IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV-2008-404-008352

BETWEEN	COMMERCE COMMISSION Plaintiff
AND	AIR NEW ZEALAND LIMITED Defendant

CIV-2008-404-008348

AND BETWEEN	COMMERCE COMMISSION Plaintiff
AND	JAPAN AIRLINES INTERNATIONAL CO LIMITED Defendant

CIV-2008-404-008349

AND BETWEEN	COMMERCE COMMISSION Plaintiff
AND	EMIRATES Defendant

CIV-2008-404-008350

AND BETWEEN	COMMERCE COMMISSION Plaintiff
AND	MALAYSIAN AIRLINES SYSTEM BERHAD LIMITED Defendant

CIV-2008-404-008351

AND BETWEEN	COMMERCE COMMISSION Plaintiff

AND	KOREAN AIR LINES CO LIMITED Defendant

CIV-2008-404-0008354

AND BETWEEN	COMMERCE COMMISSION Plaintiff
AND	THAI AIRWAYS INTERNATIONAL PUBLIC COMPANY LIMITED Defendant

CIV-2008-404-008356

AND BETWEEN	COMMERCE COMMISSION Plaintiff
AND	SINGAPORE AIRLINES LIMITED & SINGAPORE AIRLINES CARGO PTE LIMITED Defendants

CIV-2008-404-008357

AND BETWEEN	COMMERCE COMMISSION Plaintiff
AND	CATHAY PACIFIC AIRWAYS LIMITED Defendant

Hearing:	11 May - 10 June 2011
Court:	Asher J Professor M Richardson (lay member)
Counsel:	BWF Brown QC, JCL Dixon, KC Francis and LCA Farmer for Plaintiff AR Galbraith QC, DJ Cooper and SJP Ladd for Air New Zealand JA Farmer QC and IJ Thain for Cathay Pacific MR Dean QC, GW Hall and AN Birkinshaw for Emirates DS Alderslade, JWJ Graham and RM Irvine-Shanks for Japan Airlines AM Callinan and AE Murray for Korean Airlines

JL Land and I-RL Sheerin for Malaysia Airlines
MD O'Brien, JH Stevens and KJ Dobbs for Singapore Airlines
TC Weston QC, AW Lear and MW McCarthy for Thai Airways

Judgment: 24 August 2011

JUDGMENT OF ASHER J
AND PROFESSOR M RICHARDSON

This judgment was delivered by me on Wednesday, 24 August 2011 at 2.30pm pursuant to r 11.5 of the High Court Rules.

Registrar/Deputy Registrar

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Introduction

[1] On 15 December 2008 the Commerce Commission issued these proceedings, claiming that the defendants with others had fixed elements of the price of inbound and outbound air cargo services to New Zealand. The essential allegation is that there have been arrangements to impose fuel and security surcharges at certain agreed rates. All the defendants filed statements of defence. Some have since withdrawn their defences, admitting liability. Eight defendants remain.

[2] Harrison J heard an application to formulate a preliminary question before trial on 3 May 2010. That hearing developed into a conference where it was agreed by counsel and accepted by the Court that there would be a two-stage trial. The issues that were to be determined in the first stage were defined in a memorandum of counsel that was annexed to a Minute of 6 May 2010. This first stage hearing has proceeded on the basis of these issues which were further refined and added to during the hearing.

[3] The parties have agreed a statement of facts. The statement of facts comprises a summary of 131 pages and various appendices. Two of the appendices contain written responses by the defendants to questions posed by the Commerce Commission ("the Commission"), and responses to questions from a sample of freight forwarders and exporters/importers. These are referred to as the schedules. The terms of the admission of the statement of facts and an accompanying agreed bundle of documents are set out in a joint memorandum, referred to as the protocol. The parties agree that the statement of facts has the status of evidence in both stages of the trial in accordance with s 9 of the Evidence Act 2006 and r 9.57 of the High Court Rules. In the event of any material inconsistency between the summary contained therein and the schedules, the evidence in the summary prevails. If there is any inconsistency between any document within the agreed bundle of documents and the statement of facts, the statement of facts prevails. The protocol also records the parties' consent position on various market issues.

[4] The level of agreement meant that it was not necessary for the parties to call any evidence, save for expert economic evidence. Ultimately the Commission called two economists and the defendants three. The experts gave their evidence over a period of five days in a process known in New Zealand as the hot tub process. They presented summaries of their evidence, brief comments on the evidence of each other, and then during cross-examination any of the experts could be called upon by counsel to respond to, or comment on, an answer. The Bench asked further questions at the end.

[5] The final version of the statement of issues was as follows:

> 1. There is no dispute that the Court has jurisdiction to determine claims relating to air cargo services ***from*** New Zealand to an overseas country or region. The Stage 1 trial is intended to determine whether the Court also has jurisdiction in relation to alleged fixing of prices for air cargo services from an overseas country or region ***to*** New Zealand.
>
> 2. **Section 30 Issue:** For the purposes of its claims under section 27 via section 30, is it:
>
> (a) sufficient for the Commission to prove that the defendants supply services the subject of the alleged price fixing arrangement in competition with each other in New Zealand; or

(b) necessary for the Commission to prove that each of the pleaded services subject to the alleged price fixing arrangement were supplied by the defendants in competition with each other in a market in New Zealand?

3. **Follow-on Issues:**

(a) Do the activities described in the evidence undertaken by the defendants with respect to inbound air cargo services constitute the supply by them of air cargo services in competition with each other in New Zealand.

[The defendants accept that they supply inbound air cargo services in competition with each other but deny that they do so in New Zealand.[1]]

(b) Are the relevant pleaded markets (i.e. the pleaded markets listed in the attached Schedule) markets in New Zealand?

4. **Section 4 issue:**

Does the Act apply to the engaging in conduct outside New Zealand by any person resident or carrying on business in New Zealand where:

(a) as the Commission says, that conduct comprises any act (or refusal to act) to the extent that such an act (or refusal to act) has some impact or influence on any market in New Zealand; or

(b) as the Defendants say, the conduct:

(i) would be prohibited by a substantive provision of the Act if it occurred in New Zealand; and

(ii) "affects a market in New Zealand" by affecting competition in the market in New Zealand in respect of which that substantive provision is alleged to have been breached.

5. **Bi-directional Market Limitation issue:** Are the amendments in the Commission's Fourth Amended Statements of Claim to introduce a pleading of "bidirectional markets" for air cargo services statute barred under section 80(5) of the Act because they were first introduced more than three years after the matters giving rise to that pleading were discovered or ought reasonably to have been discovered?

[6] It was also hoped that the parties could agree on the consequential orders that would follow findings on the various issues, but understandably the definition of such consequences has proved too difficult.

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1 This acceptance is subject to the reservations regarding the role of the subsidiaries of Malaysian Airlines System Berhad Ltd and Singapore Airlines Ltd.

[7] In this judgment the lay member has not participated in the determination of the s 30 issue as this is a determination for a High Court Judge sitting alone under s 78(4)(b) of the Commerce Act 1986 ("the Act") (although we make no decision as to whether it is impermissible for a lay member to participate in such a determination).

[8] The summary contained in the statement of facts is voluminous, as are the accompanying schedules and the bundle of documents. Given that the essential facts are not in contention they can be set out in a relatively short compass, adopting in the main the exact words used in the summary.

Key agreed facts

[9] The defendant airlines all transport freight by air to and from New Zealand. The freight is transported in the belly hold of passenger aircraft, and on some occasions in relation to some defendants or associated companies in specialist cargo aircraft.

[10] The main participants in the international air freight industry are:

a) exporters and importers who need to have goods transported internationally by air;

b) freight forwarders[2] providing various logistical and other services relating to the movement of goods from origin to destination;

c) airlines providing air cargo transport and related services, from a particular origin airport to a destination airport;

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[2] While there are approximately 300 freight forwarders in New Zealand the 10 New Zealand-based freight forwarders who are the largest purchasers of air cargo services from New Zealand account for a very considerable proportion of the volume of shipments from New Zealand. The 10 overseas-based freight forwarders who are the largest purchasers of air cargo services to New Zealand account for a significant number of the volume of shipments to New Zealand. An appendix to the agreed statement of facts contains responses by a sample of New Zealand-based freight forwards to questionnaires put to them in interviews conducted by the Commission. The sample included at least three of the 10 largest New Zealand-based freight forwarders (possibly four, as the identity of one of the interviewees is anonymous).

d) integrators who combine the functions of airlines and freight forwarders providing both air cargo services and freight forwarding services; and

e) other service providers, such as ground handlers providing loading and unloading and other related services, general sales agents acting as sales agents on behalf of the airlines, customs brokers providing customs clearance related services and airports providing various ground facilities for the airlines' operations.

[11] The transport of goods by air is initiated by an exporter or importer who needs to move goods from a specific place of origin (eg the exporter's factory) to a specific place of destination (eg the importer's warehouse) by air. In airline terminology, the exporter may be referred to as the "consignor" or "shipper" and the importer as the "consignee".

[12] Whether it is an exporter or an importer who initiates the cargo arrangements (by contacting a freight forwarder) and pays for the transport depends on a number of factors including:

a) the nature of the relationship between the exporter and importer;

b) whether one of them can obtain more favourable terms than the other;

c) the nature of the goods and/or service levels required (eg an importer may wish to have more control over the transport logistics where goods are required urgently and/or special handling is required); and

d) the relevant terms of sale.

[13] Freight forwarders offer and provide all or some of the logistical and other related services required to meet the cargo transport needs of exporters and importers. The services freight forwarders typically offer to exporters and importers include advising on the most appropriate mode of transport, advising on the most appropriate routes or airline, purchasing air cargo services from airlines, advising on

and arranging security and insurance, completing necessary documentation, arranging for the collection of goods from the place of origin and delivery of them to the origin airport, assembling and packaging of goods at origin, warehousing of goods at the origin airport and ensuring goods that require special treatment are attended to. They include arranging for customs clearance at the origin and destination airports. For inbound air cargo they include arranging the appropriate certification, collecting the goods from the destination airport, warehousing goods at the destination airport, arranging for the delivery of goods to the importer's designated destination and tracking and monitoring the progress of cargo from origin to destination. In arranging and acquiring these services the freight forwarder's standard conditions of contract generally (but not always) provide that the freight forwarder is the "agent" of its customer.[3]

[14] Depending on the nature of the goods to be shipped and the requirements of the exporter/importer, freight forwarders will endeavour to combine different shipments on a route into one larger shipment, a process known as "consolidation".

[15] The international standard document typically required for the transport of all cargo by air is the air waybill ("the waybill"). The waybill includes the shipper details, being the name and address for the person or entities sending cargo from the point of origin. A shipper is also known as a consignor. Where cargo is consolidated the shipper named on the waybill will always be the freight forwarder. The waybill also includes the issuing agent or the issuing carrier's agent details, being the person authorised to hold the airline's waybill stock and therefore to authenticate and issue the waybill on the airline's behalf. The issuing agent will almost always be the freight forwarder.

[16] The consignee is the recipient of the cargo at destination. This can either be a freight forwarder (and always will be when the cargo is consolidated) or the ultimate recipient of the cargo.

[17] Subject to certain exceptions, in particular when an airline enters into an arrangement directly with an exporter or multi-national corporation, airlines'

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[3] See [165].

customers are the origin freight forwarders to whom airlines sell outbound air cargo services. Airlines do not sell air cargo services to destination freight forwarders or importers (or anyone else at the destination). Thus, the New Zealand offices of the airlines sell outbound air cargo services to New Zealand freight forwarders but not inbound capacity to destination freight forwarders or importers or anyone else based in New Zealand. Similarly, none of the airlines' overseas cargo offices sell air cargo services to freight forwarders based in New Zealand for shipments to New Zealand from any of the relevant points of origin pleaded in the amended statements of claim.

[18] Notwithstanding that airlines do not commonly sell air cargo services directly to exporters (indeed, freight forwarders generally discourage it), there is nevertheless a degree of direct contact between airlines and New Zealand exporters and importers. The practice and the extent of contact during the relevant period varied between the defendant airlines. Most of the defendant airlines had occasional direct contact with New Zealand exporters. Air New Zealand Ltd, as the national carrier, had more frequent direct contact with New Zealand exporters. To a much lesser extent, some airlines (including one defendant airline) had occasional direct contact with New Zealand importers.

[19] Three of the defendant airlines during the relevant period provided an online booking service available to New Zealand based freight forwarders registered with the particular airline to request capacity for cargo being transported from New Zealand (Singapore Airlines Ltd, Korean Air Lines Co Ltd and Emirates). Since February 2006, one airline (Thai Airways International Public Co Ltd, in late 2008) has added an online service available to approved New Zealand based freight forwarders. Exporters/importers could not then, or now, use these online services to buy cargo space (in the way that passenger online booking services function). Rather, they could only be used by freight forwarders at origin and only then for requests for capacity.

[20] The process for setting general air cargo rates (as opposed to surcharges) varies widely between the defendant airlines, depending on their internal policies and procedures. Rates are generally set by local cargo managers at the point of origin for air cargo services from that point of origin to various points of destination

(ie rates are quoted and set one-way only). Local rate setting is subject to varying degrees of head office or regional office involvement. All the defendant airlines take into account "market-related factors", with the differences amongst them lying primarily in the extent to which "cost-related factors" are also considered (ranging from not at all, for one defendant airline, through "playing a lesser role" than market-related factors for five, to being considered alongside market-related factors for the remaining two).

[21] Once an exporter and importer have agreed on the international sale of goods, the onus then falls on either the exporter or importer to organise the transport of the goods from origin to destination. Exporters/importers use freight forwarders to arrange some or all of the logistics associated with the transport of their goods by air, including acquiring air cargo services from an airline to transport the goods from the origin airport to the destination airport. Decisions made by exporters or importers regarding freight forwarding services will often have an impact on the decisions that freight forwarders make regarding the purchase of air cargo services.

[22] It is difficult to estimate precisely the percentage of imports carried into New Zealand by air where the importer initiates the transaction with the destination freight forwarder and pays for all the associated costs. However, estimates for their own businesses provided by freight forwarders range from 27 to 70–75 per cent of imports by weight.

[23] In choosing an airline considerations for the freight forwarder regarding the suitability of an airline for the particular shipment include the price of the air cargo services; availability of capacity; the location of the airport from which the airline flies and its proximity to, and ease and cost of transport from, the original location of the cargo; the routes flown by the airline; frequency of flights; landing times at destination; the quality and reliability of the airline's services; any specific instructions from the exporter or importer (eg dangerous goods, special handling requirements); and occasionally, any preference of the exporter or importer for a particular airline. In many cases the airlines will not know the identity of the exporter, particularly when the freight forwarder has consolidated shipments.

[24] Once the airline and freight forwarder have agreed all terms of shipment, the (origin) freight forwarder (or its contracted trucking company) will deliver the shipments (where consolidated in unit load devices or pallets) and relevant documents to the warehouse of the ground handler. The ground handler will check the shipments against the relevant documents (including the waybill) and load the shipments. These documents will be sent electronically or faxed to the airline's load controller.

[25] Once the airline has flown the goods to the destination airport, the airline's ground handler (more specifically, the ramp handler) is responsible for unloading the cargo from the aircraft. The destination freight forwarder will collect the shipments and pay a cargo terminal fee to the ground handler for the release of the cargo.

[26] Airlines carry cargo on passenger planes or dedicated freighters internationally from a point of origin to a point of destination, often via one or more other airports along the route. In contrast to passenger services, air cargo services involve the transport of cargo in one direction only.

[27] Airlines' customers for air cargo services are usually origin freight forwarders. There are exceptions. For example Air New Zealand, in New Zealand, regards some exporters as its customers as well as freight forwarders.

[28] The air cargo services provided by airlines include:

a) the physical transport of air cargo internationally from the origin airport to the destination airport, including any special handling requirements (eg refrigeration for live seafood, fruit, vegetables or flowers, or temperature control for pharmaceutical products, edible products or live animals);

b) ground handling services at origin and destination airports (ie loading and unloading of the aircraft), which are usually subcontracted to third parties, except where a home carrier provides its own ground handling services; and

c) generally dealing with inquiries about cargo (eg tracing delayed, lost or damaged shipments).

[29] In some jurisdictions there has been active government involvement in the setting of the surcharges that are the subject of this proceeding. In Hong Kong the government has been involved as a regulator. In Dubai a common airport-wide fuel surcharge was agreed with the Dubai Department of Civil Aviation, which is a government department.

[30] The rates for a route and the type and volume of cargo almost always differ in each direction, reflecting specific supply and demand characteristics. The freight forwarders with whom the airlines deal are different at each point of origin.

[31] The defendant airlines have local offices which sell outbound air cargo services only. They do not sell inbound air cargo services. Airlines sell air cargo services to origin freight forwarders (and very occasionally to exporters directly). There is only a degree of direct contact between airlines and exporters, and to a much less extent between airlines and importers.

[32] All the defendant airlines that provide inbound air cargo services also provide outbound air cargo services. Most aircraft flying to and from New Zealand are passenger planes and so the majority of air cargo carried to and from New Zealand is transported in the belly-hold of passenger aircraft. In such instances air cargo services are offered as an ancillary to passenger services. Generally for belly-hold cargo, routes, schedules and capacity will in almost all cases be primarily determined by passenger considerations.

[33] From this overview of the facts the following key facts can be isolated:

a) The demand for air cargo services is derived from the demands of importers and exporters. Four of the six freight forwarders interviewed by the Commission estimated that at least half of transactions were initiated by importers. Exporters and importers provide information to freight forwarders which may include the route

or timing required, and occasionally a preference for a particular airline. These are then considered by the freight forwarder who then makes the choice of airline (and may dictate that choice).

b) Ultimately the exporter or importer makes the decision whether to proceed with a transaction and may, for instance, elect not to if the air cargo cost is too high.

c) Airlines most commonly sell air cargo services to origin freight forwarders. Airlines do not sell air cargo services to destination freight forwarders or importers. Airlines occasionally sell air cargo services direct to exporters.

d) The airlines' offices in the various jurisdictions sell outbound air cargo services only. Payment is most commonly, in over 99 per cent of cases, collected at origin. Where collected at destination ("charge collect" shipments) payment is nonetheless credited to origin.

e) In some cases the airline may know the identity of the exporter (especially where the freight forwarder is acting for a key exporter or the exporter is shown as the "shipper" on the waybill). In many cases, however, the airline will not know the identity of the exporter, particularly when the freight forwarder has consolidated shipments. Generally airlines negotiate and deal with freight forwarders at origin, and are paid by freight forwarders at origin. Thus, it is the freight forwarders who practically and contractually facilitate the carriage of the goods with the airlines.

f) Sometimes a New Zealand entity with a presence overseas will send cargo from itself in another country to New Zealand. In that situation the New Zealand entity will be both the consignor and consignee.

g) Air cargo services involve the transport of cargo in one direction only. The waybill is also one-way. The nature, volume and value of goods

sent inbound to and outbound from any particular country are different.

Pleadings

[34] Given the discrete nature of the issues that are to be determined in this hearing, there has been less emphasis on the pleadings than there would usually be in a full trial. However, it is necessary to make some reference to the statements of claim, which are in their fourth gestation.

[35] The Commission alleges three interlinked sets of price fixing behaviour: a global conspiracy with regional variations to apply and fix the price of fuel surcharges, a number of regional conspiracies to apply and fix the price of fuel surcharges and a global conspiracy with regional variations to apply and fix the price of security surcharges. Each cause of action alleges an arrangement or understanding that had the purpose of fixing, controlling or maintaining prices for the supply of air cargo services to and/or from New Zealand and/or had or was likely to have the effect of fixing, controlling or maintaining the prices for the supply of such services.

[36] While the Commission takes the view that an action under s 30 does not require market definition, it has nevertheless elected to plead a number of markets. Each market is defined as a market for the provision of air cargo services. The Commission pleads first a single market in respect of each region for air cargo services (that is, both to and from) New Zealand and that region. In the alternative, it pleads separate markets in respect of each region for air cargo services from New Zealand to each region and to New Zealand from each region. It alleges the markets for air cargo services in respect of any region are located both in New Zealand and in that region.

[37] The defendants ("the airlines") in their pleadings accept there are separate inbound and outbound markets for air cargo services to and from New Zealand and each region, but state that the markets are located only at the point of origin. They deny the existence of the two-way market between New Zealand and each region.

They plead various affirmative defences including a pleading that the Commission's amendment asserting a two-way market as an alternative amounts to a new cause of action, and is therefore time-barred.

Is the Commission required to prove a market in New Zealand (issues 2(a) and (b))?

The respective positions

[38] The Commission submitted that it is sufficient, in order to establish a breach of s 27 via s 30, to prove the airlines supplied the services the subject of the alleged price fixing arrangement in competition with each other in New Zealand. It is not necessary that it prove the airlines supplied those services in competition with each other in a market in New Zealand. That is, it need not plead and prove a market for the purposes of its claim and it is irrelevant whether the market is in or out of New Zealand. The Commission submitted that this is consistent with the section's natural wording, its intended meaning and effect, and the approach to per se offences in some other jurisdictions. It submitted that such an interpretation is necessary to give s 30 its intended efficacy. It suggested that if the Commission's approach to s 30 is accepted it will mean that price fixing cases will be directed at the core issue, namely whether there was a prohibited arrangement between competitors.

[39] The airlines submitted that a claim brought under s 27 via s 30 requires the plaintiff to prove that the arrangement in question concerned the supply of services in a market in New Zealand. The Commission's approach, they submitted, would have the effect of proscribing arrangements concerning the supply of services in markets outside New Zealand, contrary to the purpose of the Act (the promotion of competition in markets in New Zealand) and the presumption that Parliament did not intend to assert extraterritorial jurisdiction. They submitted that if the Commission's submission is accepted, s 30 deems something which exists and occurs overseas to exist and occur in New Zealand for the purpose of conferring jurisdiction. Rather, they submitted, the requirement in s 27 that there be a market in New Zealand survives the effect of the s 30 deeming provision.

Argument as to the use of extraneous materials

[40] In the course of argument on this point, the Commission asked us to consider a report from the Department of Trade and Industry addressed to the Chairman of the Parliamentary Select Committee considering the Commerce Bill, which it wished to refer to, to support its argument. The airlines objected submitting that the document presented a departmental perspective and was of no assistance in ascertaining the intention of the legislature.

[41] The airlines' objection is upheld. The report is from the Assistant Secretary (Commerce) and while it is explaining draft amendments prepared by Parliamentary Counsel there is no way of ascertaining the actual status of the paper and the consideration of it by the Committee, or indeed whether it had any relevance in the Committee's consideration. It offers no reliable guide to legislative intention. It is in a different category from a White Paper, committee report or other document that can confidently said to have been instrumental in the drafting of the Act in final form. It is not a statement by a minister or other promoter of the Bill that can be seen as a reliable guide to Parliament's intention.[4]

The relevant sections in the Commerce Act

[42] Guidance to the meaning of the terms "competition" and "market" is provided by s 3:

> **3 Certain terms defined in relation to competition**
>
> (1) In this Act **competition** means workable or effective competition.
>
> (1A) Every reference in this Act, except the reference in section 36A[2](b) and (c) of this Act, to the term "market" is a reference to a market in New Zealand for goods or services as well as other goods or services that, as a matter of fact and commercial common sense, are substitutable for them.

Section 3(1A) is expressed in terms that are exegetical rather than strictly definitional, a point considered later.[5]

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4 *Pepper (Inspector of Taxes) v Hart* [1993] AC 593 (HL).

5 At [121].

[43] Section 4 describes the circumstances in which the Act applies to conduct outside New Zealand:

> **4 Application of Act to conduct outside New Zealand**
>
> (1) This Act extends to the engaging in conduct outside New Zealand by any person resident or carrying on business in New Zealand to the extent that such conduct affects a market in New Zealand.
>
> (2) Without limiting subsection (1) of this section, section 36A of this Act extends to the engaging in conduct outside New Zealand by any person resident or carrying on business in Australia to the extent that such conduct affects a market, not being a market exclusively for services, in New Zealand.
>
> (3) Without limiting subsection (1) of this section, section 47 of this Act extends to the acquisition outside New Zealand by a person (whether or not the person is resident or carries on business in New Zealand) of the assets of a business or shares to the extent that the acquisition affects a market in New Zealand.

[44] The critical sections for the purposes of these proceedings are ss 27 and 30, which form the basis of the Commission's causes of action. It is alleged that the airlines breached s 27(1) and (2) via s 30 of the Commerce Act. Subsections (1) and (2) of s 27 provide:

> **27 Contracts, arrangements, or understandings substantially lessening competition prohibited**
>
> (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.
>
> ...

[45] Section 30(1) 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—
>
> (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.
>
> ...

[46] The determination of the s 30 issue is an exercise in statutory interpretation. Two interpretive principles framed the parties' analyses. The first is the principle that Parliament did not intend to assert extraterritorial jurisdiction. The second is that the meaning of an enactment must be ascertained in light of its purpose.

The presumption that Parliament did not intend to assert extraterritorial jurisdiction

[47] The airlines submitted the Commission's interpretation of s 30 seeks to "cut section 27 adrift from its fundamental jurisdictional constraint of application 'in a market in New Zealand'" in violation of the principle that statutes are presumed not to have extraterritorial effect.

[48] This principle was recently considered in the context of the Act by the Supreme Court in *Poynter v Commerce Commission*.[6] Tipping J, giving the reasons of Blanchard, Tipping, McGrath and Wilson JJ, observed:[7]

> *Bennion on Statutory Interpretation* states, as a general proposition, that an enactment is to be treated as not having extraterritorial effect unless a contrary intention appears and subject to any relevant rules of private international law. *Craies on Legislation* states, to the same effect, that, in the absence of contrary evidence, a legislative proposition is addressed to anyone who is within the territory to which the proposition extends. An enactment will generally apply to things done and people in the territory to which it extends, and no further. There is a presumption that Parliament does not intend to assert extraterritorial jurisdiction, which can be rebutted only by clear words or necessary implication.

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6 *Poynter v Commerce Commission* [2010] NZSC 38, [2010] 3 NZLR 300.
7 At [36].

(Footnotes omitted.)

The principle is underpinned by considerations of international comity.[8]

[49] The Court expressly rejected the suggestion that in modern times this approach had been relaxed.[9] It reaffirmed that Parliament should not be taken to have legislated with extraterritorial effect unless its enactment signals that purpose by express words or necessary implication.

[50] Section 4 of the Act is expressly directed at conduct outside New Zealand. There is no other express language providing for extraterritorial reach. The Court considered whether additional extraterritorial effect could be discerned as a matter of necessary implication from other provisions of the Act. Tipping J observed:[10]

> It is important to recognise that the Act is a code and, for extraterritoriality purposes, the court should confine itself to the express terms of the Act and any additional extraterritorial effect which flows as a matter of inevitable logic from those express terms read contextually in the light of the purposes of the Act. That is what necessary implication means. A necessary implication is not something judicially engrafted on to legislation as a judicial value or policy judgment, however reasonable that judgment may appear to be.

[51] The Court held s 4 was exhaustive of the circumstances in which the Act applied to conduct outside New Zealand.[11] Elias CJ stated:[12]

> It is clear that the Act proceeds on the basis that it does not have extraterritorial effect because that is the assumption on which s 4 is drafted. As the heading to the section suggests, it describes the only circumstances in which the Act applies to conduct outside New Zealand.

[52] In *Poynter* the anti-competitive conduct alleged against the appellant occurred outside of New Zealand. The appellant did not reside or carry on business in New Zealand. The Court held accordingly that the Act did not apply. That is not the position here. While the alleged anti-competitive conduct was engaged in outside New Zealand (the entering into and giving effect to the proscribed arrangement) it will be argued that the airlines were carrying on business in New

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8 At [37].
9 At [41]-[45].
10 At [46].
11 At [15] and [62].
12 At [15].

Zealand and that their conduct affected a market in New Zealand, so that the Act applies in terms of s 4. That is a matter for the second stage hearing. The airlines, however, argued that the presumption that Parliament did not intend to assert extraterritorial jurisdiction applies in the interpretation of s 30. The Commission's interpretation, the airlines submitted, confers extraterritorial effect contrary to the presumption and to the decision of the Supreme Court in *Poynter*.

[53] It is necessary to consider the reach of s 30 against this background.

A purposive interpretation

[54] Section 5 of the Interpretation Act 1999 provides that the meaning of an enactment must be ascertained from its text and in light of its purpose. Even if the meaning of the text may appear plain in isolation of purpose, that meaning should always be cross checked against purpose in order to observe the dual requirements of s 5.[13] In determining purpose the court must have regard to both the immediate and the general legislative context and may also consider the social, commercial or other objective of the enactment.

[55] The purpose of the Act is set out at s 1A. Read alongside s 3(1A) it provides that the purpose of the Act is to promote competition in markets in New Zealand for the long-term benefit of consumers within New Zealand. In the course of the parties' submissions on the interpretation of ss 27 and 30 there has been debate about the relevance of this section.

[56] Richardson J said in *Tru Tone Ltd v Festival Records Retail Marketing Ltd*:[14]

> In terms of the long title the Commerce Act is an Act to promote competition in markets in New Zealand. It is based on the premise that society's resources are best allocated in a competitive market where rivalry between firms ensures maximum efficiency in the use of resources.

[57] This statement referred to the original long title of the Act which did not contain the words "for the long-term benefit of consumers within New Zealand".

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13 *Commerce Commission v Fonterra Co-operative Group Ltd* [2007] NZSC 36, [2007] 3 NZLR 767 at [22].

14 *Tru Tone Ltd v Festival Records Retail Marketing Ltd* [1988] 2 NZLR 352 (CA) at 358.

The long title was replaced in 2001 with the purpose statement now contained in s 1A.[15] However, the Commerce Committee in proposing the change considered the addition of the purpose statement would not fundamentally change the interpretation of the Act, but rather confirm the existing approach that competition was a means to an end, not an end in itself.[16] During the consideration by Parliament of the report of that Committee the Minister of Commerce stated to a similar effect:[17]

> [The new purpose statement] makes clear that competition is not an end in itself, but a means to promote the welfare of New Zealanders. Consumers are given special mention as they are the ultimate beneficiaries of competition.

[58] The Act is not concerned with the promotion of the welfare of consumers on a case by case basis. It is not in the same category as legislation having as its immediate goal consumer welfare, such as the Fair Trading Act 1986. Rather its immediate goal is the promotion of competition in markets in New Zealand, of which it is assumed consumers will be the ultimate beneficiaries. We interpret ss 27 and 30 against this purpose.

The effect of the deeming words in s 30 on s 27

[59] The first issue concerns the effect of the s 30 deeming provision and, in particular, whether the requirement in s 27 that there be a market in New Zealand "survives" the effect of that provision.

[60] Sections 27 and 30 refer to contracts, arrangements and understandings. Each is treated in the same manner in the two sections. For simplicity, reference is made in this judgment simply to arrangements. Reference is also made in this part to "fixing the price for goods and services" in place 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 and services" as it appears in s 30. Elsewhere in the judgment the shorthand "price fixing" is used.

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15 Commerce Amendment Act 2001, ss 3 and 4.
16 Commerce Amendment Bill 2001 (296-2) (select committee report) at 7.
17 (27 February 2001) 590 NZPD 7972.

[61] Section 27 specifically requires proof of a market in New Zealand, as there must be shown to be a substantial lessening of competition in such a market. Subsections (1) and (2) of s 27 contain two ingredients:

a) Persons entering into an arrangement containing, or giving effect to;

b) A provision having the purpose, effect or likely effect of substantially lessening competition in a market in New Zealand.

The words "in New Zealand" are added because that is required by s 3(1A).

[62] The ingredients of s 30 when read with s 27 are as follows:

a) Persons entering into an arrangement containing, or giving effect to;

b) A provision having the purpose, effect or likely effect of fixing the price for goods or services;

c) Where those goods or services are supplied or acquired by the parties to the arrangement, or by any of them;

d) Where the parties to the arrangement are in competition with each other for the supply or acquisition of those goods or services.

[63] If ingredients (b)-(d) are established, the deemed consequence is that the provision has the purpose, effect or likely effect of substantially lessening competition in a market for the purposes of s 27. It is obvious from this breakdown that the market in which a substantial lessening of competition is deemed is the market in which the parties compete for the supply or acquisition of the goods or services the subject of the arrangement.

[64] The Commission submits that the deemed consequence extends to the second limb of s 27(1) and (2), as identified above,[18] in its entirety. That is, the deemed consequence is that the provision has the purpose, effect or likely effect of

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[18] At [61](b).

substantially lessening competition in a market "in New Zealand". Provided that the relevant competition takes place in New Zealand, if the market in which the parties compete for the supply or acquisition of the goods or services the subject of the arrangement happens to be outside New Zealand it is nonetheless deemed for the purposes of s 27 to be a market in New Zealand. Such situations, the Commission submits, will be rare and "a consequence of Parliament's choice to impose per se liability for the pernicious evil that is price-fixing".

[65] The reach of a deeming provision is in the end an exercise in statutory construction.[19] Acts often deem things to be what they are not.[20] The fact that the reality may not match the deemed position is irrelevant. Any other conclusion would defeat the purpose of the deeming. However, in construing a deeming provision it is necessary to bear in mind the legislative purpose.[21] Francis Bennion in *Bennion on Statutory Interpretation* stated:[22]

> The intention of a deeming provision, in laying down a hypothesis, is that the hypothesis shall be carried as far as necessary to achieve the legislative purpose, but no further.

[66] This proposition was confirmed in *Szoma v Secretary of State for Work and Pensions*.[23] As Megarry VC stated in *Polydor Ltd and RSO Records Inc v Harlequin Record Shop Ltd and Simons Records Ltd* commenting on *Szoma*:[24]

> The hypothetical must not be allowed to oust the real further than obedience to the statute compels.

[67] In assessing the reach of the deeming provision it is significant that the market is not expressly deemed to be a market in New Zealand by operation of s 30. Rather, only through s 3(1A) could the words "in New Zealand" be added to the word "market" as it appears in s 30. Section 3(1A) serves two ends. It provides an exegesis of the word "market" and has the consequence of confining the scope of the

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19 See the observations in John Burrows, Jeremy Finn and Stephen Todd *Statute Law in New Zealand* (3rd ed, LexisNexis, Wellington, 2007) at 431.

20 Francis Bennion *Bennion on Statutory Interpretation* (5th ed, LexisNexis, London, 2008) at 949.

21 Ibid.

22 At 950.

23 *Szoma v Secretary of State for Work and Pensions* [2005] UKHL 64, [2006] 1 AC 564 at [25].

24 *Polydor Ltd and RSO Records Inc v Harlequin Record Shop Ltd and Simons Records Ltd* [1980] 1 CMLR 669 (Ch) at [11], quoted in *Bennion on Statutory Interpretation* at 950. This statement was made in relation to the remarks of Lord Asquith in *East End Dwellings Co Ltd v Finsbury Borough Council* [1952] AC 109 (HL) at 132.

Act to markets in New Zealand.[25] Viewed thus it would appear anomalous that s 3(1A) might operate to extend the scope of the Act to markets outside of New Zealand by operation of s 30.

[68] The relationship between s 27 and s 30 is relevant in this regard. Section 30 does not itself constitute a prohibition or create a cause of action. Rather it is an adjunct to s 27 "for the purposes of that section". In s 27 there must be a New Zealand market. It would be going beyond the purposes of s 27 to deem a market to be a market in New Zealand that is in fact overseas. The goal of s 30 appears to be restricted to obviating the need to prove a substantial lessening of competition in a market, not to extending the Act's territorial reach.

[69] Section 30 begins "Without limiting the generality of section 27". This is a further indication that s 30 is intended as an adjunct to s 27. It makes special provision for a subset of the anticompetitive arrangements with which s 27 is concerned. It would be inconsistent with this aspect of the relationship between the two provisions to interpret s 30 as possessing greater geographical reach than s 27, extending further than that latter provision can ever extend, to markets wholly outside New Zealand. That would mean that s 30 would not only not be limiting the generality of s 27. It would be extending the scope of that provision beyond the territory of New Zealand.

[70] Earlier, reference has been made to the airlines calling in aid the presumption that Parliament did not intend to assert extraterritorial jurisdiction to support their argument that s 30 still requires that there be a market in New Zealand and the consideration of the presumption in *Poynter*.[26] *Poynter* was concerned with conduct outside New Zealand. Similarly s 4 is concerned with "engaging in conduct outside New Zealand", indeed as the Supreme Court held is exhaustive of the circumstances in which the Act applies to conduct outside New Zealand.[27] It is necessary to consider these principles in relation to s 30.

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25 See [121].
26 At [47]–[53].
27 At [15] and [62].

[71] Guidance to the interpretation of the term "engaging in conduct" is afforded by s 2(2)(a):

> **2 Interpretation**
>
> ...
>
> (2) In this Act,—
>
> (a) A reference to engaging in conduct shall be read as a reference to doing or refusing to do any act, including—
>
> (i) The entering into, or the giving effect to a provision of, a contract or arrangement; or
>
> (ii) The arriving at, or the giving effect to a provision of, an understanding; or
>
> (iii) The requiring of the giving of, or the giving of, a covenant:
>
> ...

The relevant conduct here is the airlines' entering into or giving effect to the alleged arrangement. The presumption as it was applied in *Poynter* requires that the arrangement be entered into or given effect to in New Zealand, or, to the extent only that s 4 applies, outside New Zealand. The conduct in that case was engaged in by the appellant in Sydney, and as the domicile requirements of s 4 were not met the Act was held not to apply. In the present case the remaining elements of s 30 in issue, that the parties supplied the services the subject of the alleged arrangement in competition with each other and any requirement that they did so in a market, are not elements to which s 4 is directed or to which the presumption as it was applied in *Poynter* naturally attach.

[72] However, the presumption that Parliament did not intend to assert extraterritorial jurisdiction may be understood more broadly. Consistent with the principle of comity an Act is taken to be for the governance of the territory to which it extends, that is the territory throughout which it is law.[28] The Act may be presumed not to extend to the governance of a market outside of New Zealand. The presumption that Parliament did not intend to assert extraterritorial jurisdiction therefore supports an interpretation that the s 30 deeming provision should not be

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[28] See *Bennion on Statutory Interpretation* at 361.

read as removing the need to prove that the relevant services were supplied in a market in New Zealand. To interpret the Act as governing competition in markets wholly outside of New Zealand would be to confer on it extraterritorial jurisdiction.

[73] The presumption is therefore a further reason not to allow the hypothetical, in Megarry VC's words, to oust the real.

[74] The services the subject of the alleged arrangement must therefore have been supplied by the parties in a market in New Zealand. Obedience to the statute does not in our view compel a contrary result. In particular, this requirement does not defeat the purpose of the deeming provision. The substantial lessening of competition in a market is assumed, but s 3(1A) applies and the market must despite the deeming be in New Zealand. In the ordinary run of cases it may be unnecessary to plead and prove a market as it may be clear that it is in New Zealand. However, the s 3(1A) requirement that a reference to a market is a reference to a market in New Zealand remains, and if there is no market in New Zealand there is nothing on which the deemed substantial lessening of competition can bite.

[75] This is consistent with the purpose of the Act. The Commission's interpretation would see s 30 reach beyond the regulation (and, it is to be assumed, promotion) of competition in markets in New Zealand, to markets wholly outside New Zealand. This would be to exceed the statutory purpose of the Act. The Act is only concerned with competition in markets in New Zealand. Conversely the airlines' interpretation, requiring that the services the subject of the alleged arrangement be supplied by the parties in a market in New Zealand, is consistent with that purpose.

[76] The conclusion is reached, therefore, that as a matter of statutory interpretation, the requirement in s 27 that there be a market in New Zealand survives the effect of the s 30 deeming provision. It will be an answer to a claim under s 27 via s 30 to establish that the market for the goods or services the subject of a price fixing arrangement are supplied or acquired by the parties to the arrangement in a market wholly outside New Zealand. This does not of itself suggest the Commission must plead and prove a market in every claim under s 27

via s 30. If the s 30 deeming provision applies and there is no suggestion that the market is outside New Zealand, it will be deemed that the relevant provision has the purpose, effect or likely effect of substantially lessening competition in a market for the purposes of s 27, and likely be assumed that the market is in New Zealand.

The requirement that the parties be "in competition with each other"

[77] The airlines go further. They submit that a requirement to plead and prove a market is inherent in the requirement to plead and prove that the parties supplied the goods or services "in competition with each other". Competition and markets, they submit, are not severable concepts. "Competition" should be read as "competition in a market [in New Zealand]".

[78] The strong tenor of the evidence of the airlines' experts was that competition must always occur in markets. The proposition is well supported by authority. It was observed in *Re Queensland Co-operative Milling Association Ltd*[29] in an often quoted statement that:

> Competition is a process rather than a situation. Nevertheless, whether firms compete is very much a matter of the structure of the markets in which they operate. ...
>
> ...
>
> It follows that the identification of markets must be the essential first step in assessment of present competition and likely competitive effects. In our view the usefulness of the "market" concept goes beyond the determination of market concentration to the identification of rivalrous relationships between sellers.

In *Tru Tone Ltd v Festival Records Ltd* Richardson J stated:[30]

> These two inter-related elements of competition in markets are crucial considerations under both s 36 and s 27.
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> ... The identification of the relevant market is the first step towards the assessment of the current state of competition and of the nature and extent of

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29 *Re Queensland Co-operative Milling Association Ltd* (1976) 8 ALR 481 (TPT) at 516.

30 *Tru Tone Ltd v Festival Records Ltd* [1988] 2 NZLR 352 (CA) at 358. See also *Auckland Regional Authority v Mutual Rental Cars (Auckland Airport) Ltd* (1987) 2 TCLR 141 (HC) at 64.

any inhibition of competition. At each step it is a practical jury question of fact and degree.

[79] It was observed by Barker J in *Auckland Regional Authority v Mutual Rental Cars (Auckland Airport) Ltd* that "competition must always be understood as existing within the context of a market".[31] This concept is also acknowledged in the Commission's guidelines, which at the beginning of the discussion of markets contained the statement "[m]arket definition is an integral part of competition analysis as it identifies the relevant area of competition".[32] The Commission in its closing submissions accepted that any competition will occur in a market.

[80] While accepting that proposition, the Commission submitted "competition" and "market" are nonetheless distinct concepts. The Commission is required only to establish parties are in competition with each other, in which any aspect of market analysis is merely incidental. In support of its submission it drew a distinction of some force between two senses in which the word "competition" is used in s 30 (and the Act). The first is evaluative. This is the sense in which the word is used in "substantial lessening of competition in a market". Market definition is integral to assessing the impact on competition in this first sense. It can only be understood by reference to the structure and components of a particular market. The second sense is variously described as descriptive or relational. It describes the fact that persons in a market engage in rivalrous behaviour with each other. Market definition is not required where the word "competition" is used in this sense. It is this latter sense, the Commission submitted, in which the word "competition" is used in s 30(1)(a).

[81] The Commission submitted that thus understood it is clear that market definition is not required in order to establish for the purposes of s 30 that the parties supplied the services the subject of the alleged arrangement in competition with each other. The Commission relied on the legislative history and purpose of the provision and certain authority.

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31 *Auckland Regional Authority v Mutual Rental Cars (Auckland Airport) Ltd* at 64.

32 Commerce Commission "Mergers and Acquisitions Guideline" (2004) at [2.5].

[82] The Commission pointed to a change in the drafting of the Bill containing the definition of "competition" now contained in s 3(1).[33] The original clause had read "'competition', in relation to a market, means workable or effective competition". This was changed by the Commerce and Marketing Committee to the current wording: "'competition' means workable or effective competition". The words "in relation to a market" were deleted.

[83] The deletion of the words "in relation to a market" is consistent with a legislative intention not to bind proof of competition to proof of markets. In s 29(1)(a), for example, or s 39(1)(a), where parties are required to be "in competition with each other", a market is not an element required to be proven. Competition is to be understood in its descriptive or relational sense.

[84] The Commission's interpretation is consistent with the purpose of the s 30 deeming provision. Section 30 deems price fixing arrangements between competitors per se illegal. Per se provisions establish a "bright line" providing certainty for the commercial community and enable relatively straightforward and inexpensive enforcement proceedings. Market definition is a complex and therefore costly exercise. The airlines' interpretation, as the Commission submitted, would rob s 30 of much of its clarity and intended efficacy.

[85] We accept, therefore, the Commission's argument that it is not necessary to imply after the word "competition" at the end of s 30(1)(a) and (b) the words "in a market" making it necessary to plead and prove a market in every case. Nevertheless, in a s 30 case the parties will, in fact, be competing in a market. The market will be the market for the supply or acquisition of goods or services the subject of the price fixing arrangement. That will be the market in which a substantial lessening of competition is deemed for the purposes of s 27. It is an underlying requirement that that market, for the reasons earlier outlined, must be in New Zealand.

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[33] See Commerce Bill 1985 (104-2) at 11.

Authority

[86] Academic authority is split on the general question of whether market definition is required for a claim under s 27 via s 30. The authors of *Gault on Commercial Law* stated in addressing the question whether a market definition exercise is required to determine whether two or more parties are "in competition with each other":[34]

> In contrast to s 29 which contains no reference to "market", s 30, via the deeming provision, inter-links to the s 27 "substantially lessening competition in a market" test. The Courts are likely, therefore, to read "in competition with each other" as meaning "in competition with each other in a market". Thus, a limited market identification exercise is likely to be called for.

The authors continued:

> As long as the parties compete with each other for existing or potential customers within the market, the requirement will be satisfied.

This interpretation accorded with the airlines' submission.

[87] A different approach is taken by Matt Sumpter in *New Zealand Competition Law and Policy*.[35] He observed:[36]

> Market definition is not ... critical to a s 30 claim as it is to a s 27, s 36 or s 47 cause of action. ... Market definition is not a component part of the s 30 cause of action. The concept is only potentially relevant to s 30 in pleadings and evidence as a particular to the "in competition with each other" element.[37]

Sumpter, after having considered the approach advocated in *Gault on Commercial Law*, observed that to introduce market definition into s 30 cases would be an undesirable development.[38] He stated:

> In any event, even bearing the hard cases in mind, there is no cause for reading the words "in a market" into s 30. Again, doing so would introduce

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34 Thomas Gault (ed) *Gault on Commercial Law* (looseleaf ed, Brookers) vol 1 at [CA30.14](4).

35 Matt Sumpter *New Zealand Competition Law and Policy* (CCH, Auckland, 2010).

36 At [610].

37 As an aside, I note that despite the reference to "the s 30 cause of action", I have no doubt that the author did not mean that s 30 itself creates a cause of action. It does not. What is presumably meant is the s 27 cause of action where the s 30 deeming provision applies.

38 At [610].

> the complexity and evaluative uncertainty which per se rules are designed to avoid in price-fixing matters.
>
> ...
>
> The relevant factual inquiry is whether the parties are actual or likely competitors for those particular goods or services.

[88] Thus two of the leading texts adopted differing interpretations of s 30 on this point. Neither text considered any underlying requirement that there be a market "in New Zealand" (the focus of the preceding part) or the potential applicability of s 30 to offshore or transnational markets.

[89] A requirement that parties be in competition with each other, absent an express requirement that they be in competition with each other in a market, was considered in the decision of the full Court of the Federal Court of Australia in *News Ltd v Australian Rugby Football League Ltd.*[39] That case concerned a claim that certain arrangements between the Australian Rugby Football League and rugby league clubs contained exclusionary provisions. The statutory provisions in issue were ss 45(2) (the analogue of s 29 of the New Zealand Act) and 4(D) of the Australian Trade Practices Act 1974 (Cth) ("the ATPA"). Section 45(2) prohibited the making of or giving effect to contracts, arrangements or understandings containing an exclusionary provision. Section 4D deemed certain provisions exclusionary provisions. One of the requirements of s 4D was that the parties be in competition with each other in relation to the supply of the goods or services to which the relevant provision related. Section 45(3) (which defined competition as, relevantly, competition in any market) did not apply. The full Court observed in relation to the prohibition against making or giving effect to a provision of a contract that had the purpose of substantially lessening competition:[40]

> This contrasts with the prohibition against the making of or giving effect to exclusionary provisions. Hence it is not necessary to consider questions of market definition for s. 4D purposes.

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39 *News Ltd v Australian Rugby Football League Ltd* (1996) ATPR ¶41-521 (FCA).
40 At 42,644.

[90] This decision was considered by Heerey J in *ACCC v J McPhee & Son (Australia) Pty Ltd.*[41] *McPhee* was a price fixing case. It was concerned with an express requirement in the ATPA that the parties be in competition with each other in a market[42] and is therefore of only limited assistance in interpreting s 30. In that decision Heerey J held[43] in a statement referred to in *Gault on Commercial Law*[44] and in *New Zealand Competition Law and Policy*:[45]

> [the requirement of competition in a market] does not mean that in a [price fixing case] exhaustive market definition, in the sense of pleading and proof of the full nature and extent of the market, is required.

[91] *News Ltd* was decided in the context of the Australian equivalent to s 29 which in its original form in New Zealand contained no reference to market at all. In *McPhee* Heerey J considered that the central question was whether the parties were offering or contemplating the offer of the same services to the same existing or potential customer. Once this was established it would be open to a Court to conclude that the parties were in competition with (at least) each other in a market for the supply (at least) of such services.[46] However, he did not suggest that the need to prove a market in Australia was obviated by the deeming provision. Indeed he observed earlier in the judgment:[47]

> As long as the ACCC can establish that, in connection with the alleged arrangements or understandings, McPhee and DFE were competing in *a* market, it is not to the point that others may have been supplying the same services in that market, or that services other than express freight transportation services might have been provided, or that the geographical extent of the market might have been different from that pleaded. To illustrate the point, one might ask rhetorically what would it matter for the purposes of the present case if ... it were proved ... that the alleged market did not cover the whole of Australia but only Victoria, South Australia or New South Wales?
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> (Original emphasis.)

In neither *News Ltd* or *McPhee* were extraterritoriality or overseas markets considered.

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41 *ACCC v J McPhee & Son (Australia) Pty Ltd* (1997) ATPR ¶41-570 (FCA).
42 Trade Practices Act 1974 (Cth), s 45(3).
43 At 43,921.
44 At [CA30.14](4).
45 At [610].
46 At 43,921.
47 At 43,920.

[92] The airlines referred to *Commerce Commission v Siemens AG*.[48] The Commission in that case claimed Siemens AG breached s 27, or ss 27 and 30, by giving effect to a provision fixing the price for gas-insulated switchgear ("GIS"). In considering whether there was a market for GIS in New Zealand Woodhouse J stated:

> [59] ... It was further submitted, in this context, that "s 30 strictly requires only definition of a 'service' [sic] rather than 'market' as such". (On the facts of this case "goods" should be substituted for "service" but the point remains whichever it is.)
>
> [60] I agree, picking up a further point of Ms Dean's, that this case is not concerned with issues relating to definition of a market. *What is required, as the Commission's principal submissions on this issue recognised, is proof of the existence of a GIS market in New Zealand. That clearly is required because s 30 is an extension of s 27 and s 27 is concerned with the lessening of competition in a market. If there is no market s 27 and, therefore, s 30 have no application.*
>
> (Emphasis added.)

[93] The Judge went on to find that there was a market. This analysis supports the airlines' approach. The issue, however, does not appear to have been substantially contested, whereas here it is. It was, further, necessary for the Commission to plead and prove a market at least in relation to its s 27 claim. And given the Judge's ultimate finding (he dismissed the Commission's claims) the observations are obiter.

[94] The airlines also referred to the decision of Heath J in *Commerce Commission v Visy (Board) NZ Ltd*.[49] *Visy* is discussed below.[50] Briefly, the Commission alleged breaches of s 27, and s 27 via s 30, in respect of a New Zealand or trans-Tasman market. Heath J proceeded on the basis a market in New Zealand had to be pleaded and proved. But the case was principally concerned with the requirements of s 27, specifically whether trans-Tasman markets were within its scope. The requirements of a claim under s 27 via s 30 were not specifically addressed and therefore the case does not assist the airlines on this point.

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48 *Commerce Commission v Siemens AG* (2010) 13 TCLR 40 (HC).

49 *Commerce Commission v Visy (Board) NZ Ltd* HC Auckland CIV-2007-404-7237, 20 April 2011.

50 At [238]-[240].

[95] The general tenor of these authorities is inconsistent with the submission of the airlines that the legislature intended to couple the requirement of proof of competition to that of proof of a market. In the ordinary run of cases, where there is no issue about the territoriality of the market, it will not be necessary to plead and prove a market. This is consistent with the per se nature of s 30. If the competition is in New Zealand it will likely be assumed in the absence of evidence to the contrary that the market is in New Zealand. However, in none of these authorities is it suggested that there is no need for there to be a market in New Zealand. In *Siemens* the need to prove a market in New Zealand was, with respect, correctly assumed.

Conclusion on interpretation of s 30

[96] On a purposive interpretation of s 30 and by application of the presumption, s 30 residually requires that the market for the goods or services the subject of the price fixing arrangement be a market in New Zealand.

[97] In the present case the issue of the territoriality of the market has been squarely raised and evidence that the market is overseas advanced. For the purpose of the Commission's claims under s 27 via s 30, and against the background set out, the question posed in 2(a) of the statement of issues is answered "no" and the question posed in 2(b) "yes".

Do the airlines supply inbound air cargo services in competition with each other in New Zealand (issue 3(a))?

[98] This question, and the question posed in 3(b) as to whether the relevant pleaded markets are markets in New Zealand, relate to the specific facts. Issue 3(a) is included by the parties on the premise that issue 2 will be determined in favour of the Commission. It has not been so determined, but we are still required to answer it. We conclude later that there is a market for inbound air cargo services in New Zealand.[51] To assess the question of competition divorced from market considerations is a strained exercise as our consideration of this issue is inevitably

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[51] At [241]-[244].

influenced by that decision. However, we consider it, as the issues require, separately.

[99] The Commission accepted as part of its interpretation of s 27 via s 30 that it is appropriate to read into s 30 a requirement that the parties supply the services the subject of the arrangement in competition with each other in New Zealand, and argued that they plainly did so. The airlines accepted that they supply inbound air cargo services in competition with each other, but denied that they did so in New Zealand. They distinguished between supply and performance and argued that "supply" is the counterpart to "acquire" and that supply and acquisition must occur at the same time and at the same place. They argued that supply only happens at the place of origin and so competition is also only at the place of origin.

[100] It was agreed that airlines carrying inbound air cargo fly into the 200 mile zone, fly over New Zealand territory within that zone and land in a New Zealand airport. It was agreed that after the aircraft lands the airlines provide ground handling services to unload the aircraft, which are often subcontracted to third parties. The airlines also deal with inquiries about cargo, particularly in tracing delayed, lost or damaged shipments. The airlines are supplying services in New Zealand in relation to these acts within the 200 mile zone. The question is whether in doing so in New Zealand they are at that point in competition with each other.

[101] The words "services" and "supply" are defined in s 2 of the Act:

> **Services** *includes* any rights (including rights in relation to, and interests in, real or personal property), benefits, privileges, *or facilities that are or are to be provided*, granted, or conferred in trade; and, without limiting the generality of the foregoing, also includes the rights, benefits, privileges, or facilities that are or are to be provided, granted, or conferred under any of the following classes of contract:
>
> ...
>
> **Supply,—**
>
> (a) In relation to goods, includes supply (or resupply) by way of gift, sale, exchange, lease, hire, or hire purchase; and
>
> (b) *In relation to services, includes provide*, grant, or confer;—
>
> and **supply** as a noun, **supplied**, and **supplier** have corresponding meanings:

(Emphasis added.)

[102] Paragraph (b) of the definition of supply includes the word "provide" in relation to services. Services are defined as including any "rights ... benefits, privileges, or facilities that are or are to be provided, granted, or conferred in trade". When an airline flies air cargo into New Zealand it is providing a service being a facility to transport cargo. The provision of that service does not stop at the point of departure from the place of origin. There can be active ongoing work during the flight such as caring for livestock. This can continue into the New Zealand 200 mile zone and throughout the flight until the aircraft carrying the cargo has landed. The cargo is then unloaded in the New Zealand airport by the airline and its agent. There can be follow-up services provided by the airline if there have been any problems in the carriage and landing of the cargo.

[103] Therefore, in terms of s 30(1) services are being supplied by the airlines in New Zealand from the moment the aircraft enters the 200 mile zone. A bystander observing the activities of two different aircraft in landing in New Zealand and unloading, if one was doing it better than the other, would perceive the better performer as achieving a competitive advantage. Those actions, relating to the transport of air cargo in New Zealand, would be seen as occurring between parties in competition with each other. If the bystander were an importer, or its destination freight forwarder, it is possible that what was observed could influence later decision making.

[104] Indeed, the airlines' expert Professor Willig accepted, rightly in our view, that the airlines undertake rivalrous activities at destination. Another expert for the airlines, Professor Gilbert, did not go this far and strongly maintained the distinction between supply and competition at origin, with the competition ending with the purchase, and the operations thereafter just being the resulting service. This distinction, which Professor Gilbert was making with market definition in mind, cannot be permitted to obscure the undoubted fact of continuing rivalry through the flight over New Zealand territory, and on landing in New Zealand. As Professor Williams pointed out, the airlines could not compete in offering air cargo services into New Zealand unless they undertook activities in New Zealand.

[105] For the purposes of assessing competition, it is not necessary to assess the New Zealand demand for inbound air cargo services. Even if questions of the market and market analysis are put to one side, we conclude that the activities undertaken by the airlines when they are in the 200 mile zone in New Zealand constitute the supply by them of air cargo services in competition with each other in New Zealand.

[106] Therefore, we answer the question posed in issue 3(a) "yes".

Is there a "market in New Zealand" for inbound air cargo services (issue 3(b))?

[107] This is the question posed in issue 3(b). It is expressed in the statement of issues as "Are the relevant pleaded markets (i.e. the pleaded markets listed in the attached Schedule) markets in New Zealand?" No schedule has been produced. The parties agree that the issue can be more precisely expressed as follows: "Is there a market in New Zealand for air cargo services from an overseas country or region to New Zealand?"

[108] It is the Commission's case that there is a market in New Zealand for inbound air cargo services. The airlines contest this and say that the market for inbound air cargo services is at the point or region of origin

[109] The parties called five economists: Professor P Williams and Dr G Niels for the Commission and Professor R Willig, Professor R Gilbert and Dr C Veljanovski for the airlines. Their evidence focussed on this issue of whether there was a market in New Zealand for air cargo services.

Background

The air cargo services

[110] The pleaded market is the market for inbound air cargo services. Air cargo services are defined in each of the fourth amended statements of claim, and the definitions are reflected in the agreed statement of facts. Air cargo services are:

a) the physical transport of air cargo internationally from the origin airport to the destination airport, including any special handling requirements (eg refrigeration for live seafood, fruit, vegetables or flowers, or temperature control for pharmaceutical products, edible products or live animals);

b) ground handling services at origin and destination airports (ie loading and unloading of the aircraft), which are usually subcontracted to third parties, except where a home carrier provides its own ground handling services; and

c) generally dealing with inquiries about cargo (eg tracing delayed, lost or damaged shipments).

[111] While there is no doubt that the supply of air cargo services extends into New Zealand as the aircraft enter the 200 mile zone, the argument of the airlines was that the geographical dimensions of the supply of air cargo services are not conterminous with the geographical dimensions of the market for those services. The market for air cargo services, they submitted, is located at origin.

[112] In considering this issue it is necessary first to consider the purposes of market definition.

The purposes of market definition

[113] French J in *Singapore Airlines Ltd v Taprobane Tours WA Pty Ltd* said of the concept of market:[52]

> In competition law it has a descriptive and a purposive role. It involves fact finding together with evaluative and purposive selection. In any given application it describes a range of economic activities defined by reference to particular economic functions (e.g. manufacturing, wholesale or retail sales), the class or classes of products, be they goods or services, which are the subject of those activities and the geographic area within which those activities occur. In its statutory setting the market designation imposes on the activities which it encompasses limits set by the law for the protection of

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52 *Singapore Airlines Ltd v Taprobane Tours WA Pty Ltd* (1992) ATPR ¶41-159 (FCA) at 40,169–40,170.

> competition. It involves a choice of the relevant range of activity by reference to economic and commercial realities and the policy of the statute. To the extent that it must serve statutory policy, the identification will be evaluative and purposive as well as descriptive.

We respectfully adopt that analysis. It was cited with approval by this Court in *Power New Zealand Ltd v Mercury Energy Ltd*[53] and by the Court of Appeal in *Port Nelson Ltd v Commerce Commission.*[54]

[114] Richardson J in *Tru Tone Ltd v Festival Records Retail Marketing Ltd* observed:[55]

> These two interrelated elements of *competition* in *markets* are crucial considerations under both s 36 and s 27. Competition is defined as "workable or effective competition" (s 3(1)). The definition thus makes the important point *that a practical approach must be taken in assessing the state of competition in a particular case. This is reinforced in the companion definition of "market" in the same subsection as meaning "a market for goods or services within New Zealand that may be distinguished as a matter of fact and commercial common sense".* The identification of the relevant market is the first step towards the assessment of the current state of competition and of the nature and extent of any inhibition of competition. At each step it is a practical jury question of fact and degree.
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> (Emphasis added save for first line.)

[115] Professor Stephen Breyer[56] in his 1977 article "Five Questions About Australian Anti-Trust Law" suggested:[57]

> The word "market" may best be understood, not as denoting an objective feature of the world, but, rather, as designed to set in motion a *process* related to the effective application of the particular statutory provision. That process may lead to the drawing of different lines in different circumstances, depending upon the specific aim of the particular statutory provision at issue.

French J cited the above in *Singapore Airlines Ltd v Taprobane Tours WA Pty Ltd.*[58]

[116] The concept of market has a descriptive role as well as a role in assessing the current state of competition. In s 27 the word "market" is not used just as an analytical device to assist in determining whether there is competition, as it is in

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53 *Power New Zealand Ltd v Mercury Energy Ltd* [1996] 1 NZLR 686 (HC) at 705.
54 *Port Nelson Ltd v Commerce Commission* [1996] 3 NZLR 554 (CA) at 560.
55 *Tru Tone Ltd v Festival Records Retail Marketing Ltd* [1988] 2 NZLR 352 (CA) at 358.
56 Now an Associate Justice of the US Supreme Court.
57 Stephen Breyer "Five Questions About Australian Anti-Trust Law" (1977) 51 ALJ 28 at 34.
58 At 40,171.

merger and acquisitions cases. Section 27 requires a substantial lessening of competition "in a market", so proof of the market is part of proving an element of the s 27 prohibition. In s 30, that consequence is deemed, but we have found that the deeming does not extend to markets beyond New Zealand.

Judicial definitions of market

[117] A classic exposition of the concept of a market, frequently referred to in the New Zealand authorities and referred to by both the Commission and the airlines, is contained in the decision of the Australian Trade Practices Tribunal in *Re Queensland Co-operative Milling Association Ltd*:[59]

> We take the concept of a market to be basically a very simple idea. A market *is the area of close competition between firms* or, putting it a little differently, *the field of rivalry between them* (if there is no close competition there is of course a monopolistic market). Within the bounds of a market there is substitution — substitution between one product and another, and between one source of supply and another, in response to changing prices. So a market is the field of actual and potential transactions between buyers and sellers amongst whom there can be strong substitution, at least in the long run, if given a sufficient price incentive. Let us suppose that the price of one supplier goes up. Then on the demand side buyers may switch their patronage from this firm's product to another, or from this geographic source of supply to another. As well, on the supply side, sellers can adjust their production plans, substituting one product for another in their output mix, or substituting one geographic source of supply for another. Whether such substitution is feasible or likely depends ultimately on customer attitudes, technology, distance, and cost and price incentives.
>
> It is the possibilities of such substitution which set the limits upon a firm's ability to "give less and charge more". Accordingly, in determining the outer boundaries of the market we ask a quite simple but fundamental question: If the firm were to "give less and charge more" would there be, to put the matter colloquially, much of a reaction? And if so, from whom? In the language of economics the question is this: From which products and which activities could we expect a relatively high demand or supply response to price change, ie a relatively high cross-elasticity of demand or cross-elasticity of supply?
>
> (Emphasis added.)

[118] The term "market" was originally defined in s 3(1) of the Act as "a market for goods or services within New Zealand that may be distinguished as a matter of fact and commercial common sense." The Court of Appeal in *Tru Tone Ltd v Festival*

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[59] *Re Queensland Co-operative Milling Association Ltd* (1976) 8 ALR 481 (TPT) at 517.

Records Retail Marketing Ltd observed that definition of "market" appeared to be derived from the decision of the Commission in *Edmonds/Tucker*:[60]

> A market has been defined as a field of actual or potential transactions between buyers and sellers amongst whom there can be strong substitution, at least in the long run, if given a sufficient price incentive. In delineating the relevant market in any particular case there is a value judgment which must be made which involves, for example, *an assessment of pertinent market reality* such as technology, distance, cost and price incentives; *an assessment of the degree of substitutability* of products; an appreciation of the fact that *a market is dynamic* and that potential competition is relevant; and an evaluation of industry viewpoints in public tastes and attitudes. Particularly important in this process *is industry recognition (both by supplier and purchaser) and recognition by the consumer.* Ultimately the judgment as to the appropriate market – and its delineation by function, product and area – is a question of fact which must be made on the basis of commercial commonsense in the circumstances of each case.
>
> (Emphasis added.)

[119] The Court continued:[61]

> In focusing in the definition in s 3(1) on distinguishability as a matter of fact and commercial common sense the legislation has carefully avoided giving prominence to any particular criterion. *In particular, the test is not substitutability as such, although that will ordinarily be an important consideration; and, as is recognised in the passage cited, "market" is ordinarily regarded as a multi-dimensional concept with dimensions of product, functional level, space and time.*
>
> (Emphasis added.)

[120] The definition of "market" in s 3(1) was replaced with s 3(1A) in 1990. Section 3(1A) refers specifically to substitutability. The implications of the amendment were considered in *Telecom Corporation of New Zealand Ltd v Commerce Commission.*[62] The Court described the practical effect of the change as no more than to make the relevance of economic substitutability explicit.[63] It better aligned the statutory definition with that contained in s 4E of the ATPA. The Court noted the retention of the reference to "commercial common sense" (exclusive to the

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60 *Tru Tone Ltd v Festival Records Retail Marketing Ltd* at 358-359 citing *Edmonds/Tucker* (Decision No 84, 21 June 1984).

61 At 359.

62 *Telecom Corporation of New Zealand Ltd v Commerce Commission* (1991) 4 TCLR 473 (HC).

63 At 499.

New Zealand section) and observed it "affirms the traditional New Zealand emphasis upon the need for a commercially realistic factual base".[64] The Court continued:

> We see no source of conflict or tension in the juxtaposition of the two elements, substitutability and commercial common sense, in this formulation. ...
>
> In both the Australian and New Zealand jurisdictions it has been said, in effect, that a mechanical reliance upon substitution criteria in a contextual vacuum is not sufficient (*Tru Tone* at p 359; *Queensland Wire* at p 195) ....

[121] While s 3(1A) is often referred to as the "statutory definition of market"[65] it is expressed in terms that are exegetical rather than strictly definitional.[66] Section 4E of the ATPA (now s 4E of the Competition and Consumer Act 2010 (Cth)) was similarly expressed. It provided:

> For the purposes of this Act, unless the contrary intention appears, 'market' means a market in Australia and, when used in relation to any goods or services, includes a market for those goods or services and other goods or services that are substitutable for, or otherwise competitive with, the first mentioned goods or services.

The Court of Appeal observed in *Port Nelson Ltd v Commerce Commission* that the terms in which s 3(1A) are now expressed seem to reflect a legislative intention to harmonise the approach to market definition with that adopted in Australia and incorporated into their statute by s 4E of the ATPA.[67]

[122] The Court in *Port Nelson* recognised the amendment to the statutory definition followed its decision in *Tru Tone*, in which it resisted the wholesale import of the Australian approach[68] observing that s 3(1) carefully avoided giving prominence to any particular criterion.[69] It may be said of s 3(1A) that prominence is accorded to the criterion of substitutability. But we consider that the Court's earlier observation that the test is not substitutability as such remains correct, consistent with the terms in which s 3(1A) is expressed and the Australian

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64 Ibid.

65 See for example *Port Nelson Ltd v Commerce Commission* at 560.

66 A distinction borrowed from the decision of the full Court of the Federal Court of Australia in *Auskay International Manufacturing & Trade Pty Ltd v Qantas Airways Ltd* [2010] FCAFC 96, (2010) 188 FCR 351 at [36] in relation to the terms in which the substitutability requirement of s 4E of the ATPA had been expressed in the relevant authorities.

67 *Port Nelson Ltd v Commerce Commission* at 560.

68 Ibid.

69 *Tru Tone Ltd v Festival Records Retail Marketing Ltd* at 359.

approach.[70] Substitutability is not the sine qua non of market definition. It is of great importance but it is not of itself determinative.

[123] Thus, a reference to market includes the substitutable services, but the presence of substitutable services is not the sole driver of market definition. We do not think it correct that markets must always be limited to where say, in the case of a service, the substitutable services are geographically located.

[124] Without wishing to be definitive, while we see the heart of a market in economic terms as being the actual and prospective transactions between sellers and buyers, the broader ambit of a "market" looks to the rivalry between sellers for those who will buy their products, and encompasses the factors that directly shape and constrain that rivalry, as a matter of fact and commercial common sense. In particular, relevant participants in a market can include those whose responses to changes in market terms are material to the decisions sellers make regarding those terms; this embraces sellers of goods that are close substitutes (in supply or demand) and may also include participants in downstream transactions, to the extent that such transactions transmit significant competitive pressures upstream.[71] As was observed in *Taprobane*, delineating a market in any particular case is a focusing process and the Court must select what emerges as the clearest picture of the relevant competitive process in the light of commercial reality and the purposes of the law.[72]

[125] Markets can be seen as having various dimensions. The Commission defines relevant markets in terms of five dimensions as set out in its "Mergers and Acquisitions Guidelines" ("the New Zealand guidelines").[73] The four main dimensions are:

- the goods or services supplied and purchased (the product dimension);

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70 See for example *Auskay International Manufacturing & Trade Pty Ltd v Qantas Airways Ltd* at [36].

71 See *BHP/Koppers purchasing agreement* (1981) ATPR ¶41-203.

72 *Singapore Airlines ltd v Taprobane Tours WÄ Pty Ltd* (1992) ATPR ¶41-159 (FCA) at 40,172.

73 Commerce Commission "Mergers and Acquisitions Guidelines" (2004) at 14.

- the geographic area from which the goods or services are obtained, or within which the goods or services are supplied (the geographic dimension);

- the level in the production or distribution chain (the functional dimension); and

- the time frame or timing within which the market operates, where relevant (the temporal dimension).

The New Zealand guidelines include a fifth dimension: the different customer types within a market, where relevant (the customer dimension).[74]

[126] The US Department of Justice and the Federal Trade Commission's "Horizontal Merger Guidelines"[75] ("the US guidelines") and the Australian Competition and Consumer Commission's "Merger guidelines"[76] ("the Australian guidelines") focus most explicitly on the product and geographical dimensions, subsuming the other dimensions into these.[77]

[127] The focus of the expert economic evidence and submissions was on three particular dimensions: the product dimension, the geographic dimension and the functional dimension. These different dimensions are of importance as a focus on one or the other can lead to different conclusions about the scope of the market. The various guidelines set out detailed analyses of each of the dimensions, but that work has to be approached with caution as it has been drafted with mergers and acquisitions as its focus. As a consequence the reasoning and examples assume that mergers and acquisitions are the issue, rather than more general inquiries into alleged

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74 Ibid.

75 US Department of Justice and the Federal Trade Commission "Horizontal Merger Guidelines" (19 August 2010).

76 Australian Competition and Consumer Commission "Merger guidelines" (November 2008).

77 The Australian guidelines state at [4.8]: "The ACCC focuses on two key dimensions of substitution in characterising markets: the product dimension and the geographic dimension. In some cases, market definition requires close attention to the functional levels of the supply chain that are relevant to a merger or the particular timeframe over which substitution possibilities should be assessed. Generally, however, these functional and temporal considerations form part of the product and geographic dimension analysis."

anti-competitive conduct and whether there is an effect on competition in a specific market.

[128] It is easy in a consideration of this type for there to be undue focus on one particular market dimension. In this case there has been particular emphasis on the geographic dimension, to ascertain whether the market is in New Zealand. But the geographic boundaries of a market will tend to follow the product and functional dimensions, rather than lead them. It is the product dimension in particular in terms of goods or services supplied or purchased, that is of particular interest and will tend to dictate the geographic boundaries of the market.

Guidelines

[129] It is desirable to say a little about some of the key concepts that were discussed between the experts and resolve certain points of disagreement. All the experts referred on occasion to the New Zealand, US and Australian guidelines concerning such key concepts, which were often similar to each other.

[130] We have already referred to the New Zealand guidelines. Section 25 of the Act provides that in addition to the functions conferred on it by the Act the Commission shall make available or co-operate in making available information with respect to:

> (a) the carrying out of the functions and the exercise of the powers of the Commission under the Act; and
>
> (b) the purposes and provisions of the Act.

[131] The New Zealand guidelines record that valuable comments had been provided by a number of individuals and organisations on previous drafts.[78] We understand that there was commentary from the private sector and that has been the position in relation to the equivalent guidelines in the US and Australia. Development of these guidelines has been a gradual process.

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[78] At 1.

[132] There has been no suggestion that the guidelines have any legislative force. They are not binding on the Court. They are issued by the Commission and may not therefore be regarded as wholly objective. In the present case, it is necessary to keep in mind that they are drafted with mergers and acquisitions in mind, not price fixing. We acknowledge, however, that the guidelines represent the considered view of the Commission on which those interested have had the opportunity to comment. With these considerations in mind, they provide undoubted assistance to the Court.

[133] The product dimension and the geographic dimension of markets are discussed in the New Zealand guidelines. In relation to the product dimension it is said of demand side substitutability in a statement which reflects similar wording in the Australian and US guidelines:[79]

> Close substitute products on the demand-side are those between which at least a significant proportion of buyers would switch when given an incentive to do so by a small change in relative prices.

[134] It is said in relation to supply side substitutability:[80]

> Close substitute products on the supply-side are those between which suppliers can shift production easily and in the short-run, using largely unchanged production facilities and little or no additional investment (including investment that would be sunk), when they are given a profit incentive to do so by a small change in relative product prices.

[135] This view was echoed in Dr Niels' observation (cited with approval by Dr Velajnovski) that supply side substitution, to be relevant for market definition, "requires there to be no significant additional 'sunk' investments or costs of switching; it must be sufficiently swift; and it must be of a sufficient scale to constrain the hypothetical monopolist." Professors Willig and Gilbert did not accept that supply side substitutability was a relevant consideration at the market definition stage of the inquiry. They accepted that supply side substitution could be relevant at the second stage of the trial when competitive effects of the impugned conduct are considered. Their position was anchored firmly in the US guidelines which do not

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79 At [3.2].
80 Ibid.

recognise supply side substitutability as relevant for the purposes of market definition:[81]

> Market definition focuses solely on demand substitution factors, i.e., on customers' ability and willingness to substitute away from one product to another in response to a price increase or a corresponding non-price change such as a reduction in product quality or service.

[136] It is less clear that US case law supports the position of the US guidelines. The leading US text states that, "[t]wo products, *A* and *B*, are in the same relevant market if substitutability at the competitive price is very high as measured from either the demand side or the supply side".[82] The authors cite a number of US decisions in support of this position, including a decision of the US Court of Appeals for the Seventh Circuit in which Posner J stated for the Court: "the definition of a market depends on substitutability on the supply side as well as on the demand side."[83]

[137] The Professors both maintained their view that their position was correct even in the New Zealand context and in the context of this hearing. In contrast, both Professor Williams and Dr Niels considered that supply side substitution was a relevant concept for the purposes of this market definition exercise. The Act is neutral on the point. It refers to substitutability generally and makes no reference to either demand or supply side substitutability. We deal with these different positions now.

[138] Dawson and Toohey JJ in *Queensland Wire Industries Pty Ltd v Broken Hill Pty Co Ltd* were of the clear view supply side substitutability was relevant.[84] Toohey J stated:[85]

> [T]he definition of the relevant market requires a consideration of substitutability both on the demand and on the supply side.

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81 At [4].

82 Phillip E Areeda, Herbert Hovenkamp and John L Solow *Antitrust Law* (3rd ed, Aspen Publishers, Frederick, MD, 2007) vol IIB at [561].

83 *Blue Cross & Blue Shield United of Wisconsin v Marshfield Clinic* 65 F 3d 1406 (7th Cir 1995) at 1410.

84 *Queensland Wire Industries Pty Ltd v Broken Hill Pty Co Ltd* (1989) 167 CLR 177 at 199 per Dawson J and 210 per Toohey J.

85 At 210.

Miller J in *Commerce Commission v New Zealand Bus Ltd* proceeded on the basis supply side substitutability was relevant to geographic market definition in New Zealand.[86]

[139] We can see no reason to consider one type of substitution as relevant under s 3(1A) but not another. The only argument placed before us as to why supply side substitutability should not be considered at the market definition stage of a competition analysis is that of the US experts drawing on the US guidelines and, in principle, an article by Professor Jonathan Baker of American University.[87] Professor Baker referred to the US courts' long-standing emphasis on demand side substitutability in market definition, and then to the more recent incorporation by some US courts of supply side substitutability in market definition. He preferred an approach accounting for only demand side substitutability in the market definition stage of the competitive effects analysis, and accounting for supply side substitutability in one or more other steps of the analysis (such as the analysis of competitive effects).[88] This was "because it can be both difficult and confusing to ask one analytical step, market definition, to account for two economic forces, demand and supply substitution."[89] He then provided a cautionary example of the pitfalls into which an unwary court or regulator might fall when considering supply side substitution in the context of market definition. While we accept this caution, we do not find it a sufficiently compelling reason to read a limitation into the words of the Act, or to put to one side Australian and New Zealand jurisprudence and the explicit approach of the New Zealand guidelines. In the current two-stage inquiry it is an important factor. A purposive approach to market definition militates particularly strongly, in these circumstances, in favour of considering supply side substitution as an aspect of market definition. Accordingly, both types of substitution will be considered.

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86 *Commerce Commission v New Zealand Bus Ltd* (2006) 11 TCLR 679 (HC) at [126].
87 Jonathan Baker "Market Definition: An Analytical Overview" (2007) 74 ALJ 129.
88 At 138.
89 At 134.

[140] The geographic dimension of a market is also discussed in the New Zealand guidelines, in a statement that was relied on by the airlines as of assistance to their case:[90]

> The Commission defines the geographic dimension of a market to include all of the relevant, spatially dispersed sources of supply to which buyers would turn should the prices of local sources of supply be raised. Generally, the higher the value of the product to be purchased, in absolute terms or relative to total buyer expenditure, the more likely that buyers will travel and shop around for the best buy, and the wider the likely geographic extent of the market.

[141] The airlines assert that this statement is precisely correct and limits the geographic markets to the place of supply.

[142] The experts referred to the SSNIP test when making their assessments. The SSNIP test is a concept developed by economists to assist in measuring the market by assessing the effects of a hypothetical monopolistic small but significant non-transitory price increase. Again we find it convenient to quote the New Zealand guidelines:[91]

> For the purpose of competition analysis, the internationally accepted approach is to assume the relevant market is the smaller space within which a hypothetical, profit-maximising, sole supplier of a good or service, not constrained by the threat of entry, would be able to impose at least a small yet significant and non-transitory increase in price, assuming all other terms of sale remain constant (the SSNIP test). Buyer and supplier reactions to a given price increase, when all other prices are held constant, are tested in a hypothetical exercise, which assumes the creation of a total monopoly. The smallest space in which such market power may be exercised is defined in terms of the five dimensions of a market.

[143] The purpose of the SSNIP test is a means of identifying the constraints faced by suppliers in a market on their ability to act in a non-competitive fashion.

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90 At [3.3].
91 At [3.1].

Our analysis

The economists

[144] We have been assisted by the evidence of all five economists. The experts for the airlines focussed on the place of supply and rivalry for that supply. This led them to the view that there was a clear geographic cut off between the markets at place of origin and any New Zealand airport. Persuasive analogies were given. It was argued that in the case of a London resident wishing to buy property in Auckland, the market would have to be in New Zealand, even though the purchaser and other competing purchasers might be outside of New Zealand. And in the case of a New Zealand tourist operator who offers overseas tours out of New Zealand, the fact that the service was performed outside of New Zealand could not be seen as an indication that there was a market outside of New Zealand. The field of rivalry was still in New Zealand.

[145] On the basis of such examples, the argument that the market could not extend beyond the place of origin had persuasive force. The way they put it, the market was defined at the moment when the competition for the particular service concluded. In the case of air cargo services that would be when the waybill was entered into between the origin freight forwarder and the airline. While Professor Willig accepted that there was rivalrous behaviour when the airlines landed and unloaded cargo, he was not prepared to accept that this should be seen as extending the geographic scope of the market. The rivalry for that service had already taken place and any ongoing rivalry could be seen as in the same category of general rivalry as advertising or any other type of competitive promotion. The market itself was located elsewhere from where rivalrous behaviour took place.

[146] The Commission's experts did not accept this focus that the market was where the freight forwarder and airline transaction was entered into and effected. They considered that the place of supply of an air cargo service was across the entire origin to destination route of the service. Dr Niels in particular argued that there was

no meaningful distinction between a test for the geographic dimension of an air cargo services market and its product dimension, as discussed below.[92]

[147] We accept the conceptual distinction made by the airlines' experts. Further, we do not accept the Commission's argument that the fact that the service ultimately terminates in New Zealand means that the market must extend to New Zealand. The fact that the geographic reach of the service for which the parties competed might extend to a particular jurisdiction is not conclusive. If it were conclusive it would mean that in the case of the tour operator taking customers to overseas destinations, the market necessarily extended to those overseas destinations. As a matter of commonsense it cannot be right, if the relevant transaction is seen as between the tourist and the tour operator, that the market extends to all the destinations visited. Indeed, this assumption that the geographic dimension of the market had to be measured solely by where "a customer and supplier physically commit to and effectuate their physical transaction", in Professor Willig's words, or where "the price of a good or service is determined", in Dr Veljanovski's words, was at the heart of much of the evidence of the airlines' experts. It meant that the market had to be located at the place of origin of any particular air cargo service.

Factual considerations relating to the market

[148] Demand for air cargo services is a direct function of importer or exporter demand. With the rare exception of pre-purchased "block space", freight forwarders do not commit to air cargo space unless and until exporters and importers book that space. As the Commission submitted, freight forwarders do not hold "inventory" and this distinguishes freight forwarders from ordinary wholesalers and retailers, who will generally purchase goods on their own behalf, and hold that inventory on their own books at their own risk, before reselling the goods. As the airlines' expert Dr Veljanovski accepted in his opening statement "the ultimate demand for air cargo services in, say, Hong Kong, [is] from importers in New Zealand".

[149] New Zealand customers are significantly affected by the terms of the air cargo services contracts between freight forwarders and airlines. Unsurprisingly the

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92 At [172].

statement of agreed facts records the price a freight forwarder pays for air cargo services is a material input into the price the exporter or importer pays the freight forwarder for its services. The percentage varies by route and the size of the shipment but can constitute anywhere between 30 and 95 per cent of the total price charged customers by freight forwarders. Similarly, freight costs will frequently constitute a significant part of the price for the underlying good. This appears to be particularly the case for perishable shipments. One importer of flowers recorded that the total freight cost comprised close to 60 per cent of the value of the product.

[150] Importers, although they do not negotiate directly with the airlines, can determine the choice of airline if they wish to do so. Freight forwarder Toll Global Forwarding is recorded in the schedules as observing that no matter what it advises the importer, the choice of airline is the importer's choice. This is what one would expect given that freight forwarders act as the importers' agents. The importers ultimately pay the bill so it can be expected that they will be in a position to dictate the important decisions. However, only on occasion do importers and exporters specify a preferred airline.

[151] On occasion exporters directly negotiate with airlines. Typically these negotiations also involve a freight forwarder and are known as tripartite agreements. Tripartite agreements constitute an appreciable proportion of Air New Zealand's outbound cargo revenue.

[152] These factual considerations become important in considering the functional dimension of the market and in applying the SSNIP test.

Demand for the service – the product market

[153] This issue of markets extending beyond immediate supply was considered by French J in *Singapore Airlines Ltd v Taprobane Tours WA Pty Ltd.*[93] That case concerned a wholesale travel agent based in Western Australia which sold holiday tour packages to retail travel agents around Australia. In particular, it sold tours to the Maldives, the air component of which was provided from all States of Australia

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[93] *Singapore Airlines Ltd v Taprobane Tours WA Pty Ltd* (1992) ATPR ¶41-159 (FCA).

by Singapore Airlines. In 1987 Singapore Airlines, which had now begun to market Maldives tours itself, decided to restrict the wholesaling of its Maldive services by Taprobane to those departing from Western Australia and also charged Taprobane more than it charged other wholesalers for the supply of its services. Taprobane claimed that this was an abuse of market power under s 46 of the ATPA and succeeded at first instance. The case concerned the product dimension rather than the geographic dimension of the market.[94] The trial Judge considered that the relevant market was the market for the supply of airline services to persons engaged in providing wholesale tours to the Maldives.

[154] A full Court of the Federal Court of Australia allowed the appeal. While at the functional level it was possible to limit the market to the supply of services by airlines to wholesalers, such a limitation was seen as unduly restrictive. The integration of wholesale and retail activities within Singapore Airlines and other agencies suggested that the appropriate functional level comprehended the supply of airlines services to wholesalers, packaged tours by wholesalers to retailers and packaged tours by retailers to consumers. The Court considered that it was difficult and, if not necessary, probably inappropriate to essay a precise market definition. The trial Judge had failed to address the extent to which Singapore Airlines' ability to affect the price at the wholesale and retail level would be constrained by the ability of wholesalers and their customers to turn to other destinations. It was considered that the relevant substitutions were not between airlines but between destinations.

[155] In his broader discussion of the concept of the market, French J observed:[95]

> The possible markets in any given case might encompass a continuum of product and geographic ranges, the selection of the outer limits of which would depend, in a s.46 context, on how much market power is thought to be significant ...

In this case the selection of the outer limits will depend on ss 27 and 30.

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94 It was noted at 40,176 that there was no real dispute the geographic market in issue was Australia-wide.

95 At 40,170.

[156] His Honour later stated:[96]

> The extent to which competition between derivatives of different products (downstream competition) may affect competition between primary products is a factor in market definition. In BHP Koppers purchasing agreement (1981) ATPR ¶40-203, the tribunal rejected the proposition that separate markets could be defined for the supply and acquisition of coal tar in Australia (primary market) and for the supply and acquisition of each of its derivative products and their substitutes (secondary market). The relevant product market was seen as coal tar and products derived therefrom together with certain petroleum derivatives. The evidence was sufficient to justify the incorporation of secondary products and related economic substitutes although not in that case tertiary products. There was no evidence in the latter category of competitive pressures transmitted upstream.

[157] Earlier in his judgment, French J had commented:[97]

> [The market designation] involves a choice of the relevant range of activity by reference to economic and commercial realities and the policy of the statute. To the extent that it must serve statutory policy, the identification will be evaluative and purposive as well as descriptive.

[158] He also observed:[98]

> [Market definition] is a focussing process and the Court must select what emerges as the clearest picture of the relative competitive process in the light of the commercial reality and the purpose of the law. There is a feedback between any proposed market and the structure and power distribution which that proposal throws up.

[159] We consider, with respect, that this approach to market definition (which was in the context of the product, rather than the geographic market) is correct. In certain situations a product market can extend downstream from the immediate supply. The boundaries of such an extension are not limitless but rather are determined by the extent to which competitive pressures from customers transmit upstream. In our view, there is no principle of economic analysis that always requires a tightly defined functional market. A great deal will hinge on both the exact relationship between adjacent functional levels and the nature of the competition inquiry at hand. Support for this approach is to be found in the agreement of the airlines' experts that a SSNIP test properly conducted in an upstream market would allow for its price effects to flow through to sectors downstream.

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96 At 40,172.
97 At 40,170.
98 At 40,172–40,173.

[160] It is also noteworthy that the US guidelines state that the relevant authorities, in analysing mergers, "examine effects on either or both of the direct customers and the final consumers".[99] And under the general heading "Geographic Market Definition" they note that "the influence of downstream competition faced by customers in their output markets" will be a factor in "considering likely reactions of customers to price increases for the relevant product(s) imposed in a candidate geographic market".[100]

[161] We are mindful of Professor Breyer's observation that market definition may lead to the drawing of different boundaries in different circumstances depending on the purpose of the statutory provision in question.[101] This case concerns allegations of price fixing, a per se offence under the Act. While there are many dimensions in which rival firms compete, the most fundamental is in pricing and the principal means by which price fixing imposes aggregate economic harm is through its impacts on outputs.[102] In a case alleging price fixing, then, it is important that market definition should be conducted with an eye to capturing the point at which quantities of goods or services transacted will be affected by a price increase. In particular, if a price fix occurs in a market for a good that is purchased by middlemen who simply turn around and sell it on to consumers, then the anti-competitive effect of the price fix really occurs in the next market downstream, to the extent that the price increase faced by the middlemen is simply passed through to their customers. Of course, it can be argued that all middlemen provide a service that reduces the transaction costs incurred by a consumer in buying a good, otherwise they could not exist. But it is reasonable to ask, to what extent a particular intermediary transforms and adds value to the good or service that they buy upstream and sell downstream, and who in the end controls demand?

[162] Professor Breyer wrote:[103]

> The idea behind market definition can be expressed by the notion of drawing a circle around a set of sales. Within the circle one should find sales with the

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99 At [1].
100 At [4.2.1].
101 See [115] above.
102 An exposition of this proposition can be found in Robert H Bork "The Rule of Reason and the Per Se Concept: Price Fixing and Market Division" (1966) 75 YLJ 373 at 391–394.
103 Stephen Breyer, "Five Questions About Australian Anti-Trust Law" (1977) 51 ALJ 28 at 34.

> following characteristic: were *all* those sales in the hands of a single seller, that seller would have the power to raise price significantly above the competitive level. *Those sales outside the circle are those sales that would not prevent the seller controlling all the sales inside from raising his price.* To repeat this point in different words: those sales inside the circle are sales which, so long as they are in the hands of *different* sellers, will act as constraints on the power of each to raise his price above the competitive level. Those sales *outside* the circle are sales which *do not* and *would not* act as any such constraint.
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> (Emphasis in original).

[163] This re-emphasises the point of market definition as being to identify the competitive restraints on firms in an assessment of the market boundaries. It is the reaction of consumers to price changes of products or services that imposes constraints on price changes upstream, and the location of those consumers can be relevant in market definition.

The role of the freight forwarders

[164] The airlines are indirectly providing services to importers. This is confirmed by the fact that New Zealand based consignees (the destination freight forwarders who are the agents of the importers) are parties to the waybills. Through agents, their right is to have the cargo delivered, and this is fundamental to the contract of carriage. The service has been provided to persons at the place of destination even when the airline deals directly only with the agreed freight forwarder.

[165] While freight forwarders have a greater function than that of an inactive middleman, and carry out a number of useful services for the destination freight forwarders and thereby the ultimate importer, their role is still that of an agent acting at the bidding of another party. This is confirmed by the standard contracts which generally provide that the freight forwarder is the "agent" of its customer.[104] For example, the standard trading conditions of freight forwarder DHL Global Forwarding (NZ) Ltd provide:

> The company carries on business as a customs, forwarding, transport, and shipping agent and enters into all contracts as agent only for the Client. It is not a common carrier and will accept no liability as such.

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[104] See [13] above.

[166] While not every freight forwarder includes such a provision, we regard such agency clauses as indicative of the nature of the relationship. We accept the Commission's submission that the agency arrangement that frequently exists between origin or destination freight forwarders and their customers makes it inappropriate to interpose a rigid functional distinction between airlines at origin and customers in New Zealand. The fact that the parties are in an agency relationship is relevant in analysing the vertical integration and functional market definition issues.

[167] This is a point illustrated by the observation of the Court of Appeal of England and Wales in *Western Digital Corp v British Airways plc* that the terms "consignor" and "consignee" (to whom right of suit was restricted in the Warsaw Convention) were apt to include the principals of persons named as such in a waybill, whether disclosed or not.[105] In that case the undisclosed principal of the freight forwarder named in the waybill as the consignor was allowed to sue the carrying airline for loss of its cargo. The Court observed, referring to observations to a similar effect by this Court in *Tasman Pulp & Paper Co Ltd v Brambles JB O'Loghlen Ltd*,[106] that strong considerations of commercial common sense militated in favour of an interpretation which recognised and gave effect to the underlying contractual structure.[107] Specific reference was made to forwarding agents as nominal consignees.

[168] We also accept the submission of the Commission that while freight forwarders at a particular port of origin will be limited to supply options available in their centre, the cargo owners have a wider choice of substitutes. They can select which origin freight forwarder, and indeed which port of origin, they prefer.

[169] The fact that there are now vertically integrated firms known as integrators (albeit not yet operating in New Zealand) supports an approach that the market is not hidebound by contractual dimensions. These firms combine the operations of traditional freight forwarders and airlines. The global presence of integrators that combine airline and freight forwarding functions indicates the artificiality of creating an impermeable market seal around the origin freight forwarders and airlines.

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105 *Western Digital Corp v British Airways plc* [2001] QB 733 (CA) at 765–768.
106 *Tasman Pulp & Paper Co Ltd v Brambles JB O'Loghlen Ltd* [1981] 2 NZLR 225 (HC) at 235.
107 At 766.

[170] The product market can be seen from a wider perspective than the immediate contract between the airline and the freight forwarder. That limited perspective does not capture the reality of the market, which is that airlines provide a service to exporters and importers, through their agents the freight forwarders. We are satisfied that the importers and exporters have a significant input into market behaviour, and can indirectly dictate supply.

Application of the SSNIP test

[171] The airlines' experts' position was that the specification of an origin and destination for a particular air cargo service is to be considered as part of the product dimension of the service. That is, a person could shop in Singapore, for example, for air cargo services to a number of destinations such as, for example, Auckland, Brisbane and Copenhagen, but these represent different "varieties" of the basic product being sold, just as one might choose between a sedan, a station wagon or a coupe when shopping for an automobile. The geographic aspect of the service in this example, say the airlines' experts, is that it is sold in Singapore; the destination is just the variety of air cargo service that is offered. A SSNIP test, then, would properly be conducted around the location of supply: Singapore, in this illustration.

[172] Dr Niels, on the other hand, argued that the whole route from place of origin to place of destination is the focal product for this inquiry so the proper geographic market SSNIP would be conducted around that entire route, considering substitution issues at both origin and destination. His argument was that the SSNIP test for the geographic market and that for the product market collapse, in this case, to the same thing. Indeed, he stated explicitly that only a single SSNIP test was needed and:

> ... at that stage there is no point talking about the product market and the geographic market anymore – both have been taken into account simultaneously. ... [I]n my view, this simply reflects the inherent nature of transport markets where product and geography are intrinsically linked.

[173] The experts canvassed at some length whether or not the geographic definition of a market should include the locations of consumers, as well as those of relevant producers. The US guidelines are explicit that the relevant authorities "normally define geographic markets based on the locations of suppliers" noting that

"[s]ome customers who buy from these firms may be located outside the boundaries of the geographic market".[108] Similarly, the New Zealand guidelines define the geographic dimension of a market "to include all of the relevant, spatially dispersed sources of supply to which buyers would turn should the prices of local sources of supply be raised".[109]

[174] Dr Veljanovski for the airlines made the point that freight forwarders in the port of origin confronted with a SSNIP cannot purchase air cargo services in New Zealand as a response to that SSNIP. So he says the sources of supply are location specific and the geographic market matches that. Professors Gilbert and Willig gave similar evidence. Professor Gilbert put it on the basis that the relevant geographic market is the collection of airports where the products are supplied.

[175] While the application of the SSNIP test is a useful exercise, we consider that the application of the test is not particularly well suited to defining this geographic market, given, as a matter of common sense, the fact that part of the demand, and part of the service, takes place far from the point of origin of the supply. We bear in mind that the SSNIP test is not a statutory formula, but an aid used by economists in assessing market dimensions.

[176] It is undoubtedly correct that freight forwarders in Hong Kong supplying to New Zealand cannot turn to substitute air cargo services offered from New Zealand in the event of such a SSNIP. However, the importers and exporters, for whom the freight forwarders are only agents, can respond. They can respond by changing the place of origin or destination for their products or the mode of shipping, or just stop exporting or importing the goods. Dr Niels put it this way in his oral evidence:

> For example, a 10% increase by that hypothetical monopolist on the OD route, if that increase is passed on in full by the freight forwarder to the importer, that may not happen but let's say it does, then that translates into a 6-9% increase to the importer. That is still a small but significant price increase and hence, the reaction by the importer to that price increase matters, it matters for market definition, it matters when it comes to analysing substitutability.

[177] Earlier he had said:

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[108] At [4.2] and [4.2.1].
[109] At [3.3].

> ... certainly I'm not saying, that in every competition case you have to look at indirect customers or final customers always but nor is it correct to say that you always only have to look at the direct customers. It all depends - it's all a matter of degree, like so many things in economics. It all depends on the degree of closeness or remoteness between the supplier and the direct or indirect customer.

[178] In his brief of evidence he put it this way:

> Freight forwarders at the O airports do not purchase air cargo services for their own use – their demand is derived from that of the importers (often via freight forwarders at the D airports) and exporters. For inbound cargo, the exporters are located overseas, but the importers are located 'in New Zealand'.

[179] We accept the airlines' position that the appropriate SSNIP for the geographic dimension of the air cargo services market is a conceptually distinct test from that for the product dimension of the market. However, as discussed above, the economic logic behind the use of a SSNIP test is to identify the competitive constraints that act upon a firm or firms. Consequently, it is not clear that a consideration of the effects of a SSNIP should be limited to the geographic boundaries within which immediate substitutes might exist. If there were a small but significant price increase in, say, Singapore of say 10 per cent, that SSNIP may not have any particular effect on the origin freight forwarder, who may just add that price increase onto its invoice. Ultimately the party who bears the direct impact of the SSNIP is the party who pays for the service, either the exporter or the importer. If a SSNIP is to have some impact on the demand for the air cargo service in question and thus impose some constraint on its perpetrator, that impact will be come from the initiator of the demand for the service, the importer or exporter, and not the freight forwarder who gives expression to that demand. Given that freight costs, while varying, are a considerable portion of the final price, the impact on an overseas exporter or a New Zealand importer who is ultimately paying for the air service is significant. A 10 per cent SSNIP could well end up equating to a five per cent or more increase in the price or cost of the goods to the exporter or importer. That increase might well provoke a reaction from the exporter or importer who would have a number of options to consider, including not exporting or importing the product any more, exporting or importing the product from or to a different place serviced by different airlines, or asking the freight forwarder to lower its price.

[180] Therefore, we prefer the evidence of the Commission's experts. We are satisfied that a hypothetical monopolist in considering the consequences of a SSNIP would look beyond the port of origin to where the price impact will affect the demand for its air cargo service. That place is where the ultimate person who pays for the goods resides, either the place of the exporter or the place of the importer. The focus will not be exclusively on the freight forwarder as the freight forwarder ultimately does not pay.

[181] The airlines argue that to include downstream effects in such a way is unprincipled and that there would be no clear cut off point. They say that, on this sort of approach, impacts even further down the line, say to ultimate consumers of the imported goods, could lead to further extensions of the market. The experts for the Commission suggest that there are clear criteria for determining how far downstream such an exercise should proceed. Professor Williams spoke of "things that are of material influence" and Dr Niels of original demand having a "sufficiently close and significant impact". The point at which a SSNIP ceases to have significant impact will as a matter of practice be discernible. That point will be the boundary of the market.

[182] This means that we do not accept the airlines' argument that the geographic location of the market is where supplier/customer transactions for the airline services are physically initiated and agreed. It is not limited to the "factory gate" or in this case the "cargo door" (to use Professor Willig's expressions). It extends beyond the cargo door to the geographic location of the persons whose demands will drive the place and terms of the end contract of carriage. The exporters and importers in those circumstances do not just constitute general upstream or downstream demand. They are the parties whose decisions as to what they want, and how and when they need it, directly drive the service provided by the airlines, with the freight forwarders as intermediary parties.

The geographic market

[183] We have been focusing on the product market. We are satisfied that the wider perspective of the product market can also be adopted in assessing the geographic

market. To limit the market to the geographic market available to freight forwarders at origin is unduly restrictive and ignores certain practical realities. It ignores the reality that those who ultimately dictate the terms of the transaction, who are often importers in New Zealand, ultimately pay for the services, and have their own options should they be subjected to unacceptable competitive practices by the airlines, which they can exercise to the detriment of the airlines.

[184] The Australian Competition Tribunal in *Re Fortescue Metals Group Ltd* regarded the location of customers as relevant in defining the geographic market for rail haulage services.[110] Fortescue Metals Group Ltd sought access under the access regime in Part IIIA of the ATPA to rail lines its competitors employed to haul iron ore from mines to port. The Tribunal stated in relation to the geographic market:[111]

> The geographic market for haulage is best described as a corridor around each line ... and a circumference around the access point of the line .... How wide the corridor is (and what length the radius should be) depends on the distance a miner can viably build a spur or truck ore to the line.

[185] That is, while the starting point for the geographic market definition exercise is the location of the points of supply, the boundaries of the geographic market are drawn to include customer locations. Similarly, it was held in the substantive decision in *Commerce Commission v Ophthalmological Society of NZ Inc* that:[112]

> The geographical boundaries of the market [for cataract surgery], although apt to be blurred, are the Southland area, being those patients who are geographically linked to Invercargill, and to Southland Hospital. They are those patients who choose not to travel to Dunedin or elsewhere ....

So it was the locations of customers (patients) that determined the geographic boundaries of the market for cataract surgery, not the locations of supply.

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110 *Re Fortescue Metals Group Ltd* [2010] ACOMPT 2, (2010) 271 ALR 256 at [1022].

111 At [1144].

112 *Commerce Commission v Ophthalmological Society of NZ Inc* (2004) 10 TCLR 994 (HC) at [192](d).

[186] This is not to say that customers' locations will always fall within the geographic boundaries of a market.[113] But we have heard no compelling reason to exclude the locations of the customers of the airlines in defining the geographic boundaries of the markets in the case before us. If those customers were simply origin freight forwarders, as the airlines suggest, then this approach to defining the geographic dimension of the market would be of little consequence, expanding the market from a particular airport or airports to include the locations of freight forwarders proximate to those airports. It would not expand the markets for inbound air cargo services to include New Zealand. However, if the appropriate functional markets in this case included downstream customers of freight forwarders then the market does extend to New Zealand.

[187] The airlines say in response that despite these contractual and practical matters, the rivalry for the services still takes place at the port of origin. The fact that there are influential parties downstream who can be affected by a SSNIP is irrelevant. They say that the geographic dimension of a market is assessed by reference to the sources of supply that customers find substitutable. There are no sources of supply that are substitutable outside the port of origin and its environs, and certainly not in New Zealand. The airlines rely on the portion of the New Zealand guidelines already quoted which defines the geographic dimension of a market to include all of the relevant, spatially dispersed sources of supply to which buyers would turn should the prices of local source of supply be raised.[114] The airlines say that those sources of supply are all in the port of origin and its environs.

[188] We do not accept that the geographic boundaries of the available substitutable products must perforce determine the boundaries of the market for s 27 purposes. We have observed that s 3(1A) does not require the concept of substitutability to be prescribed in that restrictive way. It is a factor, an important factor, to be considered

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113 This was demonstrated by an insightful and useful example given by Professor Willig. This concerned two firms located in cities A and B with consumers located in A, B and another city C. Consumers in C must travel to A or B to purchase the good in question and Professor Willig argued that their ability to switch their custom from one location to another could impose a discipline on the firms in A and B. It could be that the relevant geographic market would be cities A and B combined where, in the absence of C's consumers, each city A and B would constitute a local market by itself. In this way the location of consumers in C is relevant to geographic market definition but does not serve to bring city C into the geographic market of the two firms, in Professor Willig's view, in this example.

114 At [3.3].

but not the determinative factor. As the Court of Appeal in *Port Nelson Ltd v Commerce Commission* observed:[115]

> Generally a market will be identified by reference to the activities of those engaged in commerce, the structures underlying their activities and the perceived susceptibility to change in the medium-term future.[116]

[189] We prefer such a general approach to the definition of market, to prescriptive definitions strictly limiting a market to the outer geographic boundary of the immediately substitutable products. We note the powerful example given by Dr Veljanovski, already referred to, of the resident in London looking to buy property in Auckland. The market he says is in Auckland and the geographic location of the buyer is irrelevant. On the example given that may well be so. But here there are significant further facts that are relevant. It is a feature of the air cargo services market that the actual importers of inbound services will be in New Zealand. It is not a situation as applied in Dr Veljanovski's example where the originator of the demand could be anywhere in the world. The demand will often emanate from the New Zealand importer. Further, a New Zealand consignee, the destination freight forwarder, is always a party to the relevant contract for the transport of the air cargo, the waybill.

[190] Another example given by the airlines was of an Aucklander renting a car in Queenstown to drive to Nelson. The point made was that the market would be confined to Queenstown. However, the correct analogy would be of persons in Nelson renting cars, through Nelson agents who had contacts in Queenstown, to be brought from Queenstown to Nelson for their use. In such a situation it would be artificial to limit the market to Queenstown. In the air cargo industry, if the activities of those engaged in the air freighting of the cargo are examined from the perspective of the realities of demand and supply, a significant part of the demand is in New Zealand. New Zealand reactions will have effects on supply. There are elements that are crucial to the economic function of the supply of air cargo services

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115 *Port Nelson Ltd v Commerce Commission* [1996] 3 NZLR 554 (CA) at 560.

116 In *Singapore Airlines Ltd v Taprobane Tours WA Pty Ltd* (1992) ATPR ¶41-159 (FCA) at 40,169–40,170 French J observed that the concept of market incorporated the geographic area within which the economic activities defined by reference to particular economic functions occurred.

that are in New Zealand. As a matter of fact and common sense, we do not think they can be ignored in the process of market definition.

[191] We have concluded that the functional dimension of the market in this case is appropriately extended to encompass New Zealand importers who initiate these transactions (where that is the case). We also conclude that the geographic dimension of the market must encompass New Zealand by virtue of two considerations. First, as already noted and expanded on below, a significant degree of activity is undertaken by airlines in the supply of air cargo services in New Zealand. Second, if airline A transacts with origin freight forwarder B who is contracted by New Zealand-based freight forwarder C on behalf of New Zealand importer D, then D deals with A through the medium of C, and what we consider to be the appropriate functional market encompasses all of these levels of transaction: A with B, B with C and C with D. Thus a SSNIP test for the market's location centred on the sources of supply (as the airlines' experts suggested) would include the supply of the service throughout this chain of transactions. That includes the origin of a service (the AB transaction) as well as the New Zealand location of any originating freight forwarder (the CD transaction.).

Supply of the service

[192] The fact already referred to that part of the service is provided in New Zealand is a further factor which leads us to doubt the airlines' submission that the market must be limited to the place of supply. This fact follows from the ultimate demand for the service often being from importers in New Zealand. The service provided is still being rendered when the aircraft enters the New Zealand 200 mile zone, lands and unloads. It is part of the supply of the service that is the subject of the s 27 via s 30 cause of action. While this factor is not determinative it is an important consideration nonetheless.

[193] Professor Willig asserted that the locations of rivalrous activities by suppliers at destinations of transport routes or elsewhere were not indicative of competition in the relevant geographic market. That is true if the market is limited to the place of supply, and it is assumed that all rivalrous activity stops the moment a contract is

entered into. However, while that might be a sensible commercial conclusion in certain circumstances, we do not accept that on the facts there is any economic or legal imperative which requires the market to be cut off at that point. The rivalrous market behaviour which in relation to that particular service begins with the negotiations, develops into the execution of the waybill, continues through the supply phase as the flight takes place, and ends with the landing, the unloading and any follow-up. In its latter stages there is no longer competition for that particular service as it has been contractually allocated, but competition continues between competitors for future services and general reputation. There is nothing that requires the Court to ignore everything that happens following the completion of the contract and we do not accept that we should take that narrow approach. Such an approach is not supported by the definitions of supply and services in the Act, which are broad, and which extend the definition of supply to delivery. And for the reasons given, such an approach does not seem to us in accord with the facts and common sense.

[194] Indeed, we see the fact that part of the service takes place in New Zealand as an important facet of the reality that part of the market is in New Zealand. Demand emanates from New Zealand because the service is the carriage by air of cargo to New Zealand. While the airlines contract with origin freight forwarders overseas, we have earlier observed that they compete in New Zealand for the goodwill that will lead ultimately to custom.[117]

Bi-directional market

[195] The question remains whether supply side substitution is of assistance in assessing the relevant market in this case. The most obvious form such substitution might take, the switching to a route in response to a price incentive to do so by airlines not currently serving that route, is likely to be of no practical significance in this case, for two reasons. First, air cargo services to New Zealand are only a spandrel in the provision of passenger services (so that a SSNIP in cargo prices in a route will not induce additional supply on that route). Second, the acknowledged practical difficulties of initiating new routes in international air travel prevent any

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[117] See [98]–[106].

speedy or significant provision of competing air cargo services in response to a price incentive to do so.

[196] But Dr Niels argued strongly that supply side substitution of a rather different form was relevant and suggested a bilateral market both to and from New Zealand for air cargo services. The key to his argument was that if an airline has idle capacity in one direction (say, DO) as a consequence of concentrating on flying from another direction (OD), then, in response to a price increase for cargo on the DO route it would start to use that idle capacity. He described that as supply side substitution. We do not agree. This is because the flight OD and idle capacity on the route DO are not close substitutes in supply. Indeed, they are not substitutes at all. The empty space on the return flight has no relevance to the origin freight forwarder, or to any exporter or importer seeking to transport goods to New Zealand. A properly conducted SSNIP test to define the DO market would include that idle capacity as a part of the market in the first place: it cannot be considered as substitution into the market by an "external" producer in response to the price incentive to do so provided by a SSNIP.

[197] Professor Williams argued that the undoubted complementarity between inbound and outbound markets also suggested a bi-directional market. While we accept that such a complementarity exists, in the sense that all inbound flights must then fly out, it is common ground, as noted, that the primary driver for airline services is passenger demand and not air cargo demand. Therefore, a small (but significant) price increase for cargo in one direction would likely not lead to a reduced supply of cargo services in the other direction. The same flights are likely to continue whatever is happening in the air cargo services market, albeit with more idle cargo capacity in one direction.

[198] We therefore accept the airlines' submission that there was no "two-way" market.

Authority

[199] We have not been referred to any Australian case that has considered the arguments that have arisen in this hearing on a final basis. The cases have dealt with interlocutory issues, penalties, or judicial review of procedural steps, not requiring substantive decisions on the issues. They are nonetheless of some assistance on two issues. The first, and our present focus, is on the location of the market. The second, to which we return, is whether if the market is an international or otherwise transnational one it is amenable to analysis under the Act, or whether such a market must be located wholly within New Zealand.

[200] In *Emirates v ACCC*,[118] the ACCC issued notices to several airlines seeking the production of information and documents in relation to an alleged price fixing agreement, arrangement, or understanding for international air cargo services. Emirates and Singapore Airlines challenged the validity of the notices. They argued there was no market in Australia for the supply of inbound international air cargo services, because the competitive activity between airlines offering cargo services took place at the point of origin. The services to which the alleged agreements or understandings related, they submitted, were not supplied in competition in a market in Australia in terms of ss 45(3) and 4E of the ATPA and therefore the matters in the notice were incapable of constituting a contravention of that Act. The Court considered evidence in the form of a statement of agreed facts, although additional evidence was adduced and a number of witnesses cross-examined. The standard of proof, at that stage of the proceeding, was low (whether the matters identified in the notices were capable of constituting a contravention).

[201] Middleton J held the matters the subject of the notices were capable of constituting a contravention. The airlines' evidence did not eliminate any reasonable hypothesis that the market for the supply of inbound international air cargo services was at least in part inside Australia.[119] Among the reasons he gave were that part of the business of an international airline was its unloading capability at destination, that no adequate evidence was led to discount a potential competitive sphere of

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118 *Emirates v ACCC* [2009] FCA 312, (2009) 255 ALR 35.
119 At [61].

activity, and that it was the obligation of airline staff to take inquiries about inbound shipments, deal with complaints from customers and trace lost shipments.[120] The evidence did not demonstrate that there was no possibility of competitive activity in a market in Australia in relation to inbound services to Australia.[121]

[202] Middleton J rejected the airlines' contention that the place of entering into the contract for the inbound services determined the location of the geographic market. He observed:

> [66] In my view, the place of contracting is not determinative of the geographic locality of the relevant market. ... As the authorities referred to previously indicate, the concept of a "market" refers to a range of "competitive activities" relating to the field of actual or potential activities between buyers and sellers among whom there is, or can be, close competition. It involves the "field of rivalry", not just referable to the place of contracting.
>
> [67] With the advent of modern telecommunications any other approach may fail to give protection to, and enhance the welfare of, Australians who use and obtain services in Australia. ...

[203] Middleton J also considered the proposition that the market for air cargo services into Australia was part of an international air cargo market, of which the Australian market was, or may have been, a part of. After reviewing the authorities, Middleton J concluded that:[122]

> In my opinion, Hill J in *Riverstone Computer Services Pty Ltd v IBM Global Financing Australia Ltd* [2002] FCA 1608 (*Riverstone*) was correct in concluding that the fact that a market was global did not signify that there could not be a market in Australia for the same products (or services).

[204] The decision of Middleton J was upheld on appeal by a full Court of the Federal Court of Australia.[123] The Court observed:[124]

> ... prices fixed for legs of a journey which take place wholly outside of Australia may ultimately affect competition in a market in Australia.

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120 Ibid.
121 At [60].
122 At [70].
123 *Singapore Airlines Ltd v ACCC* [2009] FCAFC 136, (2009) ATPR ¶42-297.
124 At [74].

[205] In *ACCC v Qantas Airways Ltd*[125] the Federal Court of Australia determined a penalty related to Qantas' conduct in arriving at and giving effect to a collusive understanding in respect of an element in the price for the carriage of international air cargo, submitted for its approval. The relevant market, agreed for the purpose of the proceeding, was a worldwide market for air cargo services. Lindgren J of his own motion considered whether the Court had jurisdiction to make the orders sought. As had been done in *Emirates v ACCC*, he quoted *Riverstone Computer Services Pty Ltd v IBM Global Financing Australia Ltd* noting Hill J's observation that the fact that a market was global did not signify that there could not be a market in Australia for the same products. He observed:

> 34. ... As the Commission points out, a contrary view would considerably reduce the efficacy and utility of the competition law provisions of the [ATPA], especially in the modern telecommunications era.
>
> 35. The definition of "market in Australia" in s 4E excludes, however, a market that is wholly outside Australia. Part of the present global and international air cargo market necessarily falls within the territorial boundaries of Australia. ...

Lindgren J concluded the jurisdictional requirements of the ATPA were satisfied.

[206] A full Court of the Federal Court of Australia in *Auskay International Manufacturing & Trade Pty Ltd v Qantas Airways Ltd*[126] upheld an appeal by purchasers of international airfreight services against a decision striking out their claim against airlines whom it was claimed were members of a cartel which had agreed to and did fix charges for international airfreight moving into and out of Australia. The applicants had pleaded a global market for international air freight services and that part of that market was a market "in Australia". In the decision subject to appeal Tracey J had noted that it was clear a market wholly outside Australia was not comprehended by the statutory definition ("market in Australia") but accepted the existence of a global market which extended into the geographic boundaries of Australia did not preclude a finding that there existed a "market in Australia". However, he struck out the claim on the basis that it failed to identify (other than in a conclusionary manner) any market, be it a global market or a market

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125 *ACCC v Qantas Airways Ltd* [2008] FCA 1976, (2008) ATPR ¶42-266.

126 *Auskay International Manufacturing & Trade Pty Ltd v Qantas Airways Ltd* [2010] FCAFC 96, (2010) 188 FCR 351.

in Australia. The Judge considered a market for services would exist only if there was strong substitutability between those services on both the demand and supply sides. He observed that it could not, realistically, be asserted that close competition and strong substitution could be found for the supply of international air freight services between one particular route and every other route in the world. Rather, there were potentially thousands of discrete markets scattered throughout the world.

[207] The full Court unanimously upheld the appeal. It rejected the Judge's view that there had to be as many different markets as there were points of origin and destination. The Court referred to the "unwisdom of insisting on strong substitutability on the supply side and the demand side as the sine qua non of every market".[127] Jessup J observed:

> [44] ... A customer would never accept the transport of his or her goods from Melbourne to Tokyo as a substitute for transporting them from Melbourne to Boston. But, if there were suppliers who would, given a sufficient price signal, devote their resources to the former in preference to the latter, those suppliers should be regarded as doing business in the same market. From the supply side perspective, the Melbourne-Tokyo service should be regarded as a substitute for the Melbourne-Boston service. And the same conclusion would apply with respect to the example given by the primary judge, namely, the potential for a Hong Kong to Moscow service to be a substitute for a Dubai to Sydney service. By "service" here I use, of course, the economic rather than the operational sense of the word: the service is the product supplied by the carrier, not merely the identification of the route followed by a particular aircraft.
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> [45] For the above reasons, I consider that his Honour was in error in two related respects in the approach he took to the applicant's allegation that there was a global market. His Honour ought not to have treated the routes followed by aircraft as effectively defining the service which was supplied by the respondents; and he ought to have recognised that the applicant's factual case was that there was global supply-side substitutability for the provision of airfreight services, however improbable that circumstance may appear at this interlocutory stage of the proceeding.

[208] Jessup J emphasised the proceeding was at an interlocutory stage. The trial Judge ought to have recognised that the applicant's factual case was that there was global supply-side substitutability, "however improbable that circumstance may appear at this interlocutory stage of the proceeding".[128] He observed also that

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127 At [42].
128 At [45].

whether the fact that the market may have existed everywhere justified the conclusion that the market existed in Australia would be a matter of argument.[129]

[209] In *ACCC v Singapore Airlines Cargo Pte Ltd* it was alleged Singapore Airlines entered into understandings containing provisions for the imposition of fuel surcharges.[130] The ACCC pleaded three markets for the supply by international airlines and acquisition by shippers of international air freight services: a global market, an Australian market (for the supply and acquisition of international air freight services on inbound routes to and outbound routes from Australia) and a route specific market. The ACCC's claim was struck out, but not on grounds relevant to the present issue. Jacobson J held the pleaded markets were at least capable of amounting to markets in Australia.[131]

[210] None of these decisions offers a final analysis of the situation. The issues were only being determined on a threshold basis, or for the purposes of penalty. However, there was a willingness of the courts in the four cases where the issue of the market was addressed, to go beyond the geographic boundary of the area of supply.[132] On their approach, the focus of the airlines on substitutability at point of origin is unduly narrow. The cases support a broader approach to the geographic location of markets more consistent with the position of the Commission's experts.

[211] We reach the conclusion that the market for inbound air cargo services is not confined to the point of origin but rather extends to, and so is at least in part in, New Zealand.

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129 At [47].

130 *ACCC v Singapore Airlines Cargo Pte Ltd* [2009] FCA 510, (2009) 256 ALR 458.

131 At [60].

132 *Emirates v ACCC* at [60]; *ACCC v Qantas Airways Ltd* at [35]; *Auskay International Manufacturing & Trade Pty Ltd v Qantas Airways Ltd* at [45]; *ACCC v Singapore Airlines Cargo Pte Ltd* at [66].

Market wholly or partly in New Zealand?

Background to the issue

[212] Markets, in economic terms, can cross territorial borders, as indeed was expressly conceded by Dr Veljanovski. Economic supply and demand factors are not restricted by political borders. We accept the Commission's submission that there may well be markets in New Zealand for goods or services supplied overseas in worldwide markets. Professor Willig gave an example of a worldwide market for financial derivatives and Dr Veljanovski a worldwide market for iron ore. We have no doubt that as a matter of fact markets are not limited by territorial borders and can extend across different countries.

[213] The airlines argued, however, that even if part of the market for inbound air cargo services is in New Zealand, that is not sufficient for jurisdictional purposes. Rather a market to be amenable to analysis under the Act must be wholly in New Zealand (relying on what they submitted was the plain meaning of s 3(1A)) or at the very least substantially in New Zealand. That is, market boundaries cannot be drawn wider than New Zealand even where the integrity of the economic analysis might otherwise demand it. On the other hand the Commission submitted that it is sufficient if the market is partly in New Zealand. The point is of importance as the market for inbound air cargo services is clearly not wholly in New Zealand.

What the Act says

[214] Section 3(1A) provides that the term "market" is a reference to a "market in New Zealand". We regard s 3(1A) as ambiguous as to whether a market must be wholly, or can be only partly, in New Zealand. In *New Zealand Magic Millions Ltd v Wrightson Bloodstock Ltd* this Court considered that the then definition of market ("market within New Zealand") indicated that commercial activity beyond New Zealand shores could not fall within a market for New Zealand purposes.[133] That wording has since been changed to "in" New Zealand. In our view the word "within" carries with it a greater sense of enclosure or containment than does the

[133] *New Zealand Magic Millions Ltd v Wrightson Bloodstock Ltd* [1990] 1 NZLR 731 (HC) at 759.

word "in". The change has been seen by one commentator as significant, raising the question of whether there may be a market in New Zealand for the purposes of the Act even if it is part of a wider regional or global market.[134] We consider the change to the phrase "in New Zealand", while a point of distinction from the former words, to be ambiguous.

Section 3(3)

[215] Section 3(3) of the Act provides:

> **3 Certain terms defined in relation to competition**
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> ...
>
> (3) For the purposes of this Act, the effect on competition in a market shall be determined by reference to all factors that affect competition in that market including competition from goods or services supplied or likely to be supplied by persons not resident or not carrying on business in New Zealand.

[216] This section has no direct relevance to the points at issue, but we must consider whether it casts any light on whether a market can be only partly in New Zealand. In *Magic Millions* this Court considered the meaning of s 3(3). Tipping J construed it as if it read "... including competition from goods or services supplied or likely to be supplied [in New Zealand] ...".[135] He considered this necessary to harmonise s 3(3) with the then definition of market as being a market "within New Zealand". He observed that this construction was also in accord with s 4. He considered that overseas conduct by New Zealand organisations was relevant to the extent that it affected a market in New Zealand, but overseas conduct by non-New Zealand organisations was not unless the goods or services were supplied within New Zealand.

[217] This interpretation of s 3(3) was criticised by Professor Maureen Brunt in her essay "'Market Definition' Issues in Australian and New Zealand Trade Practices

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134 Chris Noonan "The Extraterritorial Application of New Zealand Competition Law" (2007) 22 NZULR 369 at 395. Noonan continues that "A market in New Zealand should not mean a market wholly in New Zealand."

135 At 759.

Litigation".[136] She questioned why in the construction of s 3(3) the phrase "all factors that affect competition in that market" that prefaced the quoted passage was not given weight. She observed that if there were enough imports or a sufficient fear of import competition the very content of domestic transactions would be affected. Competition in New Zealand would be different. The interpretation of s 3(3) in *Magic Millions* has also been criticised in other commentaries.[137]

[218] We must, with great respect, take a different view of s 3(3). There has been the change since that decision in the wording of s 4 from "within a market" to "in a market". Section 3(3) on our interpretation allows overseas competition to be considered. The need to consider "all factors" affecting competition in a New Zealand market is in our view a clear statement that overseas competition affecting a New Zealand market can be taken into account. A market in which there is workable or effective competition from goods or services supplied or likely to be supplied by persons out of New Zealand is likely to be a market that extends beyond New Zealand.

[219] As the Commission observed in its submissions, it is not necessary to determine the ambit of s 3(3) for the purposes of this judgment. Nevertheless, on our interpretation of the subsection, because it contemplates the consideration of overseas competition, it supports an interpretation of the phrase "market in New Zealand" as including a market partly in New Zealand and partly outside of New Zealand.

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136 Maureen Brunt "'Market Definition' Issues in Australian and New Zealand Trade Practices Litigation" in Maureen Brunt *Economic Essays on Australian and New Zealand Competition Law* (Kluwer Law International, The Hague, 2003) 185 at 223. Brunt's criticism is noted in Thomas Gault (ed) *Gault on Commercial Law* (looseleaf ed, Brookers) vol 1 at [CA3.07](3).

137 For example Matt Sumpter observed that the reading of s 3(3) seems today, in the context of increasing cross-border competition, overly narrow to a degree not required by s 3(3): Matt Sumpter *New Zealand Competition Law and Policy* (CCH, Auckland, 2010) at [403]. See also Chris Noonan "The Extraterritorial Application of New Zealand Competition Law" (2007) 22 NZULR (2007) 369 at 394 and Daniel Clarry "Contemporary approaches to market definition: Taking account of international markets in Australian competition law" (2009) 37 ABLR 143 at 175.

Section 36A

[220] Section 36A makes specific provision for "trans-Tasman markets". Section 36A(2) provides:

> A person must not, for any of the purposes specified in subsection (3), take advantage of the person's substantial degree of power (if any) –
>
> (a) in a market; or
>
> (b) in a market in Australia; or
>
> (c) in a market in New Zealand and Australia.

[221] Section 3(1A) does not apply to s 36A(2)(b) and (c). Corresponding provision is made in ss 3(1B) and 3(1C) respectively.

[222] Thus in s 36A Parliament has explicitly extended the statutory definition of market in order to regulate markets outside, or in part outside, New Zealand, but only to the extent of trans-Tasman markets. It can be argued that in doing so Parliament has turned its legislative mind to the question of extraterritorial markets, and by the insertion of s 36A manifested a legislative intention not to regulate international or global markets unless expressly provided.[138]

[223] The airlines submitted along these lines that if the Commission's contrary approach to s 3(1A) is correct, and "market in New Zealand" includes a market only partly in New Zealand, then a trans-Tasman market would already fall within that definition and the definition would not have required express extension by the insertion of s 36A. Rather s 36A evinces an intention not to regulate markets extending beyond New Zealand unless expressly provided. The airlines rely on *Commerce Commission v Visy (Board) NZ Ltd*,[139] to which we turn shortly.

[224] Section 36A creates a supplementary jurisdiction. It arose out of the decision to remove the application of anti-dumping laws to trans-Tasman trade in goods as

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138 See Daniel Clarry "Contemporary approaches to market definition: Taking account of international markets in Australian competition law" (2009) 37 ABLR 143 at 178 assessing this approach in relation to s 46A of the Trade Practices Act 1974 (Cth). Clarry ultimately prefers the contrary, broader, approach.

139 *Commerce Commission v Visy (Board) NZ Ltd* HC Auckland CIV-2007-404-7237, 20 April 2011.

part of the Closer Economic Relations review in 1988.[140] Prior to the amendments the Act did not apply to persons having a substantial degree of power in a market in Australia but exercising that power in a market in New Zealand. The market in which the person has a substantial degree of power may now be a market in Australia;[141] that is, a market wholly outside New Zealand. Therefore, s 36A goes further than the Act did in its previous form. There are references also to a market in New Zealand[142] and a market in New Zealand and Australia,[143] but this does not mean that those markets were previously excluded from the ambit of the Act. Rather they are now part of the specific provision made for trans-Tasman markets. We do not accept that the insertion of s 36A manifested a legislative intention not to regulate international or global markets unless expressly provided, and accordingly reject the airlines' submission that the Act does not extend to a market only in part in New Zealand with the exception only of a trans-Tasman market for the purposes of s 36A.

An approach that limits the consideration of overseas conduct to those acts that occur in New Zealand

[225] There is also the question of the relationship between the presumption that Parliament did not intend to assert extraterritorial jurisdiction and s 4 to be considered. It can be argued that a broad interpretation of "market in New Zealand" runs against the presumption.

[226] One way to deal with this problem, while accepting a trans-Tasman market, has been to cut off the parts of the market that are outside New Zealand for the purposes of a claim, and only consider those parts of the market existing within New Zealand. This was the view of Heydon J writing extrajudicially in *Trade Practices Law* where he observed:[144]

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140 See *Gault on Commercial Law* at [CA36A.01] and [CA36A.03] and the Commerce Law Reform Bill 1989 (238-1) (explanatory note).

141 Commerce Act 1986, s 36A(2)(b).

142 Commerce Act 1986, s 36A(2)(a). As to a possible reason for including this provision see *Gault on Commercial Law* at [CA36A.01].

143 Commerce Act 1986, s 36A(2)(c).

144 JD Heydon *Trade Practices Law* (Thomson Reuters, 2009, looseleaf ed) at [3.510].

> If a market extends beyond the limits of Australia the court would apply the Act in reference to that part of it which falls within Australia.

[227] It was also the approach adopted in the *Magic Millions* decision. Tipping J did not go so far as to say that if a market, in economic terms, was partly in New Zealand and partly outside of New Zealand the Act had no jurisdiction. Indeed, he appeared to accept that there was jurisdiction. His approach was that while he appeared to accept the economic reality that there was a market at least in part in Australia he would only consider conduct in New Zealand. He appeared to accept that this was an unfortunate consequence from an economic point of view and from the point of view of competition law generally, but observed that was something for Parliament to consider.[145] He stated:[146]

> Put shortly, overseas conduct by New Zealand organisations is relevant to the extent that it affects a market in New Zealand. Overseas conduct by non New Zealand organisations should not be regarded as providing effective competition in a New Zealand market unless the goods or services are supplied within New Zealand.

[228] In that case Wrightsons conducted auction sales of thoroughbred yearlings and had done so for 60 years. It sold upwards of 90 per cent of thoroughbred yearlings sold at auction in New Zealand. Magic Millions was a newcomer to the market. Wrightsons announced its national yearling sales dates knowing they clashed with the likely Magic Millions dates. Magic Millions sought an injunction to restrain Wrightstons from holding auction sales of thoroughbred yearlings on dates which clashed with its own sale dates. It alleged Wrightsons was acting in breach of s 36 of the Commerce Act by using its dominant position in the yearling auction market for the purpose of eliminating Magic Millions from that market. Wrightsons denied it had a dominant position in the market. It pointed to competition from auction sales in Australia and claimed it was thereby constrained. The issue arose whether the market was limited to New Zealand and whether in determining the question of dominance the existence of competing auction sales in Australia could be taken into account.

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145 At 759.
146 At 759-760.

[229] The Judge considered whether or not the market must be confined territorially to New Zealand or whether there was in effect a market comprising the territory of New Zealand and the east coast of Australia. He concluded that while in purely economic terms that may have been the case, he had to limit his consideration to goods or services supplied in New Zealand.

[230] If that approach were adopted in this case it would create an absurdity. The market which we have found in economic terms to be partly in New Zealand and partly out of New Zealand, would have to be assessed absent consideration of supply at origin because that supply was out of New Zealand. If that were so, the conclusion would support the approach of the airlines, which is that the market cannot be seen sensibly as extending to New Zealand.

[231] To consider only conduct in New Zealand would have the effect of artificially carving part of the market out of the analysis, and there would be the risk that decisions made with only part of the facts would be unjust. It is also an approach that has been criticised in a number of commentaries.[147] Daniel Clarry observed in the Australian context:[148]

> [T]he integrity of competition analysis requires the assessment of competition in a market, not a part of a market. To constrain competition analysis to a part of a market when the market is in economic reality broader than Australia must necessarily distort the competition assessment, ignore the existence of competitive constraints on a firm's ability to give less and charge more and procure results that imply the anticompetitive effect in the market is more significant than it in fact is or return findings that a firm, or a group of firms acting in concert, possess more market power than they in fact do.

[232] We cannot accept that the legislature in referring to competition in markets in New Zealand intended to limit any assessment of that competition only to domestic factors in New Zealand. That does not seem to be in accord with the facts and common sense. Such an approach could lead to capricious results. We adopt in this regard the approach of Barwick CJ in *Tickle Industries Pty Ltd v Hann*:[149]

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147 See nn 136-137.

148 Daniel Clarry "Contemporary approaches to market definition: Taking account of international markets in Australian competition law" (2009) 37 ABLR 143 at 180.

149 *Tickle Industries Pty Ltd v Hann* (1974) 130 CLR 321 at 331.

> It is, in my opinion, a sound rule of statutory construction that a meaning of the language employed by the legislature which would produce an unjust or capricious result is to be avoided. Unless the statutory language is intractable, an intention to produce by its legislation an unjust or capricious result should not be attributed to the legislature.

[233] It is observed earlier in this judgment that, consistent with the principle of international comity, the Act may be presumed not to extend to the governance of markets outside New Zealand. Here we are not concerned with markets outside New Zealand but rather transnational markets located partly in New Zealand. If the focus is on the effect in New Zealand, the fact that the market is located partly outside New Zealand does not offend against the principle of international comity. The Act is governing a market that is partly in and partly out of New Zealand to the extent that anti-competitive effects are felt within New Zealand. This is consistent with the approach of the legislature in s 4.

[234] The airlines argued that if there can be cross-border markets there is a risk of penalising behaviour on more than one occasion. While there is that risk, courts are able to take into account the risk or fact of penalties in other jurisdictions in assessing a penalty in New Zealand. A reduction may be warranted in the light of those other penalties.[150] The courts will be careful not to offend against the principle of international comity.

[235] We conclude that a purposive interpretation of the Act does not require us to limit our considerations to New Zealand conduct. The presumption that Parliament did not intend to assert extraterritorial jurisdiction will apply but will be subject to s 4 which permits overseas conduct to be considered if it has an effect on the relevant New Zealand market. Therefore, we consider that the words "in a market" are not on their plain meaning and in the context of the other provisions of the Act limited to markets wholly in New Zealand.

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[150] This has already occurred in two recent penalty decisions: *Commerce Commission v British Airways PLC* HC Auckland CIV-2008-404-8347, 5 April 2011 at [38] and *Commerce Commission v Qantas Airways Ltd* HC Auckland CIV-2008-404-8366 30 May 2011 at [57].

Authority

[236] This approach is supported by the New Zealand guidelines which state that there are markets that extend beyond New Zealand but still include New Zealand.[151] The same proposition is put forward in the Australian guidelines, which accept the concept of even a global market "provided that at least some part of it is located in Australia".[152] However, we note that there are two decisions of the Commission which express the view that markets must be wholly in New Zealand.[153]

[237] An interpretation that a trans-national market can be only partly in New Zealand is in accord with recent authority in Australia. We have already referred to the *Qantas*[154] and *Emirates*[155] decisions where the proposition that a market must be wholly within Australia was rejected. It was expressly asserted that a market could be partly in Australia, and partly elsewhere. In *Qantas* Lindgren J observed that a contrary view would "considerably reduce the efficacy and utility of the competition law provisions of the ATPA, especially in the modern telecommunications era". These decisions were influenced by the decision of Hill J in *Riverstone Computer Services Pty Ltd v IBM Global Financing Australia Ltd* where in the context of an originating application for pre-commencement discovery the global market for new and secondhand computers was under consideration. The defendant argued that the market was global so that there could not be a market in Australia. Hill J rejected that submission observing:[156]

> With respect to the submissions of the respondent they demonstrate a somewhat simplistic view of the material which is before the Court. First, it may be said that the fact that there exists a global market, whether for new or second-hand computers, does not mean that there is no market for such products in Australia. It may well be the case that the market both for new and second-hand mainframe computers in Australia is small. ... In any case it is not clear to me as a matter of law, merely because the Act is concerned with market power in a market in Australia (or New Zealand), that there could not be a breach of s 46. A global market which includes Australia (and

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151 New Zealand guidelines at 19.

152 ACCC Merger Guidelines (2008) at 4.31.

153 *New Juice Ltd and Rio Beverages Ltd and Cerebos Gregg's Ltd* [1997] NZComCom 2 at [18]; *Skycity Entertainment Group Ltd and Aspinall (NZ) Ltd* [2004] NZComCom 6 at [142].

154 *ACCC v Qantas Airways Ltd* [2008] FCA 1976, (2008) ATPR ¶42-266.

155 *Emirates v ACCC* [2009] FCA 312, (2009) 255 ALR 35 and *Singapore Airlines Ltd v ACCC* [2009] FCAFC 136, (2009) ATPR ¶42-297.

156 *Riverstone Computer Services Pty Ltd v IBM Global Financing Australia Ltd* [2002] FCA 1608 at [21].

> the inference is that any global market did) is arguably a market in Australia if sales are made here (and the evidence shows they are) even if that market might also exist in the United States, Japan, China or any country which was a member of the European Union.

[238] In *Commerce Commission v Visy (Board) NZ Ltd*,[157] Heath J observed that that "the way in which the term "market" is defined in s 3(1A) means that s 27 can only apply to a market that is wholly (or perhaps, substantially) in New Zealand".[158] The Commission alleged in that case that the defendants had engaged in a price fixing cartel in respect of a "trans-Tasman market". Heath J held the concept of a market encompassing both New Zealand and Australia was specific to s 36A. He held the concept was not extended to other parts of the Act, such as s 27.[159]

[239] It was submitted for the Commission in *Visy*, relying on the Australian decisions we discuss above, that a market which is partly in or includes New Zealand is capable of being a "market in New Zealand" notwithstanding that it may also be a market elsewhere.[160] Heath J did not regard this as meeting the objection to jurisdiction for a trans-Tasman claim. He stated:[161]

> The New Zealand legislation is explicit. In my view, it is incapable of an interpretation that brings a trans-Tasman market within the scope of s 27. While the Australian decisions deal with a similar point, they do so in a different context. They are focussed on the question whether a "market" can be regarded as being in Australia, notwithstanding that it may also be characterised as a market situated in another country. The authorities to which Mr Miles referred to do not deal with trade between Australia and New Zealand specifically, which is the type of market a "trans-Tasman" market describes. This is reinforced by the existence of a s 36A equivalent in the Trade Practices Act 1974 (Cth), in relation to the misuse of market power in a trans-Tasman market.

[240] We accept the tenor of Heath J's decision supports the airlines' case. But it is instructive that Heath J considered a "market in New Zealand" might only be substantially in New Zealand, and that he did not cast express doubt on the Australian decisions, which he regarded as decided in a different context. His Honour reached his decision by contradistinction to the ambit of s 36A and "trade

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157 *Commerce Commission v Visy (Board) NZ Ltd* HC Auckland CIV-2007-404-7237, 20 April 2011.
158 At [44].
159 Ibid.
160 At [46].
161 At [47].

between Australia and New Zealand specifically", which is not the nature of the market pleaded in the present case. We do not regard the decision as of particular significance to these facts.

Conclusion on issue 3(b)

[241] We conclude that a market does not have to be wholly in New Zealand. We are not required at this point to define the extent of the market that must be in New Zealand. We are satisfied on the facts before us that the market in New Zealand for air cargo services from an overseas country or region to New Zealand has a sufficient presence in New Zealand to constitute a "market in New Zealand" in terms of the Act. We have already set out the factual considerations on which we rely.[162]

[242] In summary, there is in New Zealand a market for inbound air cargo services which has the following constituents:

(a) Importer and destination freight forwarder demand from New Zealand;

(b) On occasions New Zealand importer decisions in relation to inbound air cargo;

(c) Inbound flights over New Zealand air space;

(d) Unloading in New Zealand;

(e) Follow-up on transport issues including lost or damaged air cargo; and

(f) Economic effects of inbound services and their cost having an impact in New Zealand.

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[162] At [148]–[152].

[243] While accepting that the activities in New Zealand are only part of a wider market, it is our decision that these elements are proven and sufficient to constitute a market in New Zealand.

[244] We answer the question posed in issue 3(b) "yes".

The s 4 interpretation question (issue 4)

[245] The airlines are alleged to have engaged in the actions the subject of these proceedings outside New Zealand. Section 4 of the Act is expressly directed to such conduct. It extends the application of the Act to the engaging in conduct outside New Zealand where its requirements are met. Section 4 is an exhaustive statement of the circumstances in which the Act applies to actions outside New Zealand.[163]

[246] In order for the Act to apply to conduct outside New Zealand, s 4 requires that the conduct:

(a) Be engaged in by a person resident or carrying on business in New Zealand;

(b) Affect a market in New Zealand.

[247] The s 4 issue concerns whether the conduct must be prohibited by a substantive provision of the Act and whether the affected market must be the market in respect of which a substantive provision of the Act is alleged to have been breached.

The parties' submissions

[248] The Commission submitted that s 4 extends the application of the Act to any act (or refusal to act) to the extent that this has any impact or influence on any market in New Zealand, subject to a de minimus test. It need not be conduct prohibited by a substantive provision of the Act. It further submitted that the phrase "affects a market in New Zealand" comprises broadly-worded language which

[163] *Poynter v Commerce Commission* [2010] NZSC 38, [2010] 3 NZLR 300 at [15] and [62].

should not be read down to refer to a certain type of effect or a particular market. It pleads the alleged conduct affected both the market for air cargo services (the market in respect of which s 27 is alleged to have been breached via s 30) and the market for freight forwarding services. In the latter respect, it submitted that the freight forwarding services market was affected by the conduct because the higher fuel surcharge would have flowed through to higher prices in that market.

[249] The airlines submitted that for s 4 to apply the conduct must have been conduct that would have been prohibited by a substantive provision of the Act if it occurred in New Zealand, and must affect competition in the market in New Zealand in respect of which the substantive provision is alleged to have been breached. Any effect on the freight forwarding services market in New Zealand would therefore be irrelevant to the application of s 4.

Analysis

[250] Section 2(2)(a) provides:

> **2 Interpretation**
>
> ...
>
> (2) In this Act,—
>
> (a) A reference to engaging in conduct shall be read as a reference to doing or refusing to do any act, including—
>
> (i) The entering into, or the giving effect to a provision of, a contract or arrangement; or
>
> (ii) The arriving at, or the giving effect to a provision of, an understanding; or
>
> (iii) The requiring of the giving of, or the giving of, a covenant:
>
> ...

[251] Section 4 does not create any new prohibitions or offences. It cannot itself sustain a cause of action. Rather it operates extraneously to the substantive provisions of the Act. Like s 7 of the Crimes Act 1961, it is a section to be applied in conjunction with the substantive provisions of the Act to extend the reach of those

provisions, in certain circumstances, to conduct outside New Zealand. As was observed by Elias CJ in *Poynter*, the Act otherwise proceeds on the basis that it does not have extraterritorial effect because that is the assumption on which s 4 is drafted.[164] Section 4 must therefore be read against the substantive provisions of the Act, and applied in conjunction with those provisions. An indication of this is afforded by s 2(2)(a)(i)-(iii) which are clearly referable to the substantive provisions of the Act.

[252] Section 4 requires that the overseas conduct affect "a market" in New Zealand. No assistance is given by the definition of market in s 3(1A). The indefinite article "a" in s 4 suggests that any market in New Zealand will do, rather than s 4 being confined to the market in respect of which the substantive provision is alleged to have been breached. Parliament might otherwise have used the words "the relevant" or a phrase to similar effect. Nevertheless, the meaning is not unambiguous. The indefinite article "a" has a certain neutrality in the context in which it appears. Section 4 is of general application. It is a conjunct to each of the substantive provisions of the Act. It can be read, if a purposive interpretation requires it, to refer to the market the subject of the substantive provision alongside which it is invoked.

[253] In certain other provisions the pronoun "that" is used. Section 3(5), for example, provides that for the purposes of s 27 a provision shall be deemed to have the effect of substantially lessening competition in a market if that provision and others taken together have the effect of substantially lessening competition in "that market". However, the substitution of the word "that" (or "the") would be meaningless in s 4, as s 4 is not referable to a specific provision.

[254] The Commission points out that if the conduct the subject of s 4 is to be construed as co-extensive with the conduct the subject of the relevant substantive provision, then it would appear to follow that every substantive provision requires proof of a market. In fact there are sections, such as s 37 (resale price maintenance by suppliers), that do not. However, where a market is not a specific ingredient of an offence, such as under s 37, there will nevertheless be a market in which the goods

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164 *Poynter v Commerce Commission* at [15].

subject to retail price maintenance are sold, and that will be the relevant market for s 4 purposes, should s 4 be invoked. In a s 37 case, if this market was not a New Zealand market, it would not be expected that the Act would apply. The Act's purpose is to promote competition in New Zealand markets, not overseas markets, a point to which we return.

[255] In *Commerce Commission v British American Tobacco Holdings (New Zealand) Ltd*[165] where the Court considered the inter-relationship between ss 4(1) and (3) in the context of a global merger agreement, it was argued that as the parties to the global merger agreement were overseas companies neither resident nor carrying on business in New Zealand, s 4(1) excluded the Act's application to the merger. The High Court in rejecting the argument observed:[166]

> Section 4(1) and (3) extend the operation of s 47 to the foreign acquisition of shares or assets in New Zealand businesses to the extent the acquisition affects New Zealand markets. Any affecting suffices. That plainly catches the transaction agreement and the 31 May, 20 July, and 26 August deeds to the extent that they affected the New Zealand tobacco products markets as, it is clear, they did. The Commerce Act 1986 therefore extends to those transactions ...

This statement was referred to by the Commission, but there is no suggestion in the judgment that the affected market can be different from that in which the breach occurred. Indeed, Williams J assumed that it was the same market in which the prohibition was allegedly breached that was relevant.

A purposive interpretation

[256] If parties enter into or give effect to a prohibited arrangement outside of New Zealand in relation to a market for goods or services outside of New Zealand, it would be somewhat surprising if a derivative effect on another different market in New Zealand had the consequence by virtue of s 4 of bringing that conduct within the purview of the Act. The substantive provisions are referable (expressly or by implication) to particular markets, except where this is otherwise made clear (for

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165 *Commerce Commission v British American Tobacco Holdings (New Zealand) Ltd* (2001) 10 TCLR 320.

166 At [73].

example in s 36, "that or any other market"). It could be expected that the prohibited conduct would need to directly rather than derivatively affect a New Zealand market.

[257] The purpose of the Act, when s 1A and s 31A are read together, is to promote competition in markets in New Zealand. If overseas anticompetitive conduct affects a different market (in New Zealand) from that in which the competition took place, a prohibition utilising s 4 is not promoting competition in a New Zealand market but rather an overseas market. That is beyond the express purpose of the Act. If the competition and the market in which it occurs are outside of New Zealand, the statutory purpose is not served in prohibiting it. As Jacobson J said at first instance in *ACCC v Singapore Airlines Cargo Pte Ltd*[167] in relation to s 45 of the ATPA:

> It is not sufficient to assert that higher prices on routes between points outside Australia of themselves have an adverse price effect on consumers in Australia. What s 45(2) is concerned with is the effect on competition in a market in Australia, not the effect on consumers residing in Australia.

[258] Of course, not all sections in the Act require proof of a market, or indeed any express proof of an effect on competition. Nevertheless, the Act's purpose is to promote competition in New Zealand. An interpretation of the reach of s 4 which does not affect New Zealand competition, but rather may impact on competitive behaviour of protagonists outside of New Zealand in different markets, is inconsistent with the Act's purpose.

[259] The word "a" while not specific as to the market in question, is open to interpretation in accord with the Act's purpose. Essentially the Commission argues for an interpretation of s 4 whereby it can be invoked where there is an effect on any downstream market in New Zealand, no matter how distant. Even if a de minimis qualification is applied to such an argument so that the effect must be significant, that conclusion seems implausible. It would give the Act worldwide reach whenever effects were felt in New Zealand, and it happened that a protagonist was resident or carrying on business in New Zealand, albeit in a possibly completely unrelated business. We do not think that was the intention behind s 4.

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[167] *ACCC v Singapore Airlines Cargo Pte Ltd* [2009] FCA 510, (2009) 256 ALR 458 at [75].

[260] When s 4(1) is juxtaposed with s 27 it seems likely that the term "affects a market in New Zealand" is intended to refer to the market in which the proscribed effect (the substantial lessening in competition) occurs. If not, it would mean that price fixing which took place overseas which had the effect of substantially lessening competition in a market wholly out of New Zealand would be prohibited and could be the basis of a claim, even though it had no relevance to competition in New Zealand. This is not in accord with the Act's purpose. It would be a result driven by what might be the fluke of residence or place of business in New Zealand. The fact that New Zealand consumers were affected because of an effect on a New Zealand market is not relevant when set against the purpose. The purpose is not to stop ripple down effects from overseas price fixing which might indirectly affect a New Zealand market. It is to stop anti-competitive behaviour in this country. This conclusion does not change when the s 30 deeming applies, as the mischief the section is aimed at is the same, although of a specific type.

[261] We conclude in the words of issue 4, that the Act applies to the engaging in conduct outside New Zealand by any person resident or carrying on business in New Zealand where the conduct would be prohibited by a substantive provision of the Act if it occurred in New Zealand, and "affects a market in New Zealand" by affecting competition in the market in New Zealand in respect of which that substantive provision is alleged to have been breached.

[262] Therefore, in relation to issue 4, (b) is correct.

The limitation defence

[263] The Commission's fourth amended statements of claim introduced an alternative formulation of the relevant market. The Commission's earlier pleadings alleged uni-directional markets to each region from New Zealand and from New Zealand to each region. Those pleaded markets were retained but an additional alternative pleaded market was introduced to cover all air cargo services between New Zealand and each region. That is, a two-way market including services in both directions. The airlines argued that this amounts to a new cause of action and is therefore time barred.

[264] Rule 7.77(2)(a) of the High Court Rules provides:

> **7.77 Filing of amended pleading**
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> ...
>
> (2) An amended pleading may introduce, as an alternative or otherwise,—
>
> (a) [relief in respect of] a fresh cause of action, *which is not statute barred*; or
>
> ...
>
> (Emphasis added.)

[265] Section 80(5) of the Act provides that proceedings seeking pecuniary penalties may be commenced within three years after the matter giving rise to the contravention was discovered or ought reasonably to have been discovered. The Commission accepts that it discovered or ought reasonably to have discovered the matters giving rise to the alleged contraventions more than three years before the amended pleadings were filed.

[266] The question is whether the amended market pleadings raise fresh causes of action. The relevant principles were considered in *Ophthalmological Society of New Zealand Inc v Commerce Commission*[168] and *Transpower New Zealand Ltd v Todd Energy Ltd*[169] and are not in dispute. A cause of action is a factual situation the existence of which entitles one person to obtain a legal remedy against another. An amended pleading raises a fresh cause of action if it is something essentially different from that which was pleaded earlier. Whether there is such a change is a question of degree. A plaintiff will not be permitted to set up a new case varying so substantially from the previous pleadings that it would involve investigation of factual or legal matters, or both, different from what have already been raised and of which no fair warning has been given.

[267] In the *Ophthalmological* case the Commission had earlier pleaded that the defendants entered into an arrangement or understanding having the purpose or effect of substantially lessening competition in the market for the supply of routine

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168 *Ophthalmological Society of New Zealand Inc v Commerce Commission* CA168/01, 26 September 2001 at [24]-[24].

169 *Transpower New Zealand Ltd v Todd Energy Ltd* [2007] NZCA 302 at [61].

cataract surgery in Southland. It proposed an amended pleading extending the market from Southland to a national market. The majority considered the change to the pleading of the market from one pertaining to the region of Southland only to the national market created a "new case" and therefore the proposed amendment amounted to a new cause of action:[170]

> It is a question of fact and degree when a proposed change to the pleading of a market will produce a new case. If, for example, the proposed pleading sought only to extend the market from Southland to Otago and Southland that might, in relation to ophthalmology, be a relatively insignificant change. It is to be supposed that an analysis of a Southland market would require consideration of services available to Southlanders in Dunedin and perhaps even somewhat further afield. Now, however, the survey of competition must encompass the whole country. That, it seems to us, would be a very different proposition, particularly when coupled with a different and more wide-ranging allegation concerning the nature of the proposed arrangement or understanding.

[268] Gault J, in dissent, observed that where conduct contravenes a statutory provision only in certain factual contexts the context that makes the conduct unlawful is to be pleaded.[171] Under s 27 of the Act conduct is only unlawful where it has the purpose or effect of substantially lessening competition in a market.[172] Accordingly the market is generally the subject of a pleaded definition. The ultimate finding on market definition involves an analysis of business rivalry and a full review of the competitive process, calling for mixed legal and economic analysis. He observed:

> [44] In my view it is not appropriate to adopt the same approach to the context or consequence elements of the cause of action as for the alleged contravening conduct. ... The Judge was merely saying that a widened market definition did not alter the cause of action so as to set up a new one. ...
>
> [45] I have not been persuaded that was wrong.

[269] A market can be a difficult and elusive concept to delineate. In a case such as this, attended by particular conceptual difficulties, it is not at all surprising that the market pleadings will be reconsidered and may undergo some modification. The fourth amended market pleading is not something wholly different from that which

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170 At [32].
171 At [38].
172 Ibid.

was pleaded earlier. The Commission had earlier pleaded that there were separate markets in respect of each region for air cargo services from New Zealand to each region and to New Zealand from each region. The amended market pleading aggregates these two markets. There is no new or substantially different factual or legal inquiry required of the airlines, although there is the new economic concept of the aggregated market. The position can be distinguished from that in the *Ophthalmological* case where the amended market pleading was of a market greatly different in nature and geographic extent, requiring a redirected and more burdensome competitive analysis Here we do not accept that the addition of the aggregated market constitutes a change of the same moment as that in the *Ophthalmological* case.

[270] We note also that the complementarities in supply between inbound and outbound routes which lie at the heart of the amended market pleading were addressed in both the initial briefs of Professor Williams and Dr Niels. Although the question whether the amended market pleadings raise fresh causes of action does not turn on the question of prejudice, the raising of this material when the earlier pleadings applied indicates the limited nature of the change.

[271] The question is in the end one of degree. We conclude that the amended market pleadings do not raise any significant new factual or legal issues. At most the amended pleadings may have required some further expressions of opinion from the airlines' experts. We conclude that the amended market pleadings do not raise fresh causes of action and therefore are not time barred under s 80(5) of the Act.

[272] The answer to question 5 is "no", the amendments are not statute barred.

Result

[273] In conclusion we answer the questions following the headings set out in the statement of issues as follows:

(a) Section 30 issue: 2(b) is correct. For the purposes of its claims under s 27 via s 30 it is necessary for the Commission to prove that each of

the pleaded services subject to the alleged price fixing arrangement were supplied by the defendants in competition with each other in a market in New Zealand.

(b) Follow-on issues in the questions posed: 3(a) and 3(b) are both answered "yes". The activities described in the evidence undertaken by the defendants with respect to inbound air cargo services constitute the supply by them of air cargo services in competition with each other in New Zealand. There is a market in New Zealand for air cargo services from an overseas country or region to New Zealand.

(c) Section 4 issue: 4(b) is correct. The Act applies to the engaging in conduct outside New Zealand by any person resident or carrying on business in New Zealand where the conduct:

(i) would be prohibited by a substantive provision of the Act if it occurred in New Zealand; and

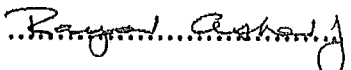
(ii) "affects a market in New Zealand" by affecting competition in the market in New Zealand in respect of which that substantive provision is alleged to have been breached.

(d) Bi-directional market limitation issue: The amendments in the Commission's fourth amended statements of claim to introduce a pleading of "bi-directional markets" for air cargo services are not statute barred under s 80(5) of the Act.

[274] No consequential orders have been sought. As the case is part-heard and this is a judgment on particular issues, leave is reserved for the parties to apply for further orders.

Costs

[275] Costs are reserved. If the parties wish to pursue the issue of costs at this point it will be necessary to convene a telephone conference to set a timetable.



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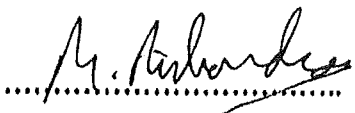

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