger kilometres it ranks about eleventh in the world.

[4] Qantas is a participant in the international air freight industry, which involves all facets of the movement of goods by air from origin to destination on passenger aircraft using available belly space capacity, and on dedicated air freighters.

[5] During the period with which this proceeding is concerned (the relevant period), Qantas and other international air cargo carriers charged their customers a price for air cargo services which consisted of a base rate and various surcharges and fees, including a fuel surcharge. During the relevant period, various air cargo carriers published formulae that set out fuel surcharges per kilogram of air cargo weight according to fuel price indices. Changes in such indices triggered changes in the quantity of fuel surcharges levied by the carrier.

[6] For the purpose of this proceeding only, Qantas and the Commission are agreed that, during the relevant period there existed markets, including in New Zealand, for air cargo services both to New Zealand from individual regions throughout the world, and from New Zealand to individual regions throughout the world. During all or part of the relevant period, Qantas provided air cargo services

in a number of those markets, either directly, or indirectly via interlining, namely between New Zealand and the countries concerned.

[7] During the same period, a significant number of other carriers (at least 15) were involved in providing air cargo services to and from New Zealand, either directly or indirectly via interlining.

[8] Most international air carriers, including Qantas, are members of the International Airport Transport Association (IATA), a non-governmental international trade association of air carriers.

[9] In August 1997, members of IATA approved in principle Resolution 116ss, which provided that IATA would develop and publish a fuel price index for its members. Qantas did not send a representative to the meeting in Geneva at which the resolution was passed. The resolution provided for the application of fuel surcharges in accordance with a specified methodology. When the fuel price index reached a certain threshold, airlines agreed to impose a fuel surcharge per kilogram of any cargo carried. The surcharge would be removed when the index fell below a certain level.

[10] The resolution was to be effective from about 1 October 1997, but was subject to regulatory approval by governmental agencies.

[11] The trigger level for the imposition of the fuel surcharge was reached for the first time in about November 1999, but when IATA sought regulatory approval from the United States (US) Department of Transportation, approval was declined. Early in 2000 IATA ceased publishing the fuel price index, having been advised that IATA members could incur anti-trust liability if it continued to do so. In a memorandum dated 14 November 2000, IATA informed members that, if carriers were to co-ordinate pricing by reference to the index, they could be exposed to legal action.

[12] Between November 1999 and February 2000 (that is, prior to the refusal of consent by the US Department of Trade), many airlines entered into a series of bilateral and multilateral discussions which culminated in the Fuel Surcharge

Understanding (FSU), which underpins this proceeding. It appears that Lufthansa led the way by announcing the introduction of a fuel surcharge, following the terms of Resolution 116ss (yet to be rejected by the US Department of Transportation), to which it made explicit reference in its public announcement. Thereafter, a number of other airlines, including Qantas, made public announcements purporting to give effect to Resolution 116ss by introducing fuel surcharges across part or all of their respective global networks.

[13] Between January and April 2000, Qantas engaged in discussions for the purpose of reaching an understanding regarding the imposition of fuel surcharges with industry participants in New Zealand, Europe, Hong Kong, Japan, Singapore and the United States. Some of those discussions were multilateral.

[14] Qantas gave effect to the FSU during the relevant period, principally by:

(a) exchanging information and assurances with other parties to the FSU as to the amount and timing of fuel surcharges;

(b) imposing fuel surcharges across its global networks in accordance with FSU to the extent possible, having regard to local conditions in any given hub or region; and

(c) accepting or agreeing exceptions to the imposition of fuel surcharges where local conditions prevented a full imposition of a fuel surcharge from a particular hub or region.

[15] At about the time of IATA's notification to members of the rejection of the FSU in the United States, Lufthansa published an alternative price index which Qantas subsequently implemented until it was withdrawn in December 2001. From about April 2002, Qantas and other airlines imposed surcharges in accordance with one or more revised methodologies that led to substantially the same outcome, namely the fixing of fuel surcharges by agreement.

[16] During the relevant period, Qantas routinely exchanged information and assurances with a number of carriers based in other regions or hubs, as to fuel surcharge levels.

[17] In January 2002, the impugned conduct ceased in relation to fuel surcharges on outbound cargo from New Zealand, because the home carrier, Air New Zealand ceased to impose a separate fuel surcharge and the understanding became unworkable. For in-bound cargo, the conduct ceased world-wide in February 2006, when the details of the FSU became widely known internationally.

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

> (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.
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> (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] Qantas admits that it has contravened s 27, via s 30, by:

(a) entering into an understanding that had the purpose and effect of fixing, controlling or maintaining the fuel surcharge component of the price for international air cargo services, including air cargo services to and from New Zealand (cause of action 1); and

(b) giving effect to an understanding that had the purpose and effect of fixing, controlling or maintaining the fuel surcharge component of the price for international air cargo services, including air cargo services to and from New Zealand (cause of action 2).

[21] 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.

[22] It is often said that, where cartel behaviour is identified, punishments must be condign, in order 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.

[23] 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

(1) If the Court is satisfied on the application of the Commission that a person—

(a) Has contravened any of the provisions of Part 2 of this Act; or

(b) Has attempted to contravene such a provision; or

(c) Has aided, abetted, counselled, or procured any other person to contravene such a provision; or

(d) Has induced, or attempted to induce, any other person, whether by threats or promises or otherwise, to contravene such a provision; or

(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

(f) Has conspired with any other person to contravene such a provision,—

the Court may order the person to pay to the Crown such pecuniary penalty as the Court determines to be appropriate ….

(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.

[24] 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.

[25] 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;

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

[26] 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

[27] In *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 states 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 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.

[28] In *Commerce Commission v Geologistics International (Bermuda) Ltd*,[3] I noted also His Honour's analysis of the place of ordinary criminal sentencing principles in the context of cases under the Act. There I said:[4]

> [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:
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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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[1] *Commerce Commission v Alstom Holdings SA* [2009] NZCCLR 22 (HC) at [19].
[2] Ibid at [18].
[3] *Commerce Commission v Geologistics International (Bermuda) Ltd* HC Auckland CIV-2010-404-5490, 22 December 2010.
[4] Ibid at [18]-[20].
[5] *Alstom Holdings SA* above fn 1.

> [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.
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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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> d. The degree of market power held by the defendant;
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> e. The role of the defendant in the impugned conduct;
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> f. The size and resources of the defendant;
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> g. The degree of co-operation by the defendant with the Commission;
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> h. The fact that liability is admitted;
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> i. The extent to which a defendant has developed and implemented a compliance programme.

[29] In the present case, the Commission and Qantas differ somewhat in the weighting they accord to various relevant factors, and indeed, in their respective assessments of an appropriate starting point. Those differences are not material for present purposes, provided that the Court agrees that, overall, the proposed penalty is appropriate.

[30] In *Geologistics* I said:[9]

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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 *Alstom Holdings SA* above fn 1 at [14].

9 *Geologistics* above fn 3, at [37].

> [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.

[31] 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.

[32] In *Commerce Commission v New Zealand Diagnostic Group Ltd,*[10] I noted that:

> [45] 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;*[11] *NW Frozen Foods v Australian Competition & Consumer Commission*.[12] That approach is also adopted in this country. In the *Gas Insulated Switchgear* case 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.

Quantum assessment

[33] Because the conduct with which the Court is concerned commenced prior to 2001 and continued until 2006, it is necessary to consider s 80 as it stood both before and after amendment in May 2001. In the earlier period the statutory maximum for corporate defendants was $5 million for each breach. After May 2001, the maximum penalty for corporate defendants increased significantly. The maximum for each breach became the greater of:

(a) $10 million; or

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[10] *Commerce Commission v New Zealand Diagnostic Group Ltd* HC Auckland CIV-2008-404-4321, 19 July 2010 at [45].
[11] (2004) ATPR 48,848 at 48,855.
[12] (1996) 71 FCR 285.

(b) either:

(i) three times the commercial gain obtained by the defendant for the breach if it can be readily ascertained; or

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

[34] Qantas entered into the FSU between November 1999 and February 2000. At that time the maximum penalty for entry into the FSU was $5 million. But Qantas gave effect to the FSU both before and after the May 2001 amendment. The maximum penalty for that conduct up to 26 May 2001 was therefore $5 million, but for conduct between 27 May 2001 and February 2006, it is to be determined by reference to the amended section.

[35] The first question is whether the commercial gain is readily ascertainable. In this case the parties are agreed that it is not (although, as Mr Brown submits, that is not to say there was no such commercial gain). Accordingly, the maximum penalty for the conduct will be the greater of $10 million, or 10% of Qantas turnover for trading within New Zealand. On the basis of its published financial material, the Commission calculates Qantas turnover for flights into, out of, and within New Zealand, at approximately $400 million, with the result that the maximum penalty that could be imposed for giving effect to the FSU after May 2001 would be approximately $40 million.

[36] On this aspect of penalty assessment, Mr Goddard for Qantas submits that there must be considerable doubt as to whether the fuel surcharge produced any significant commercial benefit, in that not only were there periods when no surcharge was imposed at all, but also the surcharge itself was sometimes discounted, as were base rates. It would accordingly not be safe, he submits, to infer that any significant commercial benefit was derived by Qantas from the conduct concerned.

[37] Moreover, Mr Goddard submits, that the relevant conduct affected purchasers both overseas and in New Zealand; penalties imposed under the New Zealand Act should have as their focus the deterrence of harm to markets and consumers in New Zealand.

[38] These considerations are reflected in the choice of starting point on either side. There is agreement as to the starting point for both entering into the FSU and its implementation prior to 27 May 2001. For entering into the FSU, the Commission suggests a starting point of $2 to 2.5 million, and for giving effect to the FSU, a starting point of $2 to 3 million.

[39] Counsel for Qantas is in broad agreement with those assessments. But the parties diverge in their approach to the selection of a starting point for giving effect to the FSU from and after 27 May 2001. The Commission says that a starting point of between $10 and $14.5 million is appropriate. Qantas says that the range ought to be between $6 and 12 million. On the Commission's assessment that produces a total starting point of between $14 and $20 million, but the Commission acknowledges that totality considerations require a reduction to between $12 and 17 million. By way of comparison, Qantas's equivalent figure is between $8 and 14.5 million, once totality principles are applied.

[40] A range of recent authorities provides helpful guidance. In *Alstom*,[13] which involved a world-wide price-fixing understanding for a key component in electrical substations, a starting range of $1.25 to $1.75 million was adopted, even though there was no pecuniary gain associated with the conduct.

[41] It is important however to note that the relevant behaviour there consisted of an agreement as to the manner in which customer inquiries ought to be managed. In the result, there were no such inquiries and therefore no pecuniary gain. It is important also to note that the maximum penalty there was $5 million, because the conduct occurred before s 80 of the Act was amended.

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[13] *Alstom Holdings SA,* above fn 1.

[42] In *Commerce Commission v Koppers Arch Wood (Protection NZ) Ltd*,[14] a starting point of $5.7 million was adopted in respect of both a covert overarching agreement, and specific price fixing understandings involving the control of prices for wood preservative chemicals over a period of about four years. The relevant market was thought to have been worth between about $14 and 25 million per annum. The challenged conduct straddled the change to the penalty regime on 26 May 2001. But most of the period occurred prior to the penalty increase. No commercial gain was identified but the Court acknowledged that the price fixing agreements must have had some effect on prices charged to customers.

[43] In *Geologistics*[15] a starting point range of between $3.75 and 4.25 million was adopted for entering into and giving effect to a price fixing agreement associated with the collusive imposition of a fee charged by freight forwarders on all freight forwarding services for cargo shipped to and from New Zealand via the United States. The conduct occurred over a number of years, commencing in about 2003. Of some significance for present purposes is that, in *Geologistics*, as here, the price fixing arrangement related only to a component of the total price. The actual commercial gain could not be quantified, but it was acknowledged to have been substantial.

[44] Two remaining cases are of special interest, because the defendants there were similarly participants in the FSU[16]. Potter J accepted that a starting range of between $8.5 and 14.5 million was appropriate, but there were two significant features in *Cargolux* that were not present in the Qantas case. The first was that Cargolux had not only entered into and given effect to a fuel surcharge understanding, but it had also done likewise in relation to the imposition of security surcharges. That was an aggravating factor. On the other hand, Cargolux's business in New Zealand was significantly smaller than that of Qantas, so the overall commercial gain and consequent detriment to consumers, was limited.

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[14] *Commerce Commission v Koppers Arch Wood Protection (NZ) Ltd* [2006] 11 TCLR 581 (HC).
[15] *Geologistics*, above fn 3.
[16] *Commerce Commission v Cargolux. Airlines International SA* HC Auckland CIV-2008-404-8355, 5 April 2011; *Commerce Commission v British Airways plc* HC Auckland CIV-2008-404-8347, 5 April 2011.

[45] British Airways was similarly a participant in the FSU. In *Commerce Commission v British Airways plc*,[17] Potter J adopted a starting point range of between $2.5 and 3 million for two breaches of the Act, namely entering into and giving effect to an agreement in relation to fuel surcharges. But British Airways was significantly less culpable than Qantas, in that its agreement was reached only with Lufthansa. Moreover, British Airways operated in New Zealand only through inter-line arrangements, and was not a major competitor in the relevant markets.

[46] The Commission distinguishes this case in several respects from some of those discussed above. It says this case is more serious than any of them. First, Qantas's conduct commenced not long before the new penalty regime became operative, so that most of it was subject to the doubled penalties enacted in May 2001. On that footing, the Commission argues, the starting points chosen in *Alstom* and *Koppers* would need to be doubled in order to provide an appropriate comparison.

[47] Second, the nature and size of the market affected by Qantas's conduct was much more significant to New Zealand, and much larger, than the markets involved in the *Alstom, Koppers* and *Geologistics* cases. Qantas generated revenue in excess of $500 million from their cargo services into and out of New Zealand during the relevant period. That circumstance alone distinguishes this case from most others. A third and allied point concerns the extent of Qantas revenue from fuel surcharges over the relevant period. Such revenue totalled approximately $31 million, compared with BA's revenue from the same source of about $300,000 and Cargolux's revenue of approximately $12.5 million in relation to both the fuel surcharges and security surcharges (not applicable here).

[48] Moreover, there was no pecuniary gain in *Alstom*, and the value of the relevant market in *Koppers* was relatively small. *Geologistics* was different again, in that it involved conduct limited to freight forwarding services in respect of cargo shipped to and from New Zealand via the United States, and not from or to other destinations.

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[17] *British Airways,* above fn 16.

[49] As earlier noted, counsel for Qantas emphasises the uncertainty of Qantas's precise commercial gain from the challenged conduct and the need to focus in particular on harm to markets and consumers in New Zealand (as distinct from consumers overseas who must have borne part of the cost of the unlawful surcharges). I consider this factor to be of only minor relevance. The Court is concerned with the deterrence of conduct in New Zealand and is obliged to impose a sanction that will be effective to that end, without the need for a close analysis of the incidence of detriment.

[50] The Commission's starting point of $12 to 17 million overlaps with that of $8 to 14.5 million advocated on behalf of Qantas. That overlap provides a window of agreement between the parties which has enabled them to reach final agreement, subject to the Court's approval. From the starting point it is of course necessary to allow such discount as may be appropriate by reference to mitigating factors.

[51] There is agreement between the parties that a very significant discount of 50% is warranted in this case. There are several important mitigating considerations.

[52] Qantas has fully co-operated with the Commission throughout the investigation and the course of this proceeding. It is agreed that none of the Qantas officers who were responsible for the infringing conduct reported directly to the Chief Executive Officer of Qantas. Neither did any member of the Qantas Board become aware of the behaviour until a late stage. As soon as the nature and scale of the problem came to the notice of Qantas senior management and its Board, the Commission was advised that Qantas would co-operate in every respect. It has continued to do so over a significant period. In particular, it has proactively provided extensive evidence and documents detailing the collusive FSU and its own participation in that FSU, beyond what was required of it under s 98 of the Act. The Commission accepts that Qantas did so in the knowledge that it would not enjoy any immunity and that it was likely to face substantial penalties.

[53] The Court is also told that Qantas has entered into an agreement with the Commission, under which the defendant will provide on-going co-operation, including making its staff available for interview and as witnesses in other

proceedings affecting other participants. In doing so, it will permit the Commission to use material provided by it on a without prejudice basis in related proceedings.

[54] The parties have always envisaged that an agreement as to penalty could be reached, even though it became necessary to file and pursue this proceeding. Although more than two years have elapsed since the proceeding was filed on 15 December 2008, the Commission accepts that the defendant required that time to provide revenue and surcharge data to the Commission and for the Commission to undertake the econometric analysis in order to assist the parties to determine a suitable penalty figure, and to reach agreement thereon.

[55] To the extent that a corporate organisation is capable of displaying remorse, Qantas has done so.

[56] It is accepted by the Commission that Qantas has paid, and is still paying, significant penalties in other jurisdictions in respect of related conduct. In certain instances those penalties are considerably greater than those contemplated here.

[57] In the context of mitigation assessment, the parties are however, at odds as to the significance of sanctions imposed elsewhere. The Commission submits that while these penalties may assist in deterring Qantas from engaging in such conduct, no significant discount ought to be allowed on that score since the penalty currently sought is referable to deterrence in New Zealand. Qantas argues that the payment of penalties in other jurisdictions will serve as a future deterrent to Qantas, and to that extent, diminishes the need for the imposition of deterrent based penalties here. There is, I believe, some substance in that approach, although in the overall scheme of things it is a relatively minor factor.

[58] A further mitigating factor concerns the Qantas compliance programme. As might be expected, Qantas did maintain a compliance programme throughout the relevant period, but it now recognises that the programme was inadequate. The Commission accepts that Qantas has substantially upgraded its programme and that it has been implemented throughout the world.

[59] Importantly, Qantas is a first offender in New Zealand so far as anti-trust behaviour is concerned. There have been no previous contraventions; nor has Qantas been warned by the Commission in respect of conduct likely to breach the Act.

[60] In *Cargolux* a one-third discount was allowed. Cargolux's co-operation was limited. In *BA* there was a total discount of 40%. There was a greater degree of assistance in the BA case. The parties in the present case are agreed that the level of co-operation and support provided by Qantas is substantially greater than in either of those instances.

[61] In both *Diagnostic*,[18] and *Commerce Commission v EGL Inc*,[19] the Court noted that the analogy with criminal sentencing could not be taken too far, when mitigating factors were assessed. In *EGL* Rodney Hansen J observed that the public benefits derived from co-operation by a defendant in an investigation into anti-competitive conduct are of a scale and nature seldom encountered in the criminal jurisdiction. He observed also that it is in the public interest that substantial discounts be allowed for a high level of co-operation. To do so would recognise the significant savings to be achieved in respect of both time and public funds, and also provide appropriate incentives to those who have engaged in anti-competitive conduct to provide assistance to the Commission.

[62] For these reasons I am satisfied that the proposed discount of 50% is in order. There are considerations here which justify the Court in going well beyond the indicative 25% cap suggested by the Supreme Court in *R v Hessell.*[20]

Conclusion

[63] The parties are agreed upon an effective starting point of $13 million for all of the admitted conduct. That figure falls towards the lower end of the Commission's range of $12 and 17 million, and towards the upper end of Qantas's

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[18] At [28].
[19] *Commerce Commission v EGL Inc* HC Auckland CIV-2010-404-5474, 16 December 2011 at [24]-[25].
[20] *R v Hessell* [2010] NZSC 135 at [75].

range of $8-14.5 million. I am persuaded that a starting point so calculated is within the properly available range in all the circumstances of this case. I am likewise satisfied that a discount of 50% for mitigating factors is appropriate, and accordingly have reached the view that the agreed penalty of $6.5 million is justified.

Result

[64] The recommended penalty is approved. There will be an order directing the defendant to pay a pecuniary penalty of $6.5 million. The defendant is further ordered to pay to the Commission costs of $100,000.

Other proceedings

[65] The Commission has filed proceedings against a number of other international airlines, alleging similar participation in the cartel. The trial of these proceedings is pending. At that trial the Court will no doubt determine certain factual matters, and in so doing may make findings that differ to some degree from those appearing in the agreed statement of facts upon which the Court has relied in this case. It is appropriate to record here that any factual admissions made by Qantas are limited in their application to this proceeding only. It follows that any factual findings in this judgment which may touch upon the behaviour of any other airline are reached only in the context of the allegations against Qantas, and are not to be construed as findings in respect of the liability of other airlines which may still be in dispute with the Commission.

C J Allan J