**IN THE HIGH COURT OF NEW ZEALAND**
**AUCKLAND REGISTRY**
**COMMERCIAL LIST**

**CIV-2008-404-8357**
**[2013] NZHC 843**

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| UNDER | Sections 27, 30 and 80 of the Commerce Act 1986 |
| BETWEEN | THE COMMERCE COMMISSION<br>Plaintiff |
| AND | CATHAY PACIFIC AIRWAYS LIMITED<br>Defendant |

Hearing: 19 February 2013

Appearances: Mr J C L Dixon and Ms A Boberg for the plaintiff
Mr I J Thain and Ms K L Broadhurst for the defendant

Judgment: 22 April 2013

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**JUDGMENT OF ALLAN J**

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

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## Introduction

[1] The defendant, Cathay Pacific Airways Ltd (Cathay Pacific) has admitted certain breaches of Part 2 of the Commerce Act 1986 (the Act) and has not denied other breaches. The Court is asked to impose a pecuniary penalty under the Act. The Commerce Commission (the Commission) and Cathay Pacific are agreed that, subject to the view of the Court, an aggregate penalty of $4.3 million is appropriate, together with costs totalling $259,079.18.

## Background

[2] Cathay Pacific is an international airline with its global head office in the Hong Kong Special Administrative Region of the People's Republic of China (Hong Kong). It is registered as an overseas company in New Zealand, under the Companies Act 1993. Throughout the period from January 2000 to February 2006, Cathay Pacific carried on business in New Zealand and elsewhere as a carrier by air of passengers and cargo. In broad terms, it was within the top 10 international airlines with respect to cargo volume and revenue passenger kilometres. It had between 14,000–19,000 staff worldwide and operated in approximately 35 countries.

[3] Throughout the period with which this case is concerned, Cathay Pacific maintained scheduled air services between Hong Kong and Auckland using its own aircraft.

[4] At all material times, Cathay Pacific and indeed other airlines, charged their customers a price for air cargo services that consisted of a base rate and various surcharges and fees, including a fuel surcharge, and from late October 2001 a security surcharge.

[5] For the purposes of this proceeding, Cathay Pacific and the Commission are agreed that separate markets existed during the relevant period for air cargo services between India and Singapore respectively, and New Zealand. A number of airlines competed with each other to supply air cargo services in these markets.

[6] The Commission's allegations relate to Fuel Surcharge Agreements (FSA) and Security Surcharge Agreements (SSA), entered into with a number of other airlines in respect of the carriage of air cargo from India and Singapore respectively to New Zealand.

*Fuel Surcharge Agreements*

[7] In January 2000, Cathay Pacific and other international airlines, which were members of the Board of Airline Representatives (India) Cargo Sub-Committee, reached an agreement regarding the imposition of a fuel surcharge on cargo carried by air from India to New Zealand (the India FSA). The India FSA provided that members of the Sub-Committee would exchange information as to their fuel surcharge intentions, charge fuel surcharges in accordance with those expressed intentions, and adjust or maintain their fuel surcharges on cargo carried by air from India to New Zealand, as agreed at meetings of members, or by email communication.

[8] Between February 2000 and February 2006, Cathay Pacific and other members of the Sub-Committee gave effect to the India FSA, by giving and receiving assurances that particular fuel surcharges would be imposed on the carriage of cargo from India to New Zealand, and maintaining or increasing their fuel surcharge levels in accordance with those assurances.

[9] A similar agreement was entered into by members of an inter-airline sub-committee operating in Singapore. That agreement commenced in or about April 2002 when members of the Singapore Sub-Committee reached an agreement regarding the imposition of fuel surcharges on cargo carried by air from Singapore to New Zealand (the Singapore FSA). The Singapore FSA also involved an agreement to exchange information as to fuel surcharge intentions, the actual imposition of fuel surcharges in accordance with those intentions, and the adjustment or maintenance of surcharges as agreed at meetings or by email communications between members.

[10] Between May 2002 and February 2006, Cathay Pacific and other members of the Singapore Sub-Committee gave effect to it by giving and receiving assurances

that a particular fuel surcharge would be mutually imposed on the carriage of air cargo from Singapore to New Zealand, by increasing, decreasing or maintaining fuel surcharge levels in accordance with such assurances, and by participating in information exchanges of airlines' intended plans for fuel surcharges in advance of that information becoming publicly available.

*Security Surcharge Agreements*

[11] In October 2001, Cathay Pacific reached an agreement with Air India and other airline members of the Indian Sub-Committee, with respect to the imposition of a security surcharge on the carriage of cargo by air from India to New Zealand (the India SSA).

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

[13] Between October 2001 and February 2006, Cathay Pacific and other airline members gave effect to the India SSA by giving and receiving assurances that a particular security surcharge would be mutually imposed on the carriage of cargo from India to New Zealand, and by each imposing its security surcharge on the carriage by air of cargo from India to New Zealand in accordance with those assurances.

[14] Similarly, in October 2001 Cathay Pacific reached an agreement with certain airlines regarding the imposition of a security surcharge on cargo carried by air from Singapore to New Zealand (the Singapore SSA). The Singapore SSA contained provisions to the effect that, among other things, the airlines would exchange information as to their security surcharge intentions on cargo carried by air from Singapore to New Zealand, would charge a security surcharge on cargo so carried in accordance with those expressed intentions, and adjust or maintain their security

surcharges on cargo carried by air from Singapore to New Zealand, as agreed at various meetings of the airlines concerned.

[15] Between October 2001 and February 2006, Cathay Pacific and other member airlines gave effect to the Singapore SSA by giving and receiving assurances that a particular security surcharge would be mutually imposed on the carriage of cargo by air from Singapore to New Zealand and by each imposing its security surcharge on the carriage of such cargo in accordance with those assurances.

**The breaches**

[16] For the purposes of this proceeding only, Cathay Pacific accepts that it committed breaches of the Act by entering into the India FSA and the India SSA (in breach of s 27(1) of the Act via s 30) and by giving effect to each agreement (in breach of s 27(2) via s 30). It does not deny the Commissioner's allegations against it in respect of the Singapore FSA and the Singapore SSA. Its non-denial is deemed to constitute an admission.[1]

**Legislation**

[17] Section 27 of the Act relevantly provides:

> **27 Contracts, arrangements, or understandings substantially lessening competition prohibited**
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> (1) No person shall enter into a contract or arrangement, or arrive at an understanding, containing a provision that has the purpose, or has or is likely to have the effect, of substantially lessening competition in a market.
>
> (2) No person shall give effect to a provision of a contract, arrangement, or understanding that has the purpose, or has or is likely to have the effect, of substantially lessening competition in a market.
>
> …

[18] Section 30 of the Act provides:

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1 High Court Rules, r 5.48(3).

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

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

[20] It is often said that, where cartel behaviour is identified, punishments must be condign. That is because it is necessary both to ensure that the participant is stripped of any profits derived from the illegal behaviour, and to serve as an appropriate deterrent in a class of case where, because illegal behaviour is often covert, detection will sometimes be avoided.

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

**80 Pecuniary penalties**

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

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

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

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

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

(e) Has been in any way, directly or indirectly, knowingly concerned in, or party to, the contravention by any other person of such a provision; or

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

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

(2) The Court must order an individual who has engaged in any conduct referred to in subsection (1) to pay a pecuniary penalty, unless the Court considers that there is good reason for not making that order.

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

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

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

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

(a) in the case of an individual, $500,000; or

(b) in the case of a body corporate, the greater of—

(i) $10,000,000; or

(ii) either—

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

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

(3) *Repealed.*

*(4) Repealed.*

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

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

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

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

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

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

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

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

(a) having regard to all relevant factors;

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

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

**Sentencing Principles**

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

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

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

> [18] In *Commerce Commission v Alstom Holdings SA*,[5] Rodney Hansen J confirmed that criminal sentencing principles provide an appropriate framework for the assessment of a proposed penalty under the Commerce Act. His Honour said:
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> > [14] The parties invite me to consider the proposed penalty, broadly by reference to orthodox sentencing principles. That requires assessing the seriousness of the offending, identifying relevant aggravating and mitigating factors to determine an appropriate starting point and, finally, having regard to any factors specific to the defendant that may warrant an

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[2] *Commerce Commission v Alstom Holdings Sentencing Act* [2009] NZCCLR 22 (HC).
[3] At [18].
[4] *Commerce Commission v Geologistics International (Bermuda) Ltd* HC Auckland CIV-2010-404-5490, 22 December 2010.
[5] *Commerce Commission v Alstom Holdings Sentencing Act ftn 2.*

> uplift in, or reduction from, the starting point. I accept that approach is appropriate. It is consistent with the statute and is endorsed by practice in New Zealand and other jurisdictions.

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

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

a. The duration of the contravening conduct;

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

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

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

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

f. The size and resources of the defendant;

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

h. The fact that liability is admitted;

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

[27] I continued:

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

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

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

[8] *Commerce Commission v Alstom Holdings SA ftn 2* at [14].

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

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

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

**Penalty assessment**

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

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

(a) determine the maximum penalty;

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

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

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[9] *Commerce Commission v New Zealand Diagnostic Group Ltd ftn 6* at [45].

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

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

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

(a) $10 million, or

(b) Either:

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

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

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

[34] For its part, Cathay Pacific denies that there was any commercial gain at all because the relevant cargo markets are highly competitive, and there is no evidence that overall charges to customers were increased in order to take into account the relevant surcharges.

[35] Be that as it may, because commercial gain cannot be readily ascertained, the maximum penalty for each breach is the greater of $10 million or 10% of Cathay Pacific's relevant turnover. "Turnover" is defined in s 2 of the Act as "the gross revenues (exclusive of any tax required to be collected) received or receivable by a body corporate in an accounting period as a result of trading by the body corporate within New Zealand".

[36] The statute is silent as to the specific accounting period or periods over which turnover is to be measured. This Court has previously considered a single year's

accounting period in order to ascertain turnover and calculate the maximum available penalty.[12]

[37] The relevant turnover figure for s 80 purposes is agreed to be Cathay Pacific's figure for the 2011 calendar year, being the most recent available figure. In that year, Cathay Pacific's revenue for passenger and cargo services into and out of New Zealand was of the order of $226 million. Consequently the maximum penalty that could be imposed for each breach of the Act after May 2001 would be $22.6 million. Under s 80(6) of the Act, no person is liable for more than one pecuniary penalty in respect of the same conduct, but the different SFAs and SSAs arose from separate agreements and were plainly different conduct. Moreover, entry into and giving effect to those agreements was also different conduct and gives rise to separate offences.

[38] In consequence, Cathay Pacific is theoretically liable for a maximum pecuniary penalty of $22.6 million for each breach in respect of six of the eight breaches and for a maximum pecuniary penalty of $5 million in respect of the two remaining breaches, which relate to conduct prior to May 2001. The aggregate maximum available penalty is accordingly a little in excess of $146 million.

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

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

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

(b) whether it was deliberate or not;

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[12] *Commerce Commission v Telecom Corporation of New Zealand Ltd* (2011) 13 TCLR 270 (HC).
[13] *Telecom Corporation of New Zealand Ltd v Commerce Commission* [2012] NZCA 344 at [28].
[14] *Commerce Commission v Alstom Holdings SA*, above n 2, at [20], *Commerce Commission v Carter Holt Harvey Building Products* (2000) 9 TCLR 636 (HC) at [15], *Commerce Commission v Ophthalmological Society* [2004] 3 NZLR 689 (CA) at [17], *Commerce Commission v New Zealand Bus Ltd (No.2)* (2006) 3 NZCCLR 854 (HC) at [20].

(c) the duration of the conduct;

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

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

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

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

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

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

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

[43] It is not disputed that the conduct in this case is at the serious end of the culpability spectrum. It involved price fixing arrangements, which as I have observed earlier is the type of conduct considered to be so serious that it is deemed to be anti-competitive per se. I accept that the surcharges comprised only part of the total charges to customers for air cargo services, but, in my view, the agreements and their implementation must inevitably have affected price competition and so impacted upon competitive dynamics in the relevant markets.[16]

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

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

[44] International cargo services generally are an important input for goods and services supplied throughout the New Zealand economy. I take into account, however, the fact that in-bound markets for air cargo between India (especially) and Singapore on the one hand and New Zealand on the other, are not particularly large. Total surcharge revenue was relatively moderate. I touch upon that issue below.

[45] It is common ground that these were not one-off transgressions, but rather were part of a sustained course of conduct in both jurisdictions. The breaches did not arise from chance conversations or from the actions of a rogue employee. They resulted from planned and methodical initiatives involving employees of Cathay Pacific in India and Singapore respectively. The unlawful conduct ceased only when search warrants were executed by regulatory bodies in the United States and Europe.

[46] On the other hand, while the conduct of the responsible employees was deliberate, it was neither sophisticated nor particularly covert. Nor was it rigorously enforced or implemented. Airlines were not forced to join the agreements, and the conduct was not designed to eliminate all competition between them. Neither is there any suggestion that senior management at head office were involved in any way. Moreover, the Commission accepts that although Cathay Pacific was a willing participant in the various agreements, it was not an instigator or leader in the cartel behaviour.

[47] I return briefly to the issue of commercial gain. The agreements were implemented over a significant period of time: broadly, between four and six years. The Commission considers that there was at the very least a potential for substantial gain for Cathay Pacific's conduct. Mr Thain for Cathay Pacific submits that:

(a) Cathay Pacific's total revenue from air cargo services to and from New Zealand over the relevant period of about six years was approximately $200 million;

(b) During that period its total fuel and security surcharge revenue was only $290,935.58;

(c) Of this sum only $305.46 related to the Singapore market. Almost all the revenue was derived from the Indian market, and

(d) There was no commercial gain at all because freight forwarders and importers did not necessarily pay higher prices for the relevant air cargo services than they would have paid but for their surcharge agreements.

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

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

[50] Mr Dixon submits that a starting point of between $5.2 and $5.6 million is appropriate for all of Cathay Pacific's conduct considered together.

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

> [62] Assessments of penalty in analogous cases may provide guidance to the court to ensure that there is parity of treatment in similar circumstances. However, while pecuniary penalties imposed in one case may provide a guide, that guide will seldom be able to be used mechanically. Changes in

[17] *Telecom Corporation of New Zealand Ltd v Commerce Commission* ftn 13 at [62].

> circumstance will affect the appropriate penalty in a case, such as differing circumstances of the conduct, size, market power and responsibility for the contraventions. These factors, among others (including mitigating factors), complicate any attempt to compare penalties imposed in one case with those imposed in another.

[52] Nevertheless, particularly helpful guidance is to be obtained from this Court's earlier judgments in *Commerce Commission v Korean Air Lines Co Ltd (Korean Air)* and *Commerce Commission v Singapore Airlines Cargo Pty Ltd (Singapore Airlines).*[18]

[53] In *Korean Air* I approved a pecuniary penalty of $3.5 million after discounting from a starting point of $4.8 million to $5.5 million. Korean Air had entered into agreements to impose fuel and security surcharges on cargo carried from Hong Kong, Japan and Malaysia respectively to New Zealand. From these agreements, implemented over a period of four to six years, Korean Air earned $266,681 in fuel surcharge revenue and $30,238 in security surcharge revenue. By comparison, Cathay Pacific entered into agreements to impose the same surcharges over a similar timeframe but out of only two hubs rather than three. Total surcharge revenue was similar. It is relevant, however, to take into account Cathay's considerable larger market share in New Zealand. Its cargo sales revenue of about $200 million was almost three times Korean Air's New Zealand revenue of $73 million. I accept Mr Dixon's submission that the considerable size of Cathay Pacific's New Zealand operations, which reflects its ability to materially affect competition in the relevant markets and goes to specific deterrence, is an important factor.

[54] In *Singapore Airlines* I approved a pecuniary penalty of $4.1 million after discounting from a starting point of $5.0 to $5.4 million. Singapore Airlines had entered into and implemented fuel and security surcharge agreements on their cargo services from Indonesia and Malaysia to New Zealand, although unlike most other airlines, Singapore Airlines did not join any illegal fuel surcharge agreement until April and May 2002. While the slightly shorter duration of Singapore Airlines' involvement in the fuel surcharge cartel renders it somewhat less culpable than

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[18] *Commerce Commission v Korean Air Lines Ltd* ftn 16; *Commerce Commission v Singapore Airlines Cargo Pty Ltd* ftn 16.

Cathay Pacific, that circumstance is counterbalanced to some considerable degree by the fact that Singapore Airlines' surcharge revenue was more than double that of Cathay Pacific.

[55] The Commission considers, and I accept, that overall Cathay Pacific maybe regarded as slightly more culpable than Singapore Airlines and Korean Air. I am satisfied that the Commission's proposed starting point of $5.2 to $5.6 million is justifiable.

[56] From that starting point it is necessary to consider mitigating factors specific to Cathay Pacific. As was the case for a number of other cartel participants, Cathay Pacific participated in the so-called stage one hearing, but following the resolution of outstanding procedural matters, has sought to resolve the issue prior to trial. For that purpose it has co-operated with the Commission during the course of the investigation and provided it with information not otherwise readily ascertainable. Cathay Pacific's co-operation involved the provision of more than 20,000 documents to the Commission through the discovery process, including documents collected from multiple jurisdictions beyond India and Singapore.

[57] But it has not for example, provided witnesses to the Commission or indicated a willingness to co-operate with the Commission at trial. It is not to be criticised for that. The absence of such co-operation simply serves to distinguish this case from one or two others, notably *Commerce Commission v Qantas Airways Ltd*,, in which very significant on-going assistance was proffered and accepted.[19]

[58] A significant mitigating consideration is the extent to which Cathay Pacific has enhanced its anti-trust and competition compliance policies following the discovery of this offending. It has undertaken a number of initiatives, such as the establishment of a Competition Compliance Office, led by a senior manager and under executive supervision. This office provides competition compliance training (both in person and on-line), together with annual and/or periodic refreshment training, and monitors compliance with all applicable competition and anti-trust

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[19] *Commerce Commission v Qantas Airways Ltd* HC Auckland CIV-2008-404-8366, 11 May 2011.

laws. Staff have been advised that failure to adhere to Cathay Pacific's anti-trust and competition compliance policies may result in dismissal.

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

[60] Cathay Pacific is a substantial company and the penalty imposed must be sufficient to operate as a deterrent in the light of its significant resources.

[61] It has not previously been found to have contravened the Act and has not previously been warned by the Commission in respect of conduct likely to breach the Act. Mr Thain has advised the Court of very substantial financial penalties imposed on Cathay Pacific in other jurisdictions for similar conduct. Those penalties amount in total to about NZ$180 million. He argues that it is appropriate to take penalties paid in other jurisdictions into account in the course of overall penalty assessment. Mr Dixon submits that while those penalties may deter Cathay Pacific from engaging in such conduct again in those jurisdictions, no discount is appropriate for overseas penalties because the penalty currently sought is for deterrence and potential and actual harm with respect to New Zealand. As I have earlier observed the trend of recent authorities is to take overseas penalties into account but only to a relatively minor degree.[20]

[62] In the light of all these mitigating factors counsel are agreed that a discount of 20% should be allowed from the starting point. I agree. That produces a final penalty range of $4.16–$4.48 million. The recommended penalty of $4.3 million is within that range.

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

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[20] See for example at [57] and *Commerce Commission v Japan Airlines Co Ltd* at ftn 17

**Result**

[64] Accordingly, there will be an order approving the recommended penalty and directing the defendant to pay to the Commission the sum of $4.3 million. The defendant is further ordered to pay costs to the Commission of:

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

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

**C J Allan J**