IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV 2008-404-8356
[2012] NZHC 3583

BETWEEN	THE COMMERCE COMMISSION Plaintiff
AND	SINGAPORE AIRLINES CARGO PTY LTD Defendant

Hearing: 7 December 2012

Appearances: J C L Dixon and A M Boberg for plaintiff
M D O'Brien and J Stevens for defendant

Judgment: 21 December 2012

JUDGMENT OF ALLAN J

In accordance with r 11.5 I direct that the Registrar endorse this judgment with the delivery time of 10 am on Friday 21 December 2012

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Introduction

[1] The defendant, Singapore Airlines Cargo Pte Ltd, (SIA Cargo), has admitted breaches of Part 2 of the Commerce Act 1986 (the Act). The plaintiff accordingly asks the Court to impose a pecuniary penalty under the Act. The Commerce Commission (the Commission) and SIA Cargo are agreed that, subject to the view of the Court, an aggregate penalty of $4.1 million is appropriate, together with costs totalling $259,079.18.

Background

[2] SIA Cargo is an international airline with its global head office in Singapore. 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 cargo by air.

[3] With effect from 1 July 2001, SIA Cargo has provided air cargo transport services using its own freighters and belly hold space on aircraft operated by Singapore Airlines Ltd (Singapore Air), pursuant to an exclusive contractual arrangement. SIA Cargo and Singapore Air are separate legal entities with different boards, management and reporting structures.

[4] During the relevant period, SIA Cargo was the fifth largest air cargo carrier in the world in terms of freight tonne-kilometres flown. Throughout the period with which this case is concerned, SIA Cargo maintained scheduled cargo services between Singapore and Auckland using its own aircraft, as well as utilising belly hold space on passenger services between Singapore and Auckland operated by Singapore Air.

[5] For the purposes of this proceeding, SIA Cargo and the Commission 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.

[6] The Commission's allegations, relate 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 Malaysia respectively to New Zealand.

[7] In October 2001, PT Garuda Indonesia and other members of the Air Cargo Representative Board – Indonesia, 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.

[8] In May 2002, SIA Cargo joined the Indonesia FSA. Between May 2002 and February 2006, SIA Cargo gave effect to the agreement, 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.

[9] A similar agreement was entered into by members of an inter-airline association operating out of Malaysia. That agreement commenced in or about December 1999 insofar as cargo carried by air from Malaysia to New Zealand was concerned. Again, that agreement 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 e-mail communications between members of the agreement.

[10] In April 2002, SIA Cargo joined the Malaysia FSA. Between April 2002 and February 2006, SIA Cargo gave effect to the Malaysia FSA by giving and receiving assurances about the level of fuel surcharge 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 of intended plans for fuel surcharges in advance of that information becoming publicly available.

[11] The SSA's followed the events of what is commonly termed 9/11, when terrorists used hijacked aircraft to destroy high rise buildings in New York. Thereafter, security surrounding air travel was greatly tightened with increased costs for the airlines.

[12] In October 2001, SIA Cargo 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.

[13] The Indonesia SSA involved an agreement 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.

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

[15] SIA Cargo entered into a similar agreement 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 agreement between October 2001 and February 2006, by giving and receiving assurances that particular security surcharges would be imposed on the carriage of freight from Malaysia to New Zealand and by maintaining those levels in accordance with those assurances.

The breaches

[16] For the purposes of this proceeding only, SIA Cargo accepts that it committed breaches of the Act by entering into each 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

[17] 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.
>
> …

[18] Section 30 of the Act provides:

> **30 Certain provisions of contracts, etc, with respect to prices deemed to substantially lessen competition**
>
> (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.

[19] 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.

[20] 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.

[21] 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.

[22] 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;
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> (b) the nature and extent of any loss or damage suffered by any person as a result of the act or omission;
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> (c) the circumstances in which the act or omission took place; and
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> (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.

[23] 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.

[24] 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

[25] In *Alstom*, 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.[1] His Honour stated that:

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[1] *Commerce Commission v Alstom Holdings Sentencing Act* [2009] NZCCLR 22 (HC) at [18].

> [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.

[26] In *Commerce Commission v Geologistics International (Bermuda) Ltd*, 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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[2] *Commerce Commission v Geologistics International (Bermuda) Ltd* HC Auckland CIV-2010-404-5490, 22 December 2010.
[3] *Alstom Holdings SA*.
[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] *Alstom Holdings* at [14].

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

[27] 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.

[28] 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.

[29] 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

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[7] *Commerce Commission v New Zealand Diagnostic Group Ltd* 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.

adopted in this country. In the *Gas Insulated Switchgear* case [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

[30] The proper 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.

[31] Section 80 of the Act provides that the statutory maximum for each breach is the greater of:

(a) $10 million; or

(b) Either:

(i) 3 x 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.

[32] Here, it is agreed that the defendant's actual commercial gain is not readily ascertainable. Indeed, SIA Cargo denies that there was any commercial gain at all

because the relevant cargo markets are highly competitive and there was no evidence that overall charges to customers were increased in order to take into account the relevant surcharges. Because commercial gain cannot be ascertained, the maximum penalty for each breach is the greater of $10 million, or 10% of SIA Cargo'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".

[33] 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]

[34] The latest available figures for SIA Cargo's New Zealand turnover relate to the 2005 income year. Given that this offending came to an end early in 2006, I accept that the 2005 figures are suitable for present purposes. In that year, SIA Cargo's New Zealand turnover was almost $95 million. Ten percent of that figure is just short of $10 million. Consequently, the Commission proceeds on the basis that the maximum penalty that could be imposed for each breach would be $10 million.

[35] 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 SFAs and the SSAs arose from separate agreements so they are plainly different conduct. Moreover, entry into and giving effect to the agreements, also constitute distinct conduct and are separate offences under ss 27(1) and (2) of the Act respectively.

[36] Consequently, as SIA Cargo is liable for both entering into and giving effect to each of the surcharge agreements, the maximum penalty available in this case is $80 million.

[37] 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:

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[10] *Commerce Commission v Telecom Corporation of NZ Ltd* (2011) 13 TCLR 270.

(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;

(i) the size and resources of the defendant;

(j) the degree of co-operation by the defendant with the Commission;

(k) the fact that liability is admitted;

(l) the extent to which the defendant has developed and implemented a compliance programme.[11]

[38] 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

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[11] *Alstom* 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].

adopted in most recent cases including those involving airline defendants in cargo cases.

[39] 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 FSAs and the SSAs. Although as Mr Dixon notes, the approach does not in any way affect the maximum available penalty.

[40] 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.

[41] 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.

[42] 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. It was a planned and methodical initiative involving employees of SIA Cargo in Indonesia and Malaysia respectively. The unlawful conduct ceased only when search warrants were executed by regulatory bodies in the United States and Europe.

[43] 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 agreements, 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.

[44] It is also important to note, that SIA Cargo was not an instigator or leader in the cartel behaviour. It joined the agreements a year or two after many other airlines were already participating in them.

[45] It is necessary in each case to consider the extent of the commercial gain, if any, arising from the impugned conduct. For the period between January 2002 and February 2006, SIA Cargo's total freight revenue for air cargo services from Indonesia and Malaysia to New Zealand, was $5,815,314. Fuel surcharge revenue relating to the admitted breaches was $392,808, while security surcharge revenue was $228,728. SIA Cargo considers that there was 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 Agreements. That may well be right. After all, the surcharges constitute but a small component of overall prices.

[46] I accept therefore that in this case the commercial gain, if any, is likely to have been no more than minimal at best.

[47] 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.

[48] It is likely that SIA Cargo 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. SIA Cargo and other participants were able to impose a surcharge without the need to consider the likely commercial response of competitors.

[49] 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]

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[12] *Commerce Commission v Telecom* at [49].

[50] As Mr Dixon acknowledges, SIA Cargo's 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 FSAs and SSAs. They were entered into by the same personnel and implemented over the same period, in respect of the same air cargo services.

[51] Mr Dixon submits that a starting point of between $5.0 million and $5.4 million is appropriate in respect of the totality of the acknowledged breaches.

[52] This is the seventh airline cargo cartel case to come before the Court for assessment of pecuniary penalty.[13] It is important to consider the level of penalties imposed in earlier cases in order to ensure that a measure of consistency is maintained.

[53] Of the six previous cases, I consider *Japan Airlines* and *Korean Air* to provide the closest comparisons. In *Japan Airlines*, a starting point of $3.1 to $3.9 million was selected, leading to an ultimate penalty of $2.275 million. Japan Airlines had entered into agreements to impose fuel and security surcharges out of the United States, Europe and Asia. The relevant fuel surcharge revenue ($241,896) was lower than that of SIA Cargo ($392,808), but its security surcharge revenue ($581,822) was higher than SIA Cargo ($228,728).

[54] Japan Airlines' conduct was more extensive than that of SIA Cargo, both geographically and in terms of the period for which the offending continued. The lower penalty reflected its significantly smaller market share in New Zealand. Its cargo sales revenue to and from New Zealand in the 2005 year amounted to only $2,822,962 compared with SIA Cargo's revenue of $94,964,398. In *Japan Airlines*, there was a significant discount for mitigating factors personal to the defendant, including the provision of very substantial on-going assistance to the Commission.

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[13] *The Commerce Commission v Cargolux Airlines International SA* HC Auckland CIV-2008-404-8355, 5 April 2011; *The Commerce Commission v British Airways Plc* HC Auckland CIV-2008-404-8347, 5 April 2011; *The Commerce Commission v Qantas Airways Ltd* HC Auckland CIV-2008-404-8366, 11 May 2011; *The Commerce Commission v Japan Airlines Co Ltd* [2012] NZHC 1683; *The Commerce Commission v Korean Air Lines Co Ltd* HC Auckland [2012] NZHC 1851; *The Commerce Commission v Emirates* HC Auckland [2012] NZHC 1858.

[55] In *Korean Air,* a starting point of $4.8 to $5.5 million was adopted. Ultimately I approved a pecuniary penalty of $3.5 million. Korean Air had entered into agreements to impose fuel and security surcharges out of Hong Kong, Japan and Malaysia. The various agreements operated over a period of four to six years. Total relevant surcharge revenue was $297,009, a figure less than half of SIA Cargo's relevant surcharge revenue of $621,536.

[56] SIA Cargo entered into agreements to impose fuel and security surcharges out of only two hubs, Indonesia and Malaysia, and gave effect to these agreements for a shorter period. On the other hand, its cargo presence in New Zealand is much larger than Korean Air, as reflected in its total revenue and in its higher surcharge revenue.

[57] These various factors balance themselves out to some degree. The result is that I am satisfied that the proposed starting point in the present case is appropriately similar to that adopted in *Korean Air*, higher than that chosen in *Japan Airlines*.

[58] From that starting point it is necessary to consider factors specific to SIA Cargo. As was the case for a number of other cartel participants, SIA Cargo participated in the so-called stage one hearing, but following the resolution of outstanding procedural matters, has sought to resolve the issue prior to trial. For that purpose it has co-operated with the Commission during the course of the investigation and provided it with information not held in New Zealand. It will however, not be providing on-going co-operation. That is not a cause for criticism; it simply distinguishes this case from one or two others, notably *Qantas*, in which very significant on-going assistance was proffered and accepted.

[59] Importantly, SIA Cargo implemented a global competition law compliance programme in 2005. Since then it has continued to update its policy, as well as undertaking additional in person training and instituting web based training. Interestingly, it maintains an ethics hotline, for employees to report any suspected competition or other violations.

[60] Mr O'Brien points out that SIA Cargo's conduct was not illegal in Malaysia at the time. But of course that is not proffered as an excuse, nor does it constitute a

significant mitigating factor. I accept that SIA Cargo's head office personnel were not involved in the relevant conduct in any way.

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

[62] SIA Cargo is a substantial company and the penalty imposed must be sufficient to operate as a deterrent in the light of its significant resources. It 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.

[63] In the light of all of those mitigating factors, the Commission proposes, and SIA Cargo agrees, that a discount of 20% be allowed from the starting point. That produces a final penalty range of $4.0 to $4.23 million. The recommended penalty of $4.1 million is within that range.

[64] In all the circumstances, and in the light of the penalties imposed in similar cases, I consider that recommended penalty to be appropriate.

Result

[65] Accordingly, there will be an order approving the recommended penalty and directing the defendant to pay to the Commission the sum of $4.1 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 Court costs.

C J Allan J