IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY No. S248 of 2016

BETWEEN: **PT Garuda Indonesia Ltd (ARBN 000 861 165)**
Appellant

and

10 **Australian Competition and Consumer Commission**
Respondent

APPELLANT'S REPLY SUBMISSIONS

Date of Document: 20 December 2016
Filed on behalf of: **PT Garuda Indonesia Ltd, the Appellant**
Prepared by: **Norton White**
Level 4, 66 Hunter Street
Sydney NSW 2000
Telephone: (02) 9230 9415
Fax: (02) 9230 9499
Ref: Mark Mackrell

PART I CERTIFICATION

These submissions are in a form suitable for publication on the internet.

PART II REPLY

A. MARKET

1. **Market Definition or Characterisation?** The respondent criticises Garuda's submission that the majority below treated the question of whether a market was "in Australia" as a separate and additional question to that of market definition (RS[24]).

10

2. The respondent's case is that in addition to questions of substitution it is permissible in answering the question whether a market is "in Australia" to take into account that:
   (a) elements of the services in question were delivered in Australia (RS [4], [16] and [29]);
   (b) competition in the market physically took place in Australia (RS [4], [9] and [24]);
   (c) participants in each market were located in Australia (RS [4], [28] and [31]);
   (d) demand for the services existed in Australia (RS [4] and [28]);
   (e) the services were marketed within Australia (RS [4], [16], [19], [28] and [31]);
20 and
   (f) barriers to entry being in Australia. (ANZ RS [66.3])

3. At RS [24] the respondent leaves open the question whether those matters are to be considered *"in order to conclude whether [the market] is properly characterised as a market "in Australia""* – that is as a separate and additional question to that of market definition - or alternatively whether those matters are to be brought to account as part of a "flexible purposive and evaluative" process of market identification.

4. Garuda does not repeat its submissions in chief as to why the question is not one of
30 characterisation but rather one of market definition.

5. The process of market definition is purposive and evaluative. It is a focusing process. Its purpose is to identify the clearest picture of relevant competitive processes to assess whether the substantive criteria for the particular contravention in issue are satisfied, in the commercial context the subject of analysis.[1] The aim is to identify suppliers whose existence significantly restrains the defendant's market power.[2]

6. Market power is price setting freedom. The metaphoric character of it cannot import the idea of the decision maker being in the marketplace physically. Constraint is the
40 consequence of substitutability at least at a competitive price. That exists in an economically significant sense at the possible place or places of substitution. Accepting that its effect will be felt at the place of decision it is important to recognise the limited significance of this fact from a market definition perspective. The situs of possible substitution is within the territorial parameters of the market. The delivery of the service, decision to substitute, marketing and barriers to entry may or may not be

---

[1] *Australian Competition and Consumer Commission v Flight Centre Travel Group Limited* [2016] HCA 49 per Kiefel and Gageler JJ at [69], Nettle and Gordon JJ agreeing at [123] and [150].

[2] Areeda and Kaplow: "Anti-Trust Analysis" cited in *Taprobane Tours* (1991) 33 FCR 158 at 178.

within those territorial parameters but they are not legally, because they are not economically, relevant as they bear no necessary relation to the question of constraint.

7. The respondent submits that it is appropriate to *"embark on a wider survey of the features of the market in order to conclude whether it is properly characterised as a market 'in Australia'"* (RS [24]). If, as the Respondent suggests, that occurs as part of market definition, it is circular: the survey is of features which can only be identified by the process. The Respondent's process does not focus any inquiry and does not seek to identify suppliers whose existence significantly restrains the defendant's market power. It is not a process of market definition. Rather, each of the matters to which the Respondent points indicates that the conduct in issue may have an effect in Australia. That is extraneous to market definition.

8. For example, Garuda was alleged and found to have made and given effect to the "Hong Kong Imposition Understanding"[3] on the basis that it joined in an Understanding between all members of the Hong Kong BAR-CSC (TJ[650]). Fifty-five airlines constituted the Hong Kong BAR-CSC.[4] Only 17 of those airlines operated "on-line"[5] (that is with their own aircraft)[6] from Hong Kong to Australian ports. The other airlines constrained Garuda's pricing freedom by offering, or being able to offer, carriage by interlining with an airline that was online to Australia. Those offline airlines did not need to have a physical presence in Australia[7] and it is a distraction from the relevant market inquiry to consider as the Respondent does at RS [32] and [33] whether they had a physical presence both in Hong Kong and Australia.

9. The submissions at RS [14] concerning *QCMA*, *Australian Meat Holdings*, *QIW Retailers v Davids Holdings* and *Boral Besser* underline that a market is where there are or may be suppliers whose presence constrains a defendant's prices. In the selling of delivered goods the economic and practical realities of delivery determine the territory across which the defendant's pricing freedom is constrained. In each of those cases the market was in the area across which it was feasible for suppliers to travel to sell their goods. A feature of the markets in *this* case is that no airline would travel to make a sale. Sales occurred at the airport of origin.

10. **The inflexible aspects of the market:** At RS [30] and ANZ RS [43] Garuda is criticised for its reliance upon inflexible aspects of the market. Those aspects inform the assessment of market structure[8] and the commercial and economic reality. For example, the Respondent relies on demand for airline's services in Australia but the finding at trial was that demand from shippers was for door to door delivery (TJ[25], [27]). That demand was satisfied by freight forwarders (TJ[38], [46]) with whom

---

[3] See Amended Statement of Claim paragraphs 230A - G and TJ[658].
[4] See particulars to paragraph 230B of the Amended Statement of Claim.
[5] Application A90855 for the Revocation and Substitution of Authorisation No A90435: Discussion Paper A90855/4, page 85.
[6] TJ[84] second sentence
[7] Carriage from Indonesia is governed by the Warsaw *Convention for the Unification of Certain Rules Relating to International Carriage by Air* found at Schedule 1 to the *Civil Aviation Carriers Liability Act 1959* and that from Hong Kong by the Warsaw Convention as amended at The Hague at Schedule 2 to that Act. Articles 1(3), 30(1) and 30(3) operate so that airlines can deliver through interlining without the first carrier having any form of physical presence at the airport upon arrival.
[8] *Analysis of market structure is necessary to determine distribution of power within the market* per French J in *Taprobane Tours* (1991) 33 FCR 158 at 179.6.

consignees in Australia negotiated and contracted. The consignees paid the freight forwarder's price, not an airline's price (TJ[48] to [51]). The Respondent relies at RS [34] on the fact that "customers" paid for goods to be delivered to airports in Australia. Customers of the airlines who paid for delivery to the airport of destination were freight forwarders, generally at the airport of origin. (TJ[121]) They paid or became liable to pay, before departure, prices negotiated between them and the airline at the local sales office. (TJ [107] [114(h)] They did so whether or not they were paid by the shipper. (TJ[123]). Consignees in Australia were not customers of the airlines. They were customers of freight forwarders (TJ [46] – [50]) whom they paid following delivery to the consignee's address. They did not pay for delivery to the airport (TJ[38] [52]). That structural delineation of the roles of freight forwarders and shippers is relevant to assessing the nature and location of suppliers whose existence constrained Garuda's pricing freedom – because it focuses the inquiry upon the airlines that freight forwarders might prefer to Garuda –it was the existence of those airlines at the airport of origin that constrained Garuda's pricing freedom.

B. INCONSISTENCY

11. **Construing the Air Navigation Act**: The gravamen of the Respondent's case is that Garuda is only required by Australian law to conform to a term of the ASA that "speaks to" Garuda (RS[66] and [67]). The Respondent does not say what "speak to" means and does not identify why Article 6(2) is not such a term: it speaks of "the designated airlines" and provides that they agree tariffs. The criterion of whether a term or condition "speaks to" a non-party to the agreement is opaque.

12. For the reasons that follow, the better construction focusses upon obligations owed to Australia and not by whom they are owed. Section 12 required that ASAs provide that the air services be operated "subject to the agreement or arrangement" and thereby evinced an intention that the terms and conditions of each ASA would govern conduct of those services. Section 13 refers to "any term or condition" and should be construed to mean what it says. When ss.12 and 13 were enacted Australia's ASAs prescribed norms for the conduct of air services between Australia and the other Contracting State, as contemplated by s. 12. International airlines were designated and authorised by the other Contracting State, and not by Australia, to conduct that Contracting State's services to Australia. Australia was obliged upon receipt of the designation to have a licence issued (Article 3(2) of the Australia Indonesia ASA is typical). Section 12 provided for that to occur. Sections 12 and 13 are to be construed so that a designated airline of another country was at risk of exercise of the power under s.13(b) if the airline, in reliance upon its licence, denied to Australia the benefit of any term or condition of the relevant ASA subject to which the airline operated the service. At RS[80] the Respondent submits that "any term or condition" should be read down to exclude obligations of the Contracting State to Australia while also submitting that the ASA only gives rise to obligations of a Contracting State. That construction of s.13(b) would strip it of any operation and this Court should reject it.

13. It does not matter whether the ASA in question imposes a duty to comply with its norms on the Contracting State or its designated airline: non-conformance by the airline to a norm for conduct of the service enlivened the power to cancel or suspend the licence. The requirement thereby imposed by s.13(b) of the Act was imposed by reference to Garuda's failure to conform to those norms of conduct.

14. At RS fn[25] there is a submission that Garuda has failed to demonstrate that Australian law requires that the ASA be implemented. The reference in s.13(b) to *"any term or condition of the relevant Agreement"* is part of the criterion for the exercise of a power to cancel or suspend the licence. That reference makes those terms and conditions criteria for exercise of that power.

15. **Construing the ASA**: The Respondent distinguishes between agreements on tariffs and agreements to implement tariffs at RS [72] but *tariff* means *"prices to be paid for the air transportation of passengers, baggage and cargo and the conditions under which those prices apply". "Such conditions sometimes include various surcharges that carriers might impose".*[9] Article 6(1) provided that tariffs were to be "established". The requirements in Article 6 were requirements for establishment, by agreement, of *"the prices to be paid and the conditions under which those prices apply".* There was no need or room for any further agreement that those prices would be applied and the Respondent's distinction is one devoid of any difference.

16. The Respondent seeks to read down the obligation in Article 6(2) to be a *reasonable steps* obligation. There is nothing in the text or context of the Article or the ASA that supports that reading down and this Court should reject it. In contrast the Respondent criticizes Garuda's reliance on the context of Article 6 at RS [76]. Nothing turns on that. The material to which Garuda pointed at AS [91]–[92] is either part of the 'context' in the strict sense of Article 31 of the *Vienna Convention* (on the basis that *Bermuda I* was the model from which the Australia-Indonesia ASA was prepared),[10] or part of the circumstances of the conclusion of the Australia-Indonesia ASA to which reference can be made consistent with Article 32 of the *Vienna Convention.*[11]

17. Contrary to the submission at RS [73] a failure by Garuda to seek to reach agreement on any tariff or a failure or refusal to reach agreement where that was possible would breach an obligation owed to Australia (by Indonesia) under the ASA. Two consequences of such a breach would follow. *First*, under Australian domestic law Garuda would be at risk of licence cancellation or suspension. *Secondly*, in international law grounds for a dispute would exist between Australia and Indonesia to be resolved, in the first instance by arbitration pursuant to Article 9 of the ASA. An example of that dual character of disputes occurred in 1993 in a dispute between the Minister and Australia on the one hand and North West Airlines and the United States on the other. The dispute was managed and resolved by a nuanced interaction of the domestically conferred powers and international dispute settlement processes.[12]

18. The submission at RS [82] that any potential conflict is realised only where the Minister exercises his discretion to cancel or suspend a licence is incorrect. If the Minister were to exercise his discretion to cancel or suspend the licence there would be no room for the requirement imposed by s. 13(b) because of the absolute prohibition on conduct of services that would then apply pursuant to s.12.

---

[9] Report of Professor Dempsey at page 2.3.
[10] See *Thiel v FCT* at 349 per Dawson J.
[11] See *Thiel v FCT* at 356 per McHugh J (Mason CJ, Brennan and Gaudron JJ agreeing at 344); see also *El Greco v Mediterranean Shipping* (2004) 140 FCR 296 at 328 [147] per Allsop J (Black CJ agreeing at [1]).
[12] See Dempsey: Public International Air Law at 696 to 699.

19. **Section 51 of the Trade Practices Act:** The respondent's submissions on s.51 of the *Trade Practices Act* do not grapple with the adjectival terms of s.51(1). The Respondent points to no decided case, other than those in this matter, which gives to the section a substantive operation.

20. The availability of an executive discretion which, if exercised, would avoid legislative inconsistency referred to at RS [87] does not assist in resolution of the inconsistency.

21. The *Air Navigation Act* and in particular ss.12 and 13 (with the network of ASAs) provide for Australia to manage the complex framework of international civil aviation,[13] and the characterisation at RS [89] of it doing no more than creating the risk of a loss of licence is incorrect.

22. The submission at RS [91] concerning the character of Part IV as *foundational, national, economic regulation* underlines the significance of the issues before the Court but does not assist their resolution. The *Air Navigation Act 1920* and the *Navigation Act 1912* were also foundational and national: they provided for much of the trade and commerce which the *Trade Practices Act 1974* merely regulated.

23. The respondent queries how the *Trade Practices Act* is to be read down. Garuda dealt with that in chief. The respondent's submissions at RS [98] and [102] seek to distinguish *Refrigerated Express*. In both cases there was a requirement for competitors to agree tariffs. That the mechanism to do so in *Refrigerated Express* was through conferences is not a basis of distinction.

Dated: 20 December 2016.

Noel Hutley
T: (02) 8257 2599
F: (02) 9221 8389
E: nhutley@stjames.net.au

Tom Brennan
T: (02) 9238 0047
F: (02) 9232 4071
E: brennan
@selbornechambers.com.au

Richard Scheelings
T: (02) 92327750
E:rscheelings
@wentworthchambers.com.au

[13] As exemplified by the *Australia v United States* dispute referred to at paragraph 17.