

FEDERAL COURT OF AUSTRALIA

Castel Electronics Pty Ltd v TCL Air Conditioner (Zhongshan) Co Ltd (No 2)

[2012] FCA 1214

Citation:	Castel Electronics Pty Ltd v TCL Air Conditioner (Zhongshan) Co Ltd (No 2) [2012] FCA 1214
Parties:	CASTEL ELECTRONICS PTY LTD v TCL AIR CONDITIONER (ZHONGSHAN) CO LTD
File numbers:	VID 218 of 2011 VID 224 of 2011 VID 317 of 2011
Judge:	MURPHY J
Date of judgment:	2 November 2012
Catchwords:	INTERNATIONAL ARBITRATION – arbitration pursuant to the International Arbitration Act 1974 – domestically made Model Law award - setting aside an award — recognition and enforcement of award – meaning of “public policy” in International Arbitration Act 1974 (Cth) - whether arbitral award is in conflict with or otherwise contrary to public policy – whether “public policy” relates to procedural as well as substantive issues - importance of international uniformity to interpretation of “public policy” - whether “public policy” has the same or similar meaning in relation to grounds for setting aside an award as grounds for refusing enforcement of an award – requirement for natural justice in connection with the making of awards – seriousness of the breach of the rules of natural justice required to be in conflict with public policy - principles governing the proper exercise of the discretion to set aside or refuse enforcement - the extent of the review warranted when an award is challenged for breach of natural justice – whether a distinction exists between the award and the reasons underpinning it - whether arbitral tribunal breached the rules of natural justice in making the award – whether findings regarding the quantification of loss were made in breach of the no evidence rule and the hearing rule – whether tribunal was required to adopt expert’s quantification of loss
Legislation:	<i>Arbitration (Foreign Awards and Agreements) Act 1974</i> (Cth)

Arbitration Act 1996 (NZ)
*Explanatory Memorandum to the International
Commercial Arbitration Bill 1988*
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[2011] HCA 37

Date of hearing:

23, 24 and 26 April 2012

Place:	Melbourne
Division:	GENERAL DIVISION
Category:	Catchwords
Number of paragraphs:	192
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**IN THE FEDERAL COURT OF AUSTRALIA
VICTORIA DISTRICT REGISTRY
GENERAL DIVISION**

VID 218 of 2011

**BETWEEN: CASTEL ELECTRONICS PTY LTD
Applicant**

**AND: TCL AIR CONDITIONER (ZHONGSHAN) CO LTD
Respondent**

**IN THE FEDERAL COURT OF AUSTRALIA
VICTORIA DISTRICT REGISTRY
GENERAL DIVISION**

**VID 224 of 2011
VID 317 of 2011**

**BETWEEN: TCL AIR CONDITIONER (ZHONGSHAN) CO LTD
Applicant**

**AND: CASTEL ELECTRONICS PTY LTD
Respondent**

JUDGE: MURPHY J

DATE OF ORDER: 2 NOVEMBER 2012

WHERE MADE: MELBOURNE

THE COURT ORDERS THAT:

1. The parties are to confer and provide draft orders to the Court giving effect to these reasons within seven days.
2. The parties to file short submissions as to costs within seven days.

Note: Entry of orders is dealt with in Rule 39.32 of the Federal Court Rules 2011.

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**VID 224 of 2011
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**BETWEEN: TCL AIR CONDITIONER (ZHONGSHAN) CO LTD
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**AND: CASTEL ELECTRONICS PTY LTD
Respondent**

JUDGE: MURPHY J

DATE: 2 NOVEMBER 2012

PLACE: MELBOURNE

REASONS FOR JUDGMENT

A INTRODUCTION

1 TCL Air Conditioner (Zhongshan) Co Ltd is a Chinese company engaged in the manufacture of air conditioners for the Chinese and international markets. It manufactures and sells air conditioners under its own name ("TCL-branded products"), and also under other brand names. The parties called air conditioners manufactured under other brand names Other Equipment Manufacture products ("OEM products"). Castel Electronics Pty Ltd is an Australian company engaged in the distribution of electrical goods including air conditioning units. Under a General Distributorship Agreement ("the Distribution Agreement") TCL granted Castel the exclusive right to sell TCL-manufactured air conditioners in Australia. The dispute between the parties arises out of claims by Castel that TCL breached the Distribution

Agreement by, amongst other things, selling OEM products in Australia in breach of Castel's exclusive right to sell TCL-manufactured products.

2 The claims and counterclaims of the parties were the subject of a commercial arbitration. Following a 10 day hearing in Melbourne an arbitral tribunal comprised of Dr Gavan Griffith AO QC, Mr Alan Goldberg AO QC and Mr Peter Riordan SC ("the Tribunal") made the following awards:

(a) An award made on 23 December 2010 which required TCL to pay to Castel an amount of \$2,874,870, net after a payment due by Castel to TCL ("the Award"); and

(b) An award made on 27 January 2011 which required TCL to pay to Castel \$732,500 in costs ("the Costs Award").

3 TCL refused to pay the awards. In proceedings numbered VID 224 and 317 of 2011 TCL seeks to set aside the awards pursuant to the *International Arbitration Act 1974* (Cth) ("the IAA"). It is common ground that the Court has jurisdiction to hear the setting aside applications. TCL contends that the Award should be set aside as contrary to public policy because of alleged breaches of the rules of natural justice, namely the no evidence rule and the hearing rule, in the Tribunal's assessment of Castel's losses. It further contends that the Costs Award should be set aside as it merely follows from the Award.

4 In proceeding number VID 218 of 2011 Castel seeks enforcement of the awards in reliance on the IAA. TCL earlier denied that the Court had jurisdiction to hear the enforcement application but in an earlier judgement I held that that it did: *Castel Electronics Pty Ltd v TCL Air Conditioner (Zhongshan) Co Ltd* [2012] FCA 21. TCL contends that the Award should not be enforced, again because to do so would be contrary to public policy due to the same alleged breaches of the rules of natural justice. It argues that the Costs Award should not be enforced, again because it merely follows from the Award.

5 I heard the setting aside and enforcement applications together. I have dealt with and determined the setting aside applications first for the practical reason that, if I found that the awards should be set aside, there would be no requirement to deal with the enforcement application. If the awards were not to be set aside the enforcement application was to be decided.

6 I accept that the Costs Award merely followed from the Award. In these reasons I shall refer only to the Award as the result for the Costs Award follows the result for the Award.

7 For the reasons I set out below I refuse to set aside the Award. I will make an order in terms of the Award thereby allowing its enforcement.

B LEGISLATIVE FRAMEWORK

8 As I set out in my earlier judgment on jurisdiction, the IAA commenced as the *Arbitration (Foreign Awards and Agreements) Act 1974* (Cth) and gave effect to the *Convention on the Recognition and Enforcement of Foreign Arbitral Awards* adopted in 1958 by the *United Nations Conference on International Commercial Arbitration* (“the Convention”). In 1989 the IAA was given its current name by the *International Arbitration Amendment Act 1989* (Cth) (“the 1989 amendment”). Section 16(1) of the amended IAA gave force of law in Australia to the Model Law on International Commercial Arbitration (“the Model Law”) as adopted by the *United Nations Commission on International Trade Law* (“UNCITRAL”). The Model Law is incorporated in the IAA as Schedule 2.

B.1 Objects

9 Section 2D of the IAA sets out its objects and relevantly provides:

The objects of this Act are:

- (a) to facilitate international trade and commerce by encouraging the use of arbitration as a method of resolving disputes; and
- (b) to facilitate the use of arbitration agreements made in relation to international trade and commerce; and
- (c) to facilitate the recognition and enforcement of arbitral awards made in relation to international trade and commerce; and
- ...
- (e) to give effect to the UNCITRAL Model Law on International Commercial Arbitration adopted by the United Nations Commission on International Trade Law on 21 June 1985 and amended by the United Nations Commission on International Trade Law on 7 July 2006; and
- ...

B.2 Setting aside an award

10 Article 34(2)(b)(ii) of the Model Law is part of Chapter VII entitled “Recourse Against Award of the Model Law”. It provides:

An arbitral award may be set aside by the court specified in article 6 only if:

...

(b) the court finds that:

...

(ii) the award is in conflict with the public policy of this State.

The State referred to in this article is “the country in which, or under the law of which, that award was made” or the seat of the arbitration, in this case Australia: See art V(1)(e) of the Convention.

11 Section 18 of the IA Act specifically vests the Federal Court with jurisdiction to set aside an arbitral award pursuant to art 34(2).

12 Section 39 of the IAA is headed “Matters to which the court must have regard.” Relevantly, subs 39(1)(v) provides that the section applies where a competent court under s 18 is, amongst other things, exercising its power to set aside an award: see s 18(3). Subsection 39(2) provides:

The court or authority **must**, in doing so, **have regard to:**

(a) **the objects of the Act; and**

(b) **the fact that:**

(i) arbitration is an efficient, impartial, enforceable and timely method by which to resolve commercial disputes; and

(ii) **awards are intended to provide certainty and finality.**

(Emphasis added)

B.3 Enforcement of an award

13 Article 35 of the Model Law is part of Chapter VIII titled “Recognition and Enforcement of Awards”. Under the heading “Recognition and Enforcement” it provides:

(1) An arbitral award, irrespective of the country in which it was made, shall be recognized as binding and, upon application in writing to the competent court, shall be enforced subject to the provisions of this article and of article 36.

(2) The party relying on an award or applying for its enforcement shall supply the original award or a copy thereof. If the award is not made in an official language of this State, the court may request the party to supply a translation

thereof into such language.

14 Article 36(1)(b)(ii) of the Model Law is part of the same chapter and appears under the heading “Grounds for refusing Recognition or Enforcement”. It provides:

- (1) Recognition or enforcement of an arbitral award, irrespective of the country in which it was made, may be refused only:
 - ...
 - (b) if the court finds that:
 - ...
 - (ii) the recognition or enforcement of the award would be contrary to the public policy of this State.

The State referred to in this Article is “the country where recognition and enforcement is sought” which in this case is Australia but which can be any Convention country: see arts V(1) and (2) of the Convention.

15 Section 53 of the *Federal Court of Australia Act 1976* (Cth) (“the Federal Court Act”) provides:

Enforcement of judgment

- (1) Subject to the Rules of Court, a person in whose favour a judgment of the Court is given is entitled to the same remedies for enforcement of the judgment in a State or Territory, by execution or otherwise, as are allowed in like cases by the laws of that State or Territory to persons in whose favour a judgment of the Supreme Court of that State or Territory is given.
- (2) This section does not affect the operation of any provision made by or under any other Act or by the Rules of Court for the execution and enforcement of judgments of the Court.

16 Section 54 of the Federal Court Act relevantly provides:

- (1) The Court may, upon application by a party to an award made in an arbitration (whether carried out under an order made under section 53A or otherwise) in relation to a matter in which the Court has original jurisdiction, make an order in the terms of the award.
 - ...
- (2) Subject to subsection (3), and order so made is enforceable in the same manner as if it had been made in an action in the Court.
 - ...

In my earlier judgement I held that the Federal court has original jurisdiction to enforce a non-foreign award as the relevant matter arises under a law made by Federal Parliament: see s 39B(1A)(c) of the *Judiciary Act 1903* (Cth).

17 If an order of this Court is made in terms of the Award pursuant to s 54 (1) of the Federal Court Act the debt may be enforced.

B.4 Requirement for natural justice in connection with the making of awards

18 Section 19(b) of the IAA provides that:

Without limiting the generality of Articles...34(2)(b)(ii) and 36(1)(b)(ii) of the Model Law it is declared, for the avoidance of any doubt, that, for the purposes of those Articles an interim measure or award is in conflict with, or is contrary to, the public policy of Australia if;

...
(b) a breach of the rules of natural justice occurred in connection with the making of the interim measure or award.

As I later explain, this provides that *any* breach of the rules of natural justice in connection with the making of an award means that it is in conflict with or contrary to the public policy of Australia.

C PRINCIPLES RELATING TO PUBLIC POLICY IN THE IAA

C.1 Does “public policy” relate to both procedural as well as substantive issues?

19 It cannot be doubted that “public policy” includes procedural questions as well as questions relating to substantive law. The *United Nations Commission on International Trade Law* report of 21 August 1995 at paragraph 297 made it clear that the words “the award is in conflict with the public policy of this State” in arts 34 and 36 are not to be treated as excluding instances or events relating to the manner in which an award was arrived at. It recorded that the expression “public policy” as used in the Convention covered “fundamental principles of law and justice in substantive as well as procedural respects”.

C.2 Does “public policy” have a similar meaning in the IAA in relation to setting aside an award and as a ground for refusal to enforce an award?

20 Articles 34(2)(b)(ii) and 36(1)(b)(ii) provide that an award may either be set aside or its enforcement be refused if it is in conflict with or contrary to public policy. Section 19(b)

of the IAA applies to both the public policy basis for setting aside an award under art 34, and the public policy basis for refusal to enforce an award under art 36. Sections 8(7)(b) and 8(7A) of the IAA dealing with enforcement of foreign awards also provide that a breach of natural justice falls within the expression “public policy”.

21 The expression “public policy” has a greater and different role in relation to setting aside an award under art 34(2)(b)(ii), than it does in relation to refusal to enforce an award under art 36(1)(b)(ii). In the decision of the Hong Kong Court of Final Appeal in *Hebei Import and Export Corp v Polytek Engineering Co Ltd* [1999] 2 HKC 205 at 229 (“*Hebei*”) Sir Anthony Mason said:

The Convention distinguishes between proceedings to set aside an award in the court of supervisory jurisdiction (arts V(1)(e) and VI) and proceedings in the court of enforcement (art V(1)). Proceedings to set aside are governed by the law under which the award was made or the law of the place where it was made, while proceedings in the court of enforcement are governed by the law of that forum. The Convention, in providing that enforcement of an award may be resisted on certain specified grounds, recognises that, although an award may be valid by the law of the place where it is made, its making may be attended by such a grave departure from basic concepts of justice as applied by the court of enforcement that the award should not be enforced.

That is, an order refusing enforcement is effective only in the State where enforcement is sought, whereas an order setting aside an award prevents its enforcement in all Convention countries: see art 36(1)(a)(v).

22 His Honour’s remarks also go to the public policy to be applied. It is likely that the public policy applied when enforcement is opposed will differ to some degree between Convention countries. The public policy of the supervisory jurisdiction may also differ from the public policy of the country where enforcement is sought. For example, if in this case Castel had applied to enforce the Award in China, the public policy that China would apply in considering any opposition to enforcement may well have some differences to the public policy I must apply in hearing the setting aside applications in Australia.

23 However, given that this Court is both the court of supervisory jurisdiction and the proposed court of enforcement, and taking into account the circumstances of this case, I consider that “public policy” has a similar operation in both the setting aside and enforcement contexts.

24 TCL lightly argued that that the public policy basis for setting aside an award was somehow broader than the public policy basis for refusing to enforce an award, but it did not develop this argument. The authorities do not provide a clear cut answer but, for example, in *Hebei* at 215 Bokhary PJ indicated that a reason for refusal of enforcement of an award “must go beyond the minimum which would justify setting aside a domestic judgement or award.” In *Oil & Natural Gas Corporation Ltd v SAW Pipes Ltd* (Civil Appeal 7419/2001, 17 April 2003) the Supreme Court of India emphasised that the jurisdiction to review an award is wider before the award becomes final and capable of execution

25 As against this, there is a presumption that the same words used consistently in legislation should be given the same meaning: *Registrar of Titles (WA) v Franzon* (1975) 132 CLR 611 at 618 per Mason J. This approach is rebuttable if the words themselves indicate otherwise, but there is no such indication here. While the operative public policy may differ between Convention countries or between the supervisory country and the country of enforcement, I can discern no relevant difference in the meaning of the expression “public policy” in the IAA when it is used in the two different contexts. It is significant too that the provision in s 19(b) which stipulates that a breach of natural justice in arbitral proceedings renders an award in conflict with or contrary to public policy does not set out any different approach in relation to setting aside an award as against enforcing it.

26 In *Commercial Arbitration in Australia* (Lawbook Co, 2011) at [10.205] the learned author Doug Jones does not point to any difference in the treatment of public policy in the different contexts. He states:

Article 34(2)(b)(ii) concerns recourse against an award on the basis that it contravenes the public policy of this state. Conflict with public policy as a ground for setting aside an award under art 34(2)(b)(ii) or refusing to enforce it under art 36(1)(b)(ii) concerns, in its broadest sense, the preservation of the public good.

27 The learned authors Redfern, Hunter, Blackaby and Partasides also do not suggest any difference in *Law and Practice of International Commercial Arbitration* (Law Book Co, Fourth Edition, London, 2004) at 419 to 420, where they state:

Most developed arbitral jurisdictions have similar conceptions of public policy. According to the Swiss Federal Supreme Court, public policy denotes fundamental legal principles, a departure from which would be incompatible with the Swiss legal and economic system. Similarly, German courts have held that an award will violate public policy if it conflicts with fundamental notions of justice, *bonos mores* or

conflicts with principles which are fundamental national or economic values. Again in similar terms, the Supreme Court of Justice of Ontario refused to set aside an award rendered by a NAFTA tribunal, holding that for the order to offend public policy:

“[it] ‘must fundamentally offend the most basic and explicit principles of justice and fairness in Ontario, or evidence intolerable ignorance or corruption on the part of the arbitral Tribunal’.

(Citations omitted).

28 Finally, I note that in dealing with the public policy ground for setting aside the awards in this matter, both parties rely on authorities relating to the public policy exception to enforcement of awards. While there is some sense to the proposition that there are broader grounds for setting aside an award than refusing to enforce it, the better view is that Australian public policy is the same in both contexts.

C.3 The seriousness of the breach of natural justice required for an award to be in conflict with public policy

29 Although this interpretation might be said to lead to inconsistency with international decisions on the meaning of “public policy”, I consider that the plain words of s 19(b) unambiguously declare that if *any* breach of natural justice occurs in connection with the making of an award then, for the purposes of arts 34 and 36, the award is in conflict with or contrary to the public policy of Australia. Although I should as far as possible construe the IAA consistently with international understanding of the Convention, I must construe it in accordance with conventional Australian principles of statutory interpretation and I must give s 19(b) its plain meaning: see *IMC Aviation Solutions Pty Ltd v Altain Khuder* [2011] VSCA 248 (“*IMC Aviation*”) at [35] and [37] per Warren CJ and at [129] per Hansen and Kyrrou JJ.

30 I construe s 19(b) in this way with some reluctance, as authority around the world indicates that a Convention award is only in conflict with or contrary to public policy if it offends fundamental notions of justice and fairness. It is difficult to see how a minor breach of the rules of natural justice, that is, one which is unlikely to affect the outcome in the arbitration, should operate such that the award is treated as being in conflict with public policy. It is also difficult to see how interpreting the provision in this way is consistent with the requirement in s 39(2) that awards are intended to provide certainty and finality. The interpretation may even be argued to be inconsistent with the pro-enforcement bias in the Convention.

31 However, the result of the drafting in s 19(b) is that its clear meaning is to declare *any* breach of the rules of natural justice in connection with the making of an award as meaning the award is in conflict with or contrary to public policy. In *Ironsands Investments Ltd v Toward Industries Ltd* (unreported decision of the High Court of New Zealand, Auckland Registry, 8 July 2011) per Courtney J at [19] her Honour reached the same conclusion in relation to the same words in art 34(6) of the *Arbitration Act 1996* (NZ) (cf: *Amaltal Corporation Ltd v Maruha (NZ) Corporation Ltd* [2004] 2 NZLR 614 (“*Amaltal*”) per Gault, Blanchard and McGrath JJ at [42]).

32 The parliamentary intention in introducing s 19(b) into the IAA indicates the same outcome. The Explanatory Memorandum to the 1989 amendment set out that its object was “to make certain that the requirements of procedural justice as well as substantive principles of law and justice are complied with in arbitrations”: *Explanatory Memorandum to the International Commercial Arbitration Bill 1988*, paragraph 9.

33 Even so, lest it be thought that s 19(b) operates to put Australia out of step with other Convention countries, it is important to keep in mind that arts 34 and 36 provide that a Court *may* set aside an award or refuse enforcement if it finds that the award is in conflict with or contrary to public policy. That is, the powers to set aside an award or to refuse enforcement are discretionary. The question is what is required in the proper exercise of the discretions. As I set out below, the thrust of the authorities is that the discretions should only be exercised when fundamental notions of fairness or justice are offended.

C.4 The discretions to set aside an award or refuse to enforce it

34 One of the objects of the IAA is to facilitate the enforcement of awards and the authorities often speak of the pro-enforcement bias of the Convention. Insofar as setting aside an award is concerned, the proper exercise of my discretion requires that I have regard to the matters set out in s 39(2) and the objects of the IAA. I must have regard to the fact that arbitration is intended to be an efficient, enforceable and timely method of resolving commercial disputes, and that arbitral awards are intended to provide certainty and finality. These considerations indicate that the discretion to set aside an award or to refuse enforcement because an award is in conflict with or contrary to public policy, should be sparingly applied. If not, the certainty and finality of awards and the facilitation of award enforcement may be undermined.

35 Numerous decisions of courts in Convention countries and several decisions of this Court point in the same direction.

C.4.1 The importance of uniformity of decisions as to “public policy”

36 Although the decisions of the courts in Convention countries are not binding, there is an obvious importance to taking them into account. This importance was outlined in *Hebei* in which Bokhary PJ said at 216:

When a number of states enter into a treaty to enforce each other’s arbitral awards, it stands to reason that they would do so in the realization that they, or some of them, will very likely have very different outlooks in regard to internal matters. And they would hardly intend, when entering into the treaty or later when incorporating it into their domestic law, that these differences should be allowed to operate so as to undermine the broad uniformity which must be the obvious aim of such a treaty and the domestic laws incorporating it.

At 215 his Honour noted that a similar point was made by the United States Supreme Court in *Mitsubishi Motors Corp v Soler Chrysler-Plymouth Inc*, 473 US 614 (1985) which called for:

...sensitivity to the need of the international commercial system for predictability in the resolution of disputes...

37 In *Commercial Arbitration in Australia* Jones noted at [10.290]:

In international arbitration the trend has been to read public policy narrowly with the familiar rationale of mutual respect for the recognition of foreign laws.

38 The objects of the IAA also indicate the desirability of some uniformity between Convention countries in the meaning and operation of “public policy”. A reasonable level of uniformity will tend to facilitate international trade by encouraging the use of arbitration as a method of resolving disputes. I have had regard to the principle of international comity to the extent to which doing so is consistent with the proper construction of the provisions of the IAA.

C.4.2 The meaning of “public policy” in the IAA and Convention

39 The leading US decision on the public policy exception to enforcement of an award under art V of the Convention is *Parsons & Whittemore Overseas Co, Inc v Societe Generale De L’Industrie Du Papier (RAKTA)* 508 F 2d 969 (2d Cir 1974) (“*Parsons & Whittemore*”).

The US Second Circuit Court of Appeal, construed the public policy exception narrowly, holding at 974 that the enforcement of a foreign arbitral award should only be refused where enforcement would “violate the forum state’s most basic notions of morality and justice”. In what has become a well accepted approach, the Court referred to “the general pro-enforcement bias” of the Convention.

40 The English Court of Appeal has also taken a narrow approach to the scope of “public policy”. In *Deutsche Schachtbau-und Tiefbohrgesellschaft mbH v Shell International Petroleum Co Ltd* [1990] 1 AC 295 (“*Deutsche Schachtbau*”) Lord Donaldson MR, writing for the Court, said at 316:

Considerations of public policy can never be exhaustively defined, but they should be approached with extreme caution.

Lord Donaldson noted that public policy might be contravened where:

...there is some element of illegality or...the enforcement of the award would be clearly injurious to the public good or, possibly, that enforcement would be wholly offensive to the ordinary reasonable and fully informed member of the public on whose behalf the powers of the state are exercised.

41 As indicated earlier, the Hong Kong Court of Final Appeal held in *Hebei*, per Bokhary PJ at 215:

In my view, there must be compelling reasons before enforcement of a Convention award can be refused on public policy grounds. This is not to say that the reasons must be so extreme that the award falls to be cursed by bell, book and candle. But the reasons must go beyond the minimum which would justify setting aside a domestic judgement or award.

At 216 his Honour held that the references in the Convention to the refusal of enforcement of Convention awards on public policy grounds meant:

... those elements of a State’s own public policy which are so fundamental to its notions of justice that its courts feel obliged to apply the same not only to purely internal matters but even to matters with a foreign element by which other States are affected.

42 His Honour refused to grant relief from enforcement of an award on public policy grounds, holding at 216 that before enforcement is refused:

...the award must be so fundamentally offensive to that jurisdiction’s notions of justice that, despite its being a party to the Convention, it cannot reasonably be

expected to overlook the objection.

43 Also in *Hebei*, Sir Anthony Mason took a similar view, observing at 232 to 233:

...the object of the Convention was to encourage the recognition and enforcement of commercial arbitration agreements in international contracts and to unify the standards by which agreements to arbitrate are observed and arbitral awards are enforced (*Scherk v Alberto-Culver Co* 417 US 506 (1974); *Imperial Ethiopian Government v Baruch-Foster Corp* 535 F 2d 334 (1976) at 335). In order to ensure the attainment of that object without excessive intervention on the parts of courts of enforcement, the provisions of art V, notably art V 2(b) relating to public policy, have been given a narrow construction. It has been generally accepted that the expression 'contrary to the public policy of that country' in art V 2(b) means 'contrary to the fundamental conceptions of morality and justice' of the forum. (*Parsons v Whittemore Overseas Co Inc v Societe General de l'Industrie du Papier (RAKTA)* (1974) 508 F 2d 969 (2d Cir 1974) at 974 (where the Convention expression was equated to 'the forum's most basic notions of morality and justice'); see A J van den Berg, *The New York Convention of 1958*, p 376...

44 In *Attorney General of Canada v SD Myers Inc* [2004] 3 FCR 368 at [55] the Federal Court of Canada stated that public policy refers to fundamental notions and principles of justice.

45 The Singapore Court of Appeal in *PT Asuransi Jasa Indonesia (Persero) v Dexia Bank SA* [2007] 1 SLR(R) 597 at [59] stated that the public policy exception to enforcement would apply only where an award would shock the conscience or is clearly injurious to the public good, or wholly offensive to the ordinary, reasonable, and fully informed members of the public, or violates the forum's most basic notion of morality and justice.

46 The New Zealand Court of Appeal too has taken a restrictive approach to the scope of public policy. In *Amaltal* the Court held that only a serious breach of the rules of natural justice rendered an award contrary to or in conflict with New Zealand public policy. The Court of Appeal's approach at [47] further indicates the restrictive view which it took of the public policy basis for setting aside an award. After reviewing authorities such as *Parsons & Whittemore* and *Deutsche Schachtbau* the Court observed:

Assuming that the subject-matter of an arbitration has required the arbitrator to make a determination on a matter capable of raising some fundamental principle of law and justice - a classic instance being the illegality of the subject contract - when will the Court intervene on an application under art 34 which asserts a conflict with public policy? In principle, it might be thought that unless it is obvious that what has occurred is contrary to public policy in the sense just discussed, the limited nature of judicial review of arbitral awards will require that the arbitrator's findings of fact and

law be respected.

47 This approach was followed in another New Zealand decision, *Downer-Hill Joint Venture v Government of Fiji* [2005] 1 NZLR 554 (“*Downer-Hill*”). The Court held that a failure to accord natural justice in an arbitration under the IAA must pass a high bar before it will justify setting aside the award as being in conflict with public policy. At [81] to [82] and at [84], the Court quoted with approval a decision of Randerson J in an application to set aside an award in *Downer Connect Ltd v Pot Hole People Ltd* (High Court, Christchurch, CIV 2003-409-2878, 19 May 2004) noting:

81 In *Pot Hole* Randerson J also dealt with a submission by Downer that the arbitrator had made findings not supported by evidence or which were contrary to the evidence. In dealing with that submission Randerson J said:

[117] In view of my conclusions, it is unnecessary to consider in detail whether a challenge to factual findings (if that is what they were) is a permissible ground upon which to set aside an award under Article 34. It could only be so if the challenge could be brought under the umbrella of Article 34(2)(b)(ii) as being in conflict with the ‘public policy of New Zealand’. It is of course well-established that a finding must be based on some material that tends logically to show the existence of facts consistent with the finding and that the reasoning is not logically self-contradicting: *Mahon v Air New Zealand* [1984] 1 AC 808, 820-821 (PC) per Lord Diplock. **But it is a much larger step to conclude that an error by an arbitrator in that respect is sufficient to render an award contrary to public policy.**

82 Then, after referring to the Court of Appeal’s decision in *Amaltal*, and to its earlier judgement in *Gold Resource Developments (NZ) Ltd v Doug Hood Ltd* [2000] 3 NZLR 318 at p 335 Randerson J continued:

[119] In an era when the Arbitration Act encourages arbitration and respect for arbitral awards, a challenge to factual findings is most unlikely to succeed. In that respect, I respectfully endorse the remarks of Heath J in *Attorney-General v Tozer* (High Court, Auckland, M 1528/02, 2 September 2003) when his Honour observed at paragraph [16] that it would be inappropriate to set aside all or part of an award if the real reason for complaint was that the party making the challenge was dissatisfied with a finding of fact. Heath J noted that where the parties had appointed a person in whom they placed confidence to determine the dispute, the principle is that questions of fact are for the arbitrator to determine.

...

84 Even assuming that Downer could establish a breach of the *Erebus* ground of natural justice, the “public policy” requirement in art 34 imposes a high threshold on Downer. The phrases “compelling reasons” and “a very strong case” are employed in the judgements of the Hong Kong Court of Appeal in *Hebei...Hebei* involved an application to set aside a foreign award. To

warrant interference there must be the likelihood that the identified procedural irregularity resulted in a “substantial miscarriage of justice”: *Honeybun v Harris* [1995] 1 NZLR 64 at p 76. That entails the impugned finding being fundamental to the reasoning or outcome of the award. The Court of Appeal suggested in *Amaltal* (at para [47]) that the arbitrator’s findings of fact should not be reopened unless it was “obvious” that what had occurred was contrary to public policy.

(Emphasis added.)

48 In Australia, the Federal Court has taken a similar approach. In *Uganda Telecom Ltd v Hi-Tech Telecom Pty Ltd* (2011) 277 ALR 415 at [132] (“*Uganda Telecom No 1*”), while primarily dealing with the question as to whether a general discretion to refuse enforcement of an award on public policy grounds exists, Foster J observed:

While the exception in s 8(7)(b) has to be given some room to operate, in my view, it should be narrowly interpreted consistently with the United States cases. The principles articulated in those cases sit more comfortably with the purposes of the convention and the objects of the Act.

49 In *Traxys Europe SA v Balaji Coke Industry Pvt Ltd (No 2)* [2012] FCA 276 Foster J considered the scope of the public policy exception in the IAA in relation to enforcement. His Honour cited *Parsons & Whittemore* and *Hebei* with approval, and noted at [96] that the expression public policy, when used in s 8(7)(b) of the IAA:

...means those elements of the public policy of Australia which are so fundamental to our notions of justice that the courts of this country feel obliged to give effect to them even in respect of claims which are based fundamentally on foreign elements such as foreign awards under the IAA.

50 The Award before me is the product of a freely negotiated arbitration agreement entered into between relatively sophisticated commercial parties. They made a choice that in the event of a dispute they would prefer to resolve it by arbitration rather than litigation in the courts. An important aim of arbitrations is certainty and finality and it is well accepted that the Convention has a pro-enforcement bias. I regard the public policy ground as requiring offence to fundamental notions of fairness and justice before I should exercise my discretion to set aside an award or to refuse to enforce it.

51 Of course, this is not to say that awards must always be upheld in the interests of finality or party autonomy. As McDougall J noted in *Corvetina Technology Ltd v Clough Engineering Ltd* [2004] NSWSC 700 (“*Corvetina*”) at [18], what is required is a balancing

between the necessity to ensure that the mechanism for enforcement of international arbitral awards is not frustrated, and the necessity for the Court to be master of its own processes and to apply the public policy of that State.

C.5 The extent of the review when an award is challenged for breach of natural justice

52 TCL argues that I should adopt what it called a “broad” or “maximal review” approach in determining whether breaches of natural justice occurred in connection with the making of the Award. It contends that in reviewing the case I should carefully examine the evidence and law to ensure that there is in fact no conflict with the rules of natural justice, since the Court has a duty to ensure that the award is not in contravention of the law. It refers to various authorities in this regard including *Corvetina, Denmark Skibstekniske Konsulenter A/S I Likvidation v Ultrapolis 3000 Investments Ltd* [2010] SGHC 108 at [38] to [39], *AJT v AJU* [2010] 4 SLR 649 at [22] to [23] and *Methanex* at [46] to [47]. The thrust of these authorities is that a balance must be struck between the purpose of ensuring certainty and finality of arbitral awards, and the competing purpose of protecting the fundamental procedural rights of each party. I accept that this balance must be struck.

53 TCL contends that in order to meet this balance I should “examine the facts of the case afresh and revisit in full the questions which were before the tribunal”. It argues that the Court of Appeal of the Supreme Court of Victoria took this approach in *IMC Aviation*. I reject this contention. To do so would be to treat this matter as akin to an appeal de novo and to invite the Court to substitute its own findings of facts, interpretations of facts found, and reasoning. It would operate to undermine the parties’ decision to resolve any dispute by arbitration rather than by resort to the courts.

54 While the Court of Appeal in *IMC Aviation* did closely consider the factual questions relevant to the subject matter of the appeal in that case, it did not have cause to review the merits of the Mongolian award. That case was an appeal from a decision allowing recognition and enforcement of an award made in Mongolia against an entity which was not a party to the arbitration agreement and which did not participate in the arbitration. It was not concerned with the meaning of the expression “in conflict with or contrary to public policy” or the content of the rules of natural justice in that regard.

55 In my view the suggested requirement to examine the facts of the case afresh and revisit in full the questions before the Tribunal is against the pro-enforcement bias of the Convention. It also offends the requirement in s 39(2) of the IAA that, in considering a setting aside application, the Court must have regard to the fact that awards are intended to provide certainty and finality and the object of facilitating the recognition and enforcement of arbitral awards.

56 Having said this, I respectfully agree with the views of Fisher J in the High Court of New Zealand in *Methanex* at [148] to [149], where his Honour found that the unqualified inclusion of a “natural justice” in the *Arbitration Act 1996* (NZ) required the application of the broad common law principles of natural justice to arbitrations. The New Zealand legislation is in relevantly very similar terms to the IAA. Fisher J observed at [149] that:

The detailed demands of natural justice in a given case will turn on a proper construction of the particular agreement to arbitrate, the nature of the dispute, and any inferences properly to be drawn from the appointment of an arbitrator known to have special expertise.

57 In the matter before me there is no indication in the Distribution Agreement that the parties intended any exclusion of the common law principles of natural justice. It was not contended that the arbitrators were appointed because of any special expertise in the subject matter of the dispute, so I can draw no related inferences. In *Methanex* this went to an argument that expert arbitrators might be entitled to use their knowledge and experience to fill in gaps in the evidence.

58 Numerous authorities support the approach in *Methanex*, namely that the application of the common law principles of natural justice depends upon the nature of the dispute and the circumstances of the case: *Salemi v MacKellar* (1977) 137 CLR 396 at 419; *Fairmount Investments Ltd v Secretary of State for the Environment* [1976] 2 All ER 865 at 874; *Trustees of Rotoaira Forest Trust v Attorney-General* [1999] 2 NZLR 452 (“*Rotoaira Forest Trust*”) at 459.

59 As Jones says in *Commercial Arbitration in Australia* at 233:

It is important to keep in mind that the application of each of the [principles of natural justice] is dependent on the facts of each case, and by no means should they be considered concrete rules.

60 There is nothing technical about these principles, it is simply a matter of procedural fairness. The level of review necessary is that which will enable me to determine whether:

- (a) the no evidence rule was breached in the arbitration. That is, whether there was rationally probative evidence in support of the three findings TCL complains of; and
- (b) whether in reaching those findings the hearing rule was breached. That is, whether the Tribunal gave TCL a fair hearing and in particular whether the Tribunal made the three findings based upon its own opinions and ideas which were not reasonable corollaries of the opinions and ideas traversed during the hearing and which TCL may, with adequate notice, have been able to persuade the Tribunal against.

61 The nature of the dispute before me and the facts and circumstances of this case have led me to the conclusion that I should conduct a close examination of the evidence in the hearing, although not to the extent as TCL contends of examining the facts of the case afresh and revisiting in full the questions before the Tribunal. I have some concerns that the review which I have undertaken may be too deep and therefore unfair to Castel as the beneficiary of the Award. That is, it may pay insufficient respect to the Tribunal's findings and too little regard to the principles of certainty and finality of awards. However, I have taken some comfort from the fact that I can find no breach of natural justice in connection with the making of the Award even upon this close review.

C6 Is there a relevant distinction between the requirement for natural justice in the Award as against the reasons underpinning it?

62 Castel submits that TCL's applications to set aside the Award and its opposition to enforcement of the Awards cannot be sustained because s 19(b) of the IAA relates only to a breach of natural justice that occurs in connection with "the making of the...award." In making this argument Castel attempts to draw a distinction between the Award and the reasons for it, arguing that TCL must prove a breach of the "no evidence" rule and the "no hearing" rule in the one page Award itself, rather than in the detailed reasons. It points to the observations of Heydon J in *Westport Insurance Corporation v Gordian Runoff Limited* [2011] HCA 37 ("*Westport Insurance*") at [77] where his Honour said:

An award shall, unless otherwise agreed in writing by the parties, have included in it

a statement of the reasons for making the award...**but the reasons do not constitute the award.** The Court of Appeal erred in equating appeals against awards with complaints about the reasons for, or questions of law arising out of, awards.

(Emphasis added.)

63 I do not accept this submission. Article 31(2) of the Model Law provides that “the award shall state the reasons upon which it is based...” which tends to indicate that the reasons are part of the award. Even if the reasons are not part of the award, the words “in connection with” in s 19(b) have a broad meaning which must include the process of hearing and considering evidence, evaluating it and making an award. If there were breaches of the rules of natural justice in the conduct of the hearing or in the Tribunal’s evaluation of evidence then that is “in connection with” the making of the award.

64 It is also clear that where the circumstances require it, the Court may look to the reasons underpinning an award to discern whether a breach of natural justice has occurred. In *Westport Insurance* at [35] French CJ, Gummow, Crennan and Bell JJ cited with approval Giles J in *RP Robson Constructions Pty Ltd v Williams* (1989) 6 BCL 219 at 221 where his Honour noted that for a party to make out a complaint of an error of law in an award that party must go to the reasons. The majority in *Westport Insurance* noted at [36] that: “[t]he reasons, for this purpose, are part of the award.”

D THE SETTING ASIDE APPLICATIONS

65 TCL contends that three findings made by the Tribunal are made in breach of the rules of natural justice. TCL describes the three findings as the 14% Starting Point Finding, the Uplift Finding, and the Lost Sales Finding, and I will adopt those descriptions. It says that because the Tribunal made these three findings the Award is in conflict with or contrary to the public policy of Australia, and should be set aside pursuant to art 34 of the Model Law in the IAA.

D.1 The Arbitration

66 The Distribution Agreement between Castel and TCL was made on 29 December 2003, and varied in a meeting on 29 May 2007 (“the Variation Agreement”). It contained a clause which provided for arbitration of disputes to be held in Australia. No question as to the proper construction of the Distribution Agreement or the Variation Agreement arises in the

applications to set the awards aside or in the application to enforce them. It is accordingly unnecessary to set out their terms.

67 Castel referred a dispute for arbitration on 25 July 2008 and the Tribunal was then duly constituted. There was an initial dispute as to the extent of the Tribunal's jurisdiction under the arbitration clause which was resolved in an application to the Supreme Court of Victoria: *TCL Airconditioner (Zhongshan) Co Ltd v Castel Electronics Pty Ltd* [2009] VSC 553.

68 Both parties participated fully in the arbitration and were represented by senior and junior counsel and solicitors. Procedural hearings leading to directions by the Tribunal were held in February, July and September 2010, and rulings were given on contested discovery issues. The substantive hearing was held in Melbourne for 10 days between 13 and 24 September 2010. Both parties' expert witnesses provided detailed reports, lay witnesses provided signed statements, and both were subject to cross-examination. Detailed opening and closing submissions were made by both parties.

69 It is unnecessary for me to set out all aspects of the arbitral hearing as no question arises as to the bulk of the 95 page Award. It is only in the approach taken by the Tribunal to the assessment of Castel's loss arising from TCL's sales of OEM products that TCL complains of breaches of the no evidence rule and the hearing rule.

70 Castel claimed that it was appointed as TCL's exclusive distributor in Australia for TCL-manufactured air conditioners, whether TCL-branded products or OEM products. It said that the Variation Agreement came about as a result of extensive complaints by it concerning, amongst other things, TCL's breaches of its obligations not to sell air conditioners that competed with the TCL-branded products that Castel had the exclusive right to sell. Castel contended that in breach of its obligations TCL supplied a large volume of OEM products under a variety of brand names to purchasers in Australia.

71 TCL accepted that it had sold 52,878 OEM products over the period of the Distribution Agreement and up to 31 December 2008 but denied that this was in breach of the agreement. It contended that the distributorship and exclusivity granted to Castel was confined to TCL-branded products and did not relate to OEM products. That is, TCL's

obligation to Castel with regard to selling competing air conditioners in Australia was limited to an obligation not to sell TCL-branded products other than through Castel.

72 Contrary to TCL's submissions, the Tribunal determined that the Distribution Agreement gave Castel an exclusive right to sell all TCL-manufactured products in Australia. It determined that TCL's sales of OEM products over the period from 1 January 2004 to 31 December 2008 were made in breach of the agreement, and that Castel was entitled to damages. These findings are not the subject of complaint before me.

73 Having decided that TCL's sales of 52,878 OEM products were a breach of the exclusivity provisions of the Distribution Agreement it fell to the Tribunal to determine what loss Castel had suffered by reason of the unauthorised sales. Castel complained of very significant lost sales of TCL-branded products (and significant lost profits) by reason of the sales of the OEM products. TCL contended that Castel had suffered no loss from the sales of the OEM products, although leading expert evidence that the maximum lost sales were in the order of 7.4% of the sales of OEM products.

74 The Tribunal considered that the appropriate way to approach assessment of Castel's loss was by proceeding in three stages:

- (a) estimating the additional volumes of TCL-branded products which would have been sold by Castel had TCL not sold OEM products in Australia in the relevant period;
- (b) determining the prices at which those additional volumes would have been sold and the resulting gross profit margin; and
- (c) calculating the additional costs which would have been associated with those higher sales volumes.

The Tribunal's three stage approach is not the subject of dispute in these proceedings. TCL complains only that, in the first stage of this process - that is, in estimating the additional sales of TCL-branded products that Castel would have made if the sales of the OEM products had not been made - the Tribunal failed to accord it natural justice.

75 In support of its claim of lost sales Castel called as an expert witness Mr Peter Acton, a financial and management consultant, as well as calling evidence from its Managing Director, Mr Michael Kwong, and from its Queensland manager, Mr Trevor Francis.

76 TCL called as an expert witness the economist, Mr Phillip Williams, to provide an opinion as to Castel's lost sales arising from the sale of the OEM products. It also called evidence from its General Manager, Overseas Business Division, Mr Shi Weiyi (Mr David Shi), and its Sales Director, Mr Frank Wang. An accountant, Mr Darryn Hockley, was also called by TCL as an expert witness but his evidence is not relevant to these proceedings.

77 One of the issues affecting the Tribunal's determination of Castel's lost sales of TCL-branded products was the extent to which the OEM products were directly competitive with and substitutable for them. Mr Williams discussed horizontal and vertical differentiation of products at paragraphs 32-35 of his report. He said:

- 32 The difference between the two kinds of product differentiation stems from the number of buyers who rank one product over another. Products are said to be horizontally differentiated if buyers differ in their rankings of the products so that, if all products were available at the same price, not all buyers would demand the same products. By contrast, products are said to be vertically differentiated if buyers have the same ranking of the products so that, if all products were available at the same price, all buyers would demand the same (most highly-ranked) product. As Tirole notes, one reason for vertical differentiation is difference in quality.
- 33 Consider the example of domestic motor vehicles. These products are differentiated because some products are sold at higher prices than others. The patterns of consumer preferences among motor vehicles involve elements of both horizontal and vertical product differentiation. Elements of horizontal differentiation seem to be matters such as: (i) seating capacity; (ii) engine size; (iii) four-door or two-door; (iv) hardtop or soft top; and so on. These are elements on which potential consumers have different preferences; that is, even if all cars were available at the same price, consumers would wish to purchase different cars depending on the extent to which the characteristics of the cars corresponded to their preferences over attributes such as these.
- 34 By contrast, almost all consumers would prefer: (i) a new car over a second-hand car; (ii) a car with perfect paint work over a car with defective paint work; and (iii) a car manufactured by a maker with a reputation for high quality engineering over one manufactured by a maker with a reputation for shoddy design and manufacture. That is, these are elements on which consumers will have similar preferences; that is, if all cars were available at the same price, consumers would choose those that were new, had perfect paintwork and were manufactured by a maker with a reputation for high-quality design and manufacture. That is, all consumers will prefer higher quality over poorer quality.

- 35 Economists often speak of products being located in ‘product space’. Product space may have both vertical and horizontal dimensions. The closer one product is to another in product space, the more likely a consumer is to substitute one product for another if the price of the first product were to rise or if it were to become unavailable.

78 Mr Acton did not claim expertise as to the substitutability of OEM products for TCL-branded products. He relied on the detailed evidence of Mr Kwong and Mr Francis who said that the OEM products had a high degree of similarity with the TCL-branded products (sometimes appearing identical and having the same service brochure, sometimes being advertised as in fact being manufactured by TCL). Mr Francis also gave evidence of some retailers who had switched to OEM products from TCL-branded products. Mr Acton’s evidence based on this was that each sale of an OEM product meant that Castel lost a potential sale of a TCL-branded product. That is, the substitution ratio of OEM products for TCL-branded products was 1:1 or 100%.

79 During the arbitration TCL challenged the expertise and qualifications of Mr Acton to give expert evidence on the topics contained in his report. While the Tribunal received Mr Acton’s evidence, it ultimately said in its reasons that although he was an honest witness his report failed to meet the criteria for an expert’s opinion and no weight could be placed upon his evidence as an expert. Nevertheless, the Tribunal considered that it was still able to have regard to some parts of Mr Acton’s evidence as evidence of a fact. It considered that his evidence remained of assistance as a framework and a methodology for the calculation of Castel’s losses because the methodologies were either not challenged, or if challenged deserved to survive that challenge. I note in passing that, while TCL raised concerns about the number of references by the Tribunal to Mr Acton’s evidence in the Award, nothing of significance in the result turned on his evidence.

80 It was common ground that both the TCL-branded products and the OEM products occupied a product space at the bottom of the Australian market. In his evidence Mr Kwong identified five different levels in the market and the brands which occupied those levels as:

- Level 1 – Daikin;
- Level 2 - Panasonic, Toshiba, Fujitsu and Mitsubishi;
- Level 3 – Samsung, LG and Kelvinator;

- Level 4 – Midea, TCL, Gree (although Midea was said to be at the top of this level and TCL at the bottom);
- Level 5 - all other Chinese brands (including the OEM products).

Mr Williams did not quarrel with these suggested levels.

81 Mr Williams rejected as unreasonable the proposition advanced by Mr Acton that 100% of the sales of OEM products were diversions from potential sales of TCL-branded products. He said that his “primary reason for this opinion is that TCL’s products were not likely to be directly competing with its OEM products and other products within the lowest-priced segment of the air conditioning market.”

82 There was no attack on the expertise or independence of Mr Williams. He was however vigorously cross examined as to the approach he took to the substitutability of OEM products and TCL-branded products and the estimation of Castel’s lost sales, and Castel submitted to the Tribunal that his estimation of Castel’s lost sales was far too low and some of his opinion was abstract theorising.

83 Importantly, Mr Williams conceded an absence of data as to the degree of substitutability between OEM products and TCL-branded products. He noted:

56 ...air conditioning units are a highly differentiated product. This means that the extent to which one brand is a substitute for another is a matter of degree. **I have made efforts to discover data that would enable me to quantify the degree of substitutability between the OEM’s supplied by TCL and the TCL-branded product. I have been unable to discover such a source of data.**

(Emphasis added.)

In my view, the absence of such data meant that Mr Williams’ estimate of the level of substitutability was unavoidably less reliable.

84 In a joint statement with Mr Acton arising from an expert conclave, Mr Williams accepted that the estimate of Castel’s loss was made more difficult by the absence of appropriate data. The joint statement said:

1. As a matter of principle, the lost sales can be divided into two categories. The first is that end-users who bought TCL-OEM product would otherwise

have bought TCL-branded product if there had been no TCL-OEM product. The second is that end-users who bought non-TCL product would otherwise have bought TCL-branded product.

2. In order to assess the magnitude of the first category, **it would have been useful to see:**
 - (i) **point of sale data** to indicate how end-users switched purchases as a result of changes in relative prices; **and/or**
 - (ii) **customer survey or focus group data** as to the decision criteria and product perceptions of end-users.
3. **The only numerical data that seem to be available to assess the first category, relate to total sales of different products.**
4. **The problem with drawing inferences about the first category of lost sales from aggregate sales data is that we do not know whether the field of substitution was narrow or wide.** At one extreme, all products may be in the field in which case the loss of quantity corresponds to the first Williams alternative. At the other extreme, the only other product in the field may be TCL-branded product in which case, the loss of quantity is the number of TCL-OEM sales.
5. The second category of lost sales is that end-users who bought non-TCL product would otherwise have bought TCL-branded product. This may have occurred if retailers became less willing to promote Castel products or if end-users became less willing to buy a Castel-distributed products because of bad experiences or reputation. We have seen no data that would enable us to quantify this effect.

(Emphasis added.)

85 Mr Williams offered an opinion as to how a rational business would behave in the circumstances, stating:

- 57 Nevertheless, I can comment on what a profit-maximising enterprise would have intended. No profit-maximising enterprise would deliberately position versions on which it was earning a lower margin to be close substitutes for versions on which it was earning a higher margin - because to do so would cause it to lose substantial quantities of higher-margin sales in return for lower-margin sales. If TCL were attempting to maximise its products, it would have attempted to position its OEM versions such that they were not seen as close substitutes for its TCL-branded product.

86 Mr Williams considered that “a key distinction between brands at level 5 and those at level 4 and above seems to have been the benefit of assured after-sales service. That is, a key element in a consumer’s assessment of quality seems to have been the assurance of after-sales service.” Castel offered after-sales service of the TCL-branded products and such service was not offered for the OEM products.

87 However, the Tribunal did not accept that TCL behaved in a rational economic fashion, in that it found that TCL took no active steps to protect its TCL-branded products from OEM products. The Tribunal also considered that the existence of after sales service was a less important product differentiator because retail sales staff would likely urge customers towards the product which offered the best profit margin for the retailer, regardless of whether after-sales service was provided.

88 In relation to the impact of the sales of OEM products the Tribunal noted:

Evidence of OEM sales and impact

- 196 The evidence on which Castel relied for the extent and effect of OEM products was the evidence of Mr Kwong and Mr Francis. Mr Francis in particular gave detailed evidence of the various OEM brands which he inspected and how we formed the view that they were TCL-manufactured products. In some cases they appeared identical, in one case he recognised the service brochure as one that he himself had written for a TCL-branded product. Mr Francis also gave evidence of how the presence of the OEM brands affected Castel's sales. He gave examples of accounts that switched to the OEM brand on the basis that it was TCL-made and cheaper or which reduced their purchases of Castel's products in favour of OEM brands. Castel also produced a newspaper advertisement that stated that a particular OEM brand was manufactured by TCL.
- 197 Mr Kwong's evidence was that the presence of TCL's OEM products at the low end of the market affected the positioning of the TCL brand, which was being extensively promoted by Castel and which had positive associations through its anti-allergy certifications.
- 198 Castel relied on that evidence as demonstrating that the presence of TCL's OEM products was a factor which affected whether wholesalers bought goods from Castel and whether individual retail purchasers chose a TCL-branded product or another product.
- 199 TCL submitted that the evidence of the impact of OEM products was wholly unsatisfactory and could not support the conclusion that the presence of TCL-made OEM products had had any effect on Castel sales.

89 In relation to the degree of substitutability the Tribunal noted:

Substitutability and product differentiation

- 205 Another contested issue that affects the determination of Castel's lost sales was the extent to which the OEM products were directly competitive with TCL-branded products. It was common ground between the parties that the air conditioning market is highly differentiated. Mr Williams gave a helpful summary definition of the two forms of differentiation: vertical differentiation means differences in the quality of the product, and horizontal differentiation means differences in the physical characteristics of units while

they may be identical in their power and functioning. There is a range of styles and types of units available and customers make choices based on their particular needs.

- 206 Castel's claim was that the TCL OEM products were marketed in the same areas of the market, and had the same essential features, as the TCL-branded products so that they had a direct impact on whether TCL-branded products were bought. Mr Francis's evidence was that he inspected a range of units and found them similar or identical to models which Castel was selling. He also gave evidence that they were perceived by number of Castel customers as so similar to the TCL-branded products that they were an acceptable and cheaper substitute for them.
- 207 Mr Acton did not purport to give expert evidence as to the substitutability of OEM products for branded products. He made his calculations on the basis of Castel's evidence that there was a high degree of similarity.
- 208 TCL produced evidence in the form of pictures that compared TCL-branded units to OEM units. It is submitted on the basis of that evidence that the two types of units were insufficiently similar to be true substitutes. **This evidence was somewhat undermined by other evidence from Mr Shi** that one reason to make OEM products was that spread the product and development costs which would otherwise be wholly attributable to the TCL-branded products. **Mr Zhang also gave evidence that TCL-branded products and OEM products were in effect the same units, with different trademarks. Castel submitted that the differences were purely a matter of form and that in functional matters the TCL-branded units and the OEM units were close substitutes for each other.**
- 209 TCL's expert Mr Williams proceeded on the basis that TCL would not have been likely to cannibalise its own sales and TCL was therefore engaged in 'versioning' - the sale of different versions of its products to different sections of the market - so that TCL's OEM products would not have directly competed with TCL-branded products because they would have been sold in different places. Castel submitted that TCL's own evidence showed that this was not the case and that TCL took no interest in where and how its OEM products were sold. While there is no evidence that OEM product and a TCL branded product were ever side by side in a store, or even in adjoining stores, **we accept that TCL was not taking active steps to protect its TCL-branded products from OEM products.**
- ...
- 211 One key element of the TCL-branded products that was said to differ from the OEM products was the after sales service offered by Castel. Level 4 brands tended to offer this service where level 5 brands did not. Mr Williams' evidence was that this was an indicator of a vertical differential; customer services are an important element of quality and a reason for customers to prefer a higher level brand such as TCL. Mr Williams saw this as a sign that the OEM products would not be directly competitive with the TCL-branded products which offered that degree of support. **He agreed in cross examination that sales staff have a high degree of influence on what a customer buys and that they would urge customers towards products which offered the best profit margin for them, regardless of after-sales service.**

- 212 Having considered all of the evidence the Tribunal does not propose, and nor was it invited, to consider model by model whether there was direct substitutability between TCL-branded products and OEM products. It accepts the evidence of Mr Francis as to his observations and the perceptions of customers as conveyed to him. It accepts that for sections of Castel's actual and potential customer base the OEM products were regarded as just as good and led those customers to choose the OEM products instead of the TCL-branded products.
- 213 At the lower end of the market where the TCL brand and the OEM brands were competing it appears that functionality rather than form was the important issue. The TCL-branded products and the OEM branded products served in the similar part of the market and offered the same types of units.
- 214 The Tribunal cannot find as a fact that every OEM units sold was directly substitutable for a designated TCL-branded unit. However for the purposes of estimating the loss of sales to Castel brought about by the presence of TCL OEM products we proceed on the basis that the OEM products were sufficiently similar to be a direct competitor of, and replacement for, a line of TCL-branded products, at least insofar as they were perceived in that way by the customer base. It is important to note that Castel did not sell directly to end-users but rather to retailers who bought in bulk and who were well informed about the market and about the available brands.

(Emphasis added.)

90 Mr Williams considered three alternative approaches to the estimation of the lost sales of TCL-branded products. The first alternative was to approach the question on the basis that OEM product sales took away sales from all other brands including TCL-branded products, at an equal rate. The second alternative was to approach the question on the basis that OEM product sales took away sales from all other air conditioners that had similar physical characteristics and were priced at level 5 of the market, at an equal rate. Mr Williams rejected both of these approaches.

91 He considered the better approach was to assume that sales of OEM products were drawn equally from sales of all other air conditioners that had similar physical characteristics and were priced at levels 4 and 5 of the market. That is, he made his estimation of Castel's lost sales on the assumption that if the unauthorised sales of OEM products were not made, the consumers that made those purchases would have purchased other brands of air conditioner at levels 4 and 5 of the market in accordance with the market share of each brand. Mr Williams accepted that this approach was based on the implicit assumption that the sale of

an OEM air conditioner is equally as likely to be at the expense of the sale of a Level 4 as a level 5 air-conditioner.

92 In relation to this assumption Mr Williams conceded at paragraph 94 of his report that:

The evidence I have examined as to whether this assumption is appropriate is inconclusive. On the one hand, there is evidence of vertical product differentiation in the manufacturing market...and this differentiation is reinforced by vertical differentiation in retailing markets...On the other hand, there is evidence from Mr Kwong that sales of TCL-manufactured OEM products damaged sales of TCL-branded product. My assumption of diversion to all brands within levels 4 and 5 in proportion to market shares might be seen as a compromise between these two kinds of evidence.

(Emphasis added.)

Mr Williams further indicated his uncertainty as to his assumption by stating in a footnote to his report: “This is the best answer I am able to give to question 8 in my letter of instructions.” Question 8 had enquired:

Would end consumers switch from an OEM brand (for example, Conia) to a recognised brand such as the TCL Brand if they knew it was manufactured by the same company? Even if there is a distinct price differential between the cheaper OEM Brand and the TCL Brand?

93 Mr Williams then estimated the market shares of each brand of air conditioner within levels 4 and 5 of the market. Having done so he re-estimated the market shares assuming that the sales of OEM products made by TCL were redistributed to each other brand within levels 4 and 5 in accordance with their market shares.

94 In making his estimate of the Castel’s lost sales Mr Williams relied on historical data (provided by a company named GfK) of Australian sales of different brands of air conditioners by major retailers (“GfK data”). Unfortunately, the data was incomplete in that

- (a) it related only to major retailers whereas Castel sold to a variety of retailers including small retailers;
- (b) it covered only 54% of the total market for air conditioners in Australia which meant that any conclusion based on the data was based on information relating to just over half of the market;

- (c) it did not refer to *any* sales of TCL-branded products for the years 2004 to 2007 which was the majority of the relevant period; and
- (d) it only referred to sales of TCL-branded products for a seven month period in 2008, at a time when the relationship between TCL and Castel had broken down - which meant it was unlikely that sales in this period reflected the normal market share of TCL-branded products.

95 Mr Williams was advised by GfK that although TCL-branded products did not appear in its database through much of the period, sales of TCL-branded products were recorded in a generic category named "Tradebrand". In that category sales of TCL-branded products were aggregated with sales of other air-conditioners and there was usually no separate itemisation of sales of TCL-branded products. GfK also advised that the Tradebrand category is one that was exclusively, or close to exclusively, sold in one particular retailer. In the relevant period 35.1% of the sales of air conditioners were recorded within the Tradebrand category, which meant it was a significant category.

96 As the evidence is that TCL-branded products were sold in a variety of retailers rather than in one particular large retailer Castel argues that the extent to which the Tradebrand category captured Castel's sales of TCL-branded products is unclear. I accept this. In my view (and as found by the Tribunal) the uncertainty as to this significant category operated to reduce the reliability of Mr Williams' estimate of lost sales based on the data. The other shortcomings in the GfK data operated in the same way.

97 Because of the deficiencies in the GfK data Mr Williams found it necessary to make what he called "three important adjustments" before offering his opinion. First, because the GfK data did not include TCL-branded products except under the Tradebrand category, Mr Williams incorporated estimates of the sales of TCL-branded products based upon sales data provided by Mr Shi of TCL. Second, because the sales of OEM products recorded in the GfK data were generally larger than TCL said it had made, he used sales data provided by Mr Shi to adjust the market shares of the OEM products. A third adjustment to market shares was necessary because some of the level 4 and 5 brands specified in GfK's total air conditioner sales data did not appear in the information on air conditioner types which recorded the brand of the different types of air conditioners. To my mind, the requirement for these adjustments

again illustrates that there were real questions as to the reliability of the data and as to any conclusions based on it.

98 After Mr Williams' adjustments were made he estimated that in the absence of sales of OEM products by TCL, Castel could have expected to pick up a maximum of 7.3 % of the foregone sales as extra sales of TCL-branded products. By a process which was not made clear (but which was probably just a rounding up) this assessment was treated before me as being 7.4%.

99 As the Tribunal noted at paragraphs 220 to 222:

220 ...There were no independent figures available for the number of OEM sales by TCL or for the total sales of air conditioners in Australia. Mr Williams gave evidence that he had sought and obtained certain data from GfK on sales of air conditioner brands by major retailers in Australia. The data represented 54% of sales and referred to a number of brands for which TCL had manufactured OEM products. It did not specify who had manufactured those brands and for all but a small period in 2008 the data did not refer to TCL branded products, or to many of the OEM brands, other than in a catchall Trade brands category.

...

222 One significant difficulty faced by Mr Williams was that, as we have noted, in the GfK data on which he relied for his analysis the TCL brand was not expressly named. **He gave evidence that he had made enquiries about whether the "Trade brands" category could be disaggregated to reveal precise TCL figures, but that those enquiries had not been successful. He agreed that this was an unsatisfactory outcome but said it was the best data that he had found.**

(Emphasis added.)

100 The Tribunal went on to make the three findings that TCL complains about. While I will detail these three findings later, it suffices for the present to note that the findings meant that the Tribunal found that the total of Castel's lost sales was 22.5% of the sales of the OEM products, rather than the 7.4% proposed by Mr Williams.

101 TCL says that it was wrong for the Tribunal determine that Castel's lost sales were 22.5% of the OEM products sales, but it does not complain about the calculations that followed that determination. That is, it is not controversial that if Castel's sales of TCL-branded products over the 5 year period to 31 December 2008 had been decreased by 22.5%

of the sales of OEM products, it had lost the opportunity to sell a further 11,708 air-conditioners. It was also uncontroversial that Castel's lost profit from such lost sales was \$2,198,656. The Tribunal awarded this sum to Castel.

102 The Tribunal's assessment of Castel's loss was well short of the \$12,315,233 that it had claimed for that period based on a 1:1 substitution ratio, but well more than the loss if the award was based on Mr Williams' estimate of 7.4%.

D.2 The "no evidence" rule

103 TCL contends that in making the 14% Starting Point Finding, the Uplift Finding and the Lost Sales Finding the Tribunal breached the no evidence rule. As the party alleging evidentiary inadequacy the burden of establishing this falls on TCL.

104 In a well-known statement in *R v Deputy Industrial Injuries Commissioner, Ex parte Moore* [1965] 1 QB 456 ("*Deputy Industrial Injuries Commissioner, Ex parte Moore*") at 488, Lord Diplock explained the no evidence rule as follows:

The requirement that a person exercising quasi-judicial functions must base his decision based on evidence means no more than it must be based upon material which tends logically to show the existence or non-existence of facts relevant to the issue to be determined, or to show the likelihood or unlikelihood of the occurrence of some future event the occurrence of which would be relevant. **It means that he must not spin a coin or consult an astrologer, but he may take into account any material which, as a matter of reason, has some probative value in the sense mentioned above. If it is capable of having any probative value, the weight to be attached to it is a matter for the person to whom Parliament has entrusted the responsibility of deciding the issue.** The supervisory jurisdiction of the High Court does not entitle it to usurp this responsibility and to substitute its own view for his.

(Emphasis added).

While TCL purports to rely on Lord Diplock's explanation, to my mind his Honour's statement serves to illustrate the significant hurdle that TCL must overcome if it is to succeed in establishing that there was *no* evidence capable of supporting the Tribunal's finding. The authorities are quite clear in this regard as I set out below.

105 In *Mahon v Air New Zealand* [1984] 1 AC 808, the Judicial Committee per Lord Diplock writing for the Court at 820 to 821, applied *Deputy Industrial Injuries Commissioner, Ex parte Moore* and held that:

The technical rules of evidence applicable to civil or criminal litigation form no part of the rules of natural justice. What is required by the first rule is that the decision to make the finding must be based upon *some* material that tends logically to show the existence of facts consistent with the finding...

106 In *Downer-Hill* the New Zealand High Court dealt with the “no evidence” rule in the context of an application to strike out an application to set aside a Model Law award. The Court, per Wild and Durie JJ at [103] quoted Lord Diplock’s statement in *Deputy Industrial Injuries Commissioner, Ex parte Moore* with approval. At [83] their Honours noted

The only procedural rule which could assist Downer’s “no evidence” submission here is that in *Re Erebus Royal Commission; Air New Zealand v Mahon* [1983] NZLR 662 at p 671 which **requires only that a factual finding be based on some logically probative evidence. Provided there is such evidence, its assessment is entirely the province of the arbitrator.** [Citations omitted]

(Emphasis added.)

107 In the context of a dispute regarding an administrative decision Fox, Deane and Morling JJ observed in *Collins v Minister for Immigration and Ethnic Affairs* (1981) 58 FLR 407 at 411:

An appellant who attacks a conclusion of the Tribunal because of a deficiency of proof said to amount to an error of law must show, if he is to succeed, that there was no material before the Tribunal upon which the conclusion could properly be based.

108 In *Telstra Corporation Ltd v Australian Competition and Consumer Commission* [2009] FCA 757 Lindgren J also made clear that if there is *some* rationally probative evidence available capable of supporting a finding then the contention of breach of the no evidence rule will fail. In that case Telstra relied on the no evidence rule at common law, and his Honour held at [339]:

In this context, a finding involves an error of law when there is no evidence at all to support it (*Australian Broadcasting Tribunal v Bond* (1990) 170 CLR 321 at 355-356 and 358 per Mason CJ (*Bond*). It is not sufficient, however that the decision-maker draws an inference by illogical reasoning. Rather, **it must be established that there was no evidence permitting the drawing of the inference by any process of reasoning** (*Bond* at 356).

(Emphasis added.)

109 Finally, in *Haider v JP Morgan Holdings Australia Ltd* [2007] NSWCA 158 at [33], in dealing with the no evidence rule Basten JA noted:

Broadly speaking, error of law will arise in circumstances where a fact is found where there is in truth no relevant and probative material capable of supporting it, or an inference is drawn from a particular fact, which is not reasonably capable of supporting the inference: (citations omitted).

D.3 The no evidence contention with regard to the 14% Starting Point Finding

110 TCL's complaint with regard to the 14% Starting Point Finding centres on the fact that, notwithstanding its rejection of Mr Acton's expert evidence, the Tribunal did not accept Mr Williams' expert evidence that Castel's lost sales were 7.4% of the sales of OEM products, instead finding that a better starting point for its analysis of Castel's lost sales was 14%.

111 The Tribunal said at paragraphs 229 and 230 of the Award:

229 The Tribunal must make its best estimate of lost TCL sales resulting from the competing OEM sales through third party retailers in a practical way having regard to the entirety of the factual and expert evidence and also to the commercial realities of the market. It must reject Mr Acton's simplistic assertion of a 1:1 ratio as inconsistent with the position that both TCL-branded products and OEM products were in competition for sales with other, mostly Chinese manufactured brands at the lower end of the market.

230 Having rejected the 1:1 ratio we commence with the evidence of Mr Williams that the lost sales due to OEM products were 7.4% of the total of those OEM sales and consider whether the evidence is consistent with that figure.

112 At paragraphs 233 and 234 of the Award the Tribunal set out the factors that it considered indicated that TCL's sales of OEM products caused Castel to lose many more sales than proposed by Mr Williams. The Tribunal stated that there was evidence which suggested that:

233 ...the impact, though not approaching the 1:1 approach of Mr Acton, was much higher than the 7.4% approach of Mr Williams:

- (a) Castel sold not directly to end users but to retailers, and accordingly it is the impact of OEM products on retailers rather than the impact on those retailers' customers which must be considered.
- (b) Mr Francis gave evidence of a number of occasions on which he was told by former Castel customers that they would be purchasing OEM products which were TCL made, rather than TCL-branded products or that they were observing their own customers making the switch. The Tribunal accepts this evidence to the extent that some purchasers of TCL-manufactured OEM products were making those purchases because they were TCL made, so that in their absence a higher

percentage of buyers might have bought the TCL-branded products.

- (c) Mr Francis also gave evidence, which we accept, of anger from some Castel customers that they were being under cut by other sellers who had TCL-manufactured OEM units for sale at lower prices than the TCL-branded goods, and that Castel had lost some sales where it could not meet the lower prices.
- (d) Mr Kwong gave evidence that Castel's dealership network was being directly targeted by those for whom TCL had manufactured OEM products, such that **the impact of TCL-manufactured OEMs fell disproportionately on Castel** and its TCL-branded products.

234 **None of those factors are sufficiently reflected in Mr William's evidence,** which was that in the absence of the TCL OEM products Castel could have expected to gain 7.4% of the market share which those TCL OEM products had. He gave this as his best estimate on the basis that those who did not buy a TCL OEM would have bought another brand from Level 4 or level 5. In cross examination he agreed that if TCL manufactured OEM products were only competing with level 5 brands then Castel's share would be doubled to around 14%. Mr Kwong's evidence was that the TCL brand was at the bottom of the Level 4 market and that the TCL-made OEM products were in Level 5. **We consider the 14% a better starting point for those reasons.**

(Emphasis added.)

113 As is apparent from an examination of the Tribunal's reasons above, and also from the evidence earlier canvassed, TCL cannot make out its argument that the Tribunal breached the no evidence rule in making the 14% Starting Point Finding. In my view it is clear that there was some rationally probative evidence capable of supporting it.

114 TCL argues that the Tribunal was in error in finding that none of the factors mentioned at paragraph 233 of the Award were sufficiently reflected in Mr Williams' evidence. While TCL accepts that the balance of paragraph 234 of the Award correctly describes Mr Williams' evidence, it argues that there is no basis upon which the Tribunal could conclude, and it did not find, that the matters encompassed in each of the factors in sub-paragraphs (a) to (d) were not, at least implicitly, embraced by Mr Williams' analysis. It also points to two facts which it says are relevant:

- (a) that Mr Williams proceeded on the assumption that TCL attempted to sell the OEM products through different channels from those used for TCL-branded products; and

- (b) that Mr Williams concluded that if TCL were attempting to maximise profits it would have attempted to position the OEM products as “versions” which were not close substitutes for the TCL-branded products.

115 I do not accept this submission. Mr Williams does not state that he took the factors referred to by the Tribunal in sub-paragraphs 233 (a) to (d) into account. The absence of any explicit reference to these factors is significant given that Mr Williams carefully details the other parts of his consideration before setting out his opinion. The factors in sub-paragraphs 233 (a) to (d) are important and I expect that Mr Williams would have referred to them had he taken them into account.

116 Nor is there any indication that Mr Williams implicitly took these matters into account as TCL contends. In my view, the facts which TCL points to as supporting this argument may be seen to point in the other direction. For example, TCL contends that Mr Williams’ opinion was in part based upon his view that if TCL was seeking to maximise its profits it would not have sold OEM products which were close substitutes for TCL-branded products. I accept that Mr Williams’ opinion is that it was economically rational for TCL to engage in “versioning” rather than have its OEM products directly compete with the TCL-branded products. This makes it more surprising that he did not explicitly deal with the evidence that TCL in fact did sell OEM products which were close substitutes for the TCL-branded products, and that TCL did not take active steps to protect its TCL-branded products from OEM products.

117 TCL also says that the Tribunal incorrectly interpreted the facts, and then wrongly reasoned from them, in relying for its conclusion on the evidence that Castel did not sell the TCL-branded air conditioners directly to end users but instead did so to retailers. I do not accept this. Mr Francis’ evidence was that retail sales staff would push customers to the product which offered them the best profit margin, suggesting that this would be towards the OEM products. One can readily accept that retailers are likely to be more knowledgeable than ordinary consumers about the air conditioners they sell and therefore more likely to know that the OEM products were made by the same manufacturer and were the same or similar to the TCL-branded products. In those circumstances, even leaving aside any question as to whether the retailer enjoyed a higher profit margin from the OEM products, it is rational for the

retailer to sell the cheaper OEM products to their customers. In my view this evidence was rationally probative of the Tribunal's finding.

- 118 TCL argues that the Tribunal was wrong to rely on the evidence of Mr Francis that;
- (a) he had been informed by retailers who were former Castel customers that they would purchase OEM products rather than TCL-branded products because the OEM products were also made by TCL; and
 - (b) that the retailers had observed their own customers making the switch.

It says that the evidence was limited because the Castel customers he referred to were former customers. It also argues that Mr Francis' evidence should have been given no weight because it was hearsay, and because Castel did not call the retailers to give evidence. It argues further that his evidence ought to have been given no weight because it says his credit was damaged in cross examination.

- 119 Mr Francis also gave evidence that some retailers were angry that they were being undercut by their competitors because Castel had sold TCL-branded products to them at a higher price than the price at which OEM products were available, even though the OEM products were made by the same manufacturer and were the same or similar. TCL concedes that there was evidence to this effect for one retailer and perhaps also for another, but again says the evidence is limited and is overstated by the Tribunal. It argues that the evidence should have been given no weight because it was hearsay and because Castel did not call the retailers.

- 120 TCL's various arguments that the Tribunal should not have relied on Mr Francis' evidence for its finding are weak. Mr Francis gave detailed evidence relevant to the question of Castel's lost sales. Having reviewed the evidence I do not accept TCL's contention that Mr Francis' credit was necessarily damaged as it says. I also do not accept that his evidence was "limited" as TCL contends, but even if it is treated as such, it remains *some* rationally probative evidence upon which the Tribunal could properly rely. The assessment of his evidence is a matter for the Tribunal and not for this Court. As Goldberg J held in *Parks Holdings Pty Ltd v CEO of Customs* [2004] FCA 820 at [62]:

The tribunal is the ultimate determiner of the facts and it should only be in exceptional cases, where there is a clear case that there was no evidence to support a

particular finding and conclusion, that the Court should undertake that exercise. If there be evidence supporting the Tribunal's findings or conclusions, then the Court should resist the temptation to consider the evidence going the opposite way for the purpose of establishing that there was no evidence upon which a finding could have been made.

121 Nor could the fact that Mr Francis' evidence was not strictly admissible as evidence before a Court disqualify it from being relied on by the Tribunal. It is common ground that the Tribunal was not bound by the rules of evidence.

122 The same is true in relation to the Tribunal's reliance on the evidence of Castel's Managing Director, Mr Kwong. He gave evidence that Castel's dealership network was being directly targeted by those for whom TCL had manufactured the OEM products. TCL concedes that there was some evidence of this nature. One can readily envisage that a direct targeting of Castel's dealership network by the parties selling OEM products in Australia might operate to increase the impact on Castel of those sales. This evidence was also rationally probative of the Tribunal's finding.

123 Finally, TCL complains about the Tribunal's statement at paragraph 234 that in cross examination Mr Williams "agreed that if TCL manufactured OEM products were only competing with level 5 brands then Castel's share would be doubled to around 14%." TCL argues that while Mr Williams accepted that 14% was the appropriate figure for lost sales if the OEM products were competing with TCL-branded products at level 5 of the market, he did not accept that the TCL-branded products in fact occupied that level of the market. I agree and in my view any concession made by Mr Williams in this regard has limited probative value. However, nothing turns on this because the other evidence relied on by the Tribunal for this finding was sufficient to support it.

124 There was rationally probative evidence before the Tribunal capable of supporting the 14% Starting Point Finding.

D.4 The no evidence contention with regard to the Uplift Finding

125 Having made the finding that 14% was a better starting point for its analysis of Castel's loss, the Tribunal then set out a series of other factors which it considered justified an increase in the percentage from 14%. TCL describes this finding as the "Uplift Finding" and argues that there was no rationally probative evidence to support it.

126

At paragraphs 235 to 236 of the Award the Tribunal stated:

235 The Tribunal also notes that:

- (a) Mr Williams made his assessment on the basis that all other manufacturers in the relevant level would share equally in the redistributed share of the TCL OEM products. He agreed this might not be how things worked. We have noted and accepted the evidence of Mr Francis that at least in some instances large purchasers of TCL branded products decided to switch to what they knew to be a TCL-made OEM product. It is appropriate to allow an increase on Mr Williams's calculations on the basis that the presence in the market of OEM products that were known to be TCL-made had a disproportionate effect on Castel as against sellers of other brands.
- (b) Mr Williams based his calculations on data which represented just over 50% of the air conditioner market and which for the most part did not refer to TCL as a brand by name. He made assumptions that TCL is contained in the "Tradebrands" category but could not get an assurance of that from GfK. This affects the reliability of his calculations.
- (c) Mr Williams also assumed that the 50% sample in the GfK data is representative of the overall sample as he had no means to do otherwise.
- (d) Mr Williams agreed the GfK data was inconsistent with other evidence like the BIS Shrapnel report which would have suggested different rankings for air conditioners than those contained in the GfK data.
- (e) The GfK data on which Mr Williams relied was for major retailers only and for that reason may fail to include some OEM brands which were sold through smaller channels.
- (f) Mr Williams agreed that there could be additional TCL OEMs which he had not extracted from the Tradebrands category and which were not being redistributed on his formula.

236 All of these points affect the accuracy of the material on which Williams relied and therefore the reliability of his conclusions. Each of them warrants, in the Tribunal's view, an uplift from the figure of 14% that he agreed was the base level if OEM products were largely competing with Level 5 products.

127

The Tribunal noted in sub-paragraph 235 (a) that Mr Williams' assessment was made on the basis that all other manufacturers in the relevant level would share equally in the redistributed share of OEM products, but he agreed in cross examination that this might not be how things worked out. TCL concedes that Mr Williams made this concession.

128 For the most part TCL does not dispute the existence of shortcomings in the information relied upon by Mr Williams for his opinion. TCL argues that any deficiencies in the information have not been demonstrated to have led to an error by Mr Williams in quantifying Castel's losses. The Tribunal had expert evidence before it which assessed Castel's lost sales of TCL-branded products at 7.4% of the sales made of OEM products. The Tribunal plainly considered that the deficiencies in the information relied on by Mr Williams affected its accuracy and reduced the reliability of his conclusions.

129 I mean no criticism of Mr Williams who was requested to do the best he could with the data available, and I note that he conceded the incompleteness of the data on several occasions. However, in my view (and as the Tribunal found) the deficiencies compromised the reliability of his opinion. The deficiencies included that:

- (a) No data was available to enable Mr Williams to quantify the degree of substitutability between the OEM products and TCL-branded products;
- (b) No point of sale data to indicate how end-users switched purchases as a result of changes in price was available, or customer survey or focus group data as to the decision criteria and product perceptions of end-users;
- (c) The evidence was inconclusive as to the correctness of Mr Williams' assumption that sales of OEM products were drawn equally from sales of all other air conditioners that had similar physical characteristics and were priced at levels 4 and 5 of the market;
- (d) The GfK data recording sales of air conditioners was deficient because:
 - (i) it referred to only 54% of the Australian air conditioner market;
 - (ii) it did not refer to any sales of TCL-branded products for the years 2004 to 2007 which was the majority of the relevant period;
 - (iii) it related only to major retailers when Castel sold to a variety of retailers;
 - (iv) it only referred to TCL-branded products for a seven month period in 2008 which was after the relationship between TCL and Castel had broken down;

- (v) it only included TCL-branded products in the generic Tradebrand category which aggregated TCL-branded products with other products, which Mr Williams accepted was unsatisfactory; and
- (vi) the Tradebrand category related almost exclusively to sales made by one particular retailer, and Castel sold through a variety of retailers. Therefore the extent to which sales of TCL-branded products were captured within the Tradebrands category was unclear.

130 TCL contends that it is unclear why the unreliability in the information should lead automatically to an uplift in the quantification of Castel's losses rather than a decrease. Contrary to TCL's submission, it was reasonable for the Tribunal to treat some of these shortcomings as likely to operate to understate Castel's market share (and therefore its lost sales). In my view the fact that:

- (a) the data related only to major retailers when Castel sold to a wider group than this;
- (b) it did not refer to any sales of TCL-branded products for most of the relevant period;
- (c) the large Tradebrand category related almost exclusively to one particular retailer when Castel sold to a wider group than this; and
- (d) any sales of TCL-branded products recorded in the Tradebrand category could not readily be disaggregated from sales of other brands;

all tended to indicate an underestimation of Castel's lost sales.

131 It is also significant that there was evidence before the Tribunal from Mr Kwong and Mr Francis which pointed to a significantly greater effect on Castel's sales than Mr Williams proposed. It included evidence that Castel's dealership network was directly targeted such that the impact of the OEM product sales fell disproportionately on Castel. The Tribunal accepted Mr Francis' evidence that in some instances large purchasers of TCL-branded products decided to switch to OEM products, and that because the OEM products were known to be manufactured by TCL these purchasers bought OEM products rather than TCL branded products at a level that had a disproportionate effect on Castel sales. TCL argues that Mr Francis' evidence in this regard is not clear. In my view it is. It is certainly clear enough

to be evidence capable of supporting the finding made. This evidence too points to an under-assessment of Castel's lost sales by Mr Williams, thereby supporting the Tribunal's finding.

132 TCL's submission that there was no rationally probative evidence capable of supporting the Uplift Finding in the Award must fail.

D.5 The no evidence contention with regard to the Lost Sales Finding

133 Having concluded that it was appropriate to allow a higher assessment of Castel's lost sales, it fell to the Tribunal to determine the quantum of that assessment. The Tribunal determined that the appropriate quantum was 22.5% of the sales of OEM products made by TCL, stating:

237 On the entirety of the evidence, including the finding that the matter of no competing OEM sales was seen by Castel as of such commercial importance in its GDA and the Variation Agreement with TCL as to mandate a no-competition without consent clause, the Tribunal concludes that the least proportion of the sales assessed to be lost by Castel attributable to the OEM sales made in to the Australian marketplace is 22.5% of total TCL OEM sales.

TCL refers to this assessment as the Lost Sales Finding and contends there was no rationally probative evidence capable of supporting it.

134 As can be seen from the passage above, this finding was in part based Castel's view that its exclusive right under the Distribution Agreement to sell TCL air conditioners was of significant commercial importance. TCL says that the evidence in support of this finding is limited. I do not agree. In my view Mr Kwong's evidence, together with the minutes of the various meetings that he had with representatives of TCL, is rationally probative of the Tribunal's finding that Castel attributed commercial significance to its exclusive right to sell TCL manufactured air conditioners in Australia. His evidence indicated that Castel considered that the sales of the OEM products would operate to significantly reduce sales of TCL-branded products. It was open to the Tribunal to infer that this is what in fact occurred.

135 TCL contends that the Tribunal advanced no basis upon which the commercial importance to Castel of the non-competition obligations in the Distribution Agreement assisted in assessment of the percentage impact on TCL sales. It argues that the Tribunal must have agreed that expert evidence was necessary (because if it were not it would have ruled it

out) yet having rejected Mr Acton as an expert it did not accept Mr Williams' evidence. It submits that it was wrong for the Tribunal take this course and to then substitute its own assessment as to Castel's lost sales. It argues that, all being lawyers, none of the members of the Tribunal possessed special expertise in assessing lost sales in an electronic product market and the Tribunal was not in a position to reach its own conclusion as to Castel's lost sales. It submits that there is no clear link between the evidence and the Lost Sales Finding and that the Tribunal pulled its assessment of 22.5% from the air.

136 TCL also complains that some of the evidence relied on by the Tribunal for the finding is limited and some is hearsay. However, to make out its contention of a breach of the no evidence rule TCL must establish that there was *no* evidence rationally probative of the Tribunal's finding. As I have already said, the Tribunal was not bound by the rules of evidence and was able to rely on hearsay to support its finding.

The Tribunal's best estimate

137 The Lost Sales Finding was expressed by the Tribunal to be based on the entirety of the evidence. The Tribunal said its task was to:

229 ...make its best estimate of lost TCL sales resulting from the competing OEM sales through third party retailers in a practical way having regard to the entirety of the factual and expert evidence and also to the commercial realities of the market.

138 It was common ground before the Tribunal that the number of Castel's lost sales of TCL-branded products was not something which was capable of precise calculation. The Tribunal said:

239 The Tribunal accepts that this derived estimate is no more than a best estimate on all the evidence. However, it considers that the 22.5% figure best accounts for the varying ways in which the presence of OEM products affected direct sales and the perception of TCL in the market place, as well as the other competitors in the market and the likelihood that some potential TCL purchasers would have been drawn to those competitors.

139 Given that it was clear that some damage had been suffered by Castel, and that precise calculation was impossible, the authorities are clear that the Tribunal was required to do the best that it could in its assessment of damage. As Devlin J explained in *Biggin & Co Ltd v Permanite* [1951] 1 KB 422 at 438:

It is only that where precise evidence is obtainable the court naturally expects to have it. Where it is not the court must do the best it can.

Similarly, in *Callaghan v William C Lynch Pty Ltd* [1962] NSW 871 at 877 the Full Court of the Supreme Court of New South Wales said:

Many cases illustrate that uncertainty in the quantification of damage, either in cases of contract or tort, does not prevent an assessment; provided that some broad estimate can be made.

140 Both of these passages were cited with approval by the Full Federal Court in *Enzed Holdings v Wynthea* (1984) 57 ALR 167 (“*Enzed Holdings*”) per Sheppard, Morling and Wilcox JJ at 183. Their Honours said, in dicta:

The principle is clear. If the court finds damage has occurred it must do its best to quantify the loss even if a degree of speculation and guesswork is involved.

141 However this statement in *Enzed Holdings* has not always been accepted. In *Schindler Lifts Australia Pty Ltd v Debelak* (1989) 89 ALR 275 at 319 Pincus J considered that if evidence called by the plaintiff fails to provide any rational foundation for a proper estimate of damages the court should simply decline to make one. Pincus J said in *Atkinson v Hastings Deering (Queensland) Pty Ltd* (1985) 71 ALR 93 at 103 to 104 that it was not easy to reconcile the passage in *Enzed Holdings* with the decision in the High Court of *Ted Brown Quarries Pty Ltd v General Quarries (Gilston) Pty Ltd* (1977) 16 ALR 23.

142 In *JLW (Vic) Pty Ltd v Tsiloglou* [1994] 1 VR 237 Brooking J reviewed the authorities regarding the assessment of damages at 241 to 246. At 245 his Honour doubted that the Full Court in *Enzed Holdings* intended to lay down a general proposition that if damage is proved the court must, regardless of the circumstances, make some assessment of the damages. He read down the passage, by reference to the facts of *Enzed Holdings*, to cases where “precise evidence” was not obtainable.

143 Brooking J noted at 241:

It is often said that the amount of the damage must be proved with certainty, but this only means as much “certainty” as is reasonable in the circumstances: *Ratcliffe v Evans* [1892] 2 QB 524 at 532-3. Where precise evidence is obtainable, the court naturally expects to have it; where it is not, the court must do the best it can: *Biggin and Co Ltd v Permanite* [1951] 1 KB 422, at 438; *Commonwealth v Arnann Aviation Pty Ltd* (1991) 174 CLR 64 at 83 per Mason CJ and Dawson J. The nature of the damage may be such that the assessment of damages will really be a matter of

guesswork, as in the well-known case of *Chaplin v Hicks* [1911] 2 KB 786, where the plaintiff had lost a chance of winning an engagement as an actress as a prize. So damages will be assessed for the wrongful detention of a racehorse even though it may be necessary to guess at the amount: *Wilson v Matthews* [1913] VLR 224... But while in some cases guesswork may be permissible in assessing damages, in others it is not.

His Honour continued at 243:

There is no rigid dividing line between cases in which guesswork is permissible in assessing damages and cases in which it is not. The borderline between guesswork and rational assessment is itself indistinct, as is the line between evidence that is “precise” (the *Permanite Case dictum*) and evidence that is not. In *Enzed Holdings v Wynthea* (1985) 57 ALR 167, at 182-3...the Full Federal Court thought the case to be one in which precise evidence of the loss was not obtainable, so that if the trial judge found that the plaintiffs had suffered some loss he must do his best to quantify the loss even if “a degree of speculation and guesswork” was involved.

144 In the present case, even if the approach in *Enzed Holdings* is narrowed as proposed by Brooking J, there is no breach of the no evidence rule in the broad estimate of damages made by the Tribunal. I do not accept the contention that the Tribunal simply plucked its assessment of Castel’s losses from the air, or that it engaged in an impermissible degree of speculation or guesswork.

145 First, it is common ground that Castel’s lost sales were not capable of precise calculation.

146 Second, in all the circumstances of the case there is no error in the Tribunal derogating from Mr Williams’ evidence and not treating it as determinative. Not only was it given in relation to an issue which both parties accepted was not capable of precise calculation, but there were uncertainties as to the assumptions he used, deficiencies in the information he was forced to rely on, and he approached the task with a view that TCL would have acted in an economically rational way by “versioning” when the Tribunal accepted that it did not. I note too that Mr Williams’ evidence was not entirely rejected, as the Tribunal accepted various aspects of it and used it as a base for its further assessment.

147 Third, the lay evidence operated to throw doubt on Mr Williams’ conclusions and confirm the impossibility of any precise estimate. This evidence went directly to the degree of substitutability of OEM products for TCL-branded products and indicated that Castel had lost a higher number of sales than Mr Williams estimated.

148 While it does not go directly to pinpointing Castel's lost sales at 22.5% of the sales of OEM products, there was a large amount of evidence before the Tribunal rationally probative of the Lost Sales Finding. The evidence includes:

- (a) That the deficiencies in the information relied on by Mr Williams operated to reduce the reliability of his opinion and made it easier for the Tribunal to reject aspects of his evidence.
- (b) That some of the deficiencies in the information relied on by Mr Williams operated to understate Castel's market share and therefore its lost sales.
- (c) The evidence of Mr Francis which included that:
 - (i) he had inspected a range of TCL-made OEM products and they were similar or identical to models which Castel was selling;
 - (ii) a number of retailers perceived the OEM products as so similar to the TCL-branded products that they were acceptable and cheaper substitute for them;
 - (iii) TCL was the manufacturer of the OEM products which made them attractive to Castel's customers, and a threat to its sales of TCL-branded products;
 - (iv) former Castel customers told him that they would be purchasing TCL-made OEM products, rather than TCL-branded products, or that they were observing their own customers making the switch;
 - (v) some Castel retailers were angry that they were being under cut by other sellers who had TCL-made OEM products for sale at lower prices;
 - (vi) Castel lost sales where it could not meet the same low price at which the OEM products were sold; and
 - (vii) some large purchasers of TCL-branded products decided to switch to what they knew to be TCL-made OEM products.
- (d) The evidence of Mr Kwong which included that:
 - (i) Castel attributed commercial significance to its exclusive right to sell TCL manufactured air conditioners in Australia, and considered that

sales of the OEM products operated to significantly reduce sales of TCL-branded products;

- (ii) Castel's dealership network was being directly targeted by those for whom TCL had manufactured OEM products, so that the impact of the OEM products fell disproportionately on the TCL-branded products sold by Castel;
- (e) The evidence of Mr Zhang that the TCL-branded products and the OEM products were in effect the same air conditioning units but with different trademarks;
- (f) The fact that Castel did not sell directly to end-users and instead sold to retailers who were well informed about the market and about available brands, which meant they likely knew that TCL manufactured the OEM products and that they were similar to or the same than the more expensive TCL-branded products.
- (g) The evidence that TCL did not take active steps to protect the TCL-branded products from sales of OEM products. This operated to undercut Mr Williams' opinion that TCL was engaged in "versioning" such that sales of OEM products were unlikely to cannibalise sales of TCL-branded products.
- (h) Mr Williams' acceptance in cross examination that retail sales staff have a high degree of influence over what a customer buys, and that they were likely to urge customers towards products which offered the best profit margin for the retailer. This operated to reduce the significance of the after-sales service offered with the TCL-branded products but not with the OEM products.

149 The Award displays that the Tribunal carefully weighed the evidence in order to make an estimate of Castel's lost sales in circumstances where they could not be proved with certainty and precision. The evidence of Mr Kwong and Mr Francis went directly to the impact of the sales of OEM products on Castel's sales and the Tribunal was entitled to treat it as important in its assessment. While not rejecting Mr Williams' overall methodology the Tribunal considered it necessary to increase the assessment of Castel's lost sales to take this evidence sufficiently into account. I do not accept that the Tribunal plucked a figure from the air as TCL contends.

150 Although it is not of any importance to my decision, I note also that the arbitral tribunal was made up of three senior counsel very experienced in commercial litigation, including at least one with a wealth of experience as an arbitrator, and one former judge of this Court, formerly President of the Australian Competition Tribunal. While it was not contended that these Tribunal members were appointed because of any special expertise, it could not sensibly be argued that they were incapable of properly assessing and weighing the evidence regarding lost sales. TCL did not so contend.

D.5.1 The treatment of the expert evidence by the Tribunal

151 TCL's contention that there was no evidence to support the assessment of loss made by the Tribunal turns in part on the contention that, being left with only Mr Williams' expert opinion and having no special expertise in the area, the assessment of Castel's lost sales was a question upon which the Tribunal members were not at liberty to formulate their own view. I do not accept this.

152 Opinion evidence is admitted as an aid to the tribunal of fact to enable it to make its own determination about the issues in dispute: *Thurston v Todd* (1966) 84 WN 231 at 246 ("*Thurston v Todd*"); *R v Turner* [1975] 1 QB 834. As the trier of fact it was the Tribunal's responsibility to reach a view on the evidence, and that responsibility could not simply be ceded to an expert witness. Although it may be accepted that Mr Williams is a well-qualified and respected expert economist, the Tribunal was required to make its own decision on whether any weight should be accorded to his evidence, and if so how much: *Richmond v Richmond* (1914) 111 LT 273 per Neville J; *F (Orse C) v C* [1991] 2 IR 330; *Hocking v Bell* (1945) 71 CLR 430 at 496 per Dixon J.

153 As the High Court observed in *Ramsay v Watson* (1961) 108 CLR 642 at 645 per Dixon CJ, McTiernan, Kitto, Taylor and Windeyer JJ:

A qualified medical practitioner may, as an expert, express his opinion as to the nature and cause, or probable cause, of an ailment. But it is for the jury to weigh and determine the probabilities. In doing so they may be assisted by the medical evidence. But they are not simply to transfer their task to the witnesses. They must ask themselves "Are we on the whole of the evidence satisfied on a balance of probabilities of the fact?"

154 I respectfully adopt the approach taken in *Wigmore*, 3rd ed., vol. VII, pp 6 to 7, cited with approval by Holmes JA in *Thurston v Todd* at 246, where the learned author states:

...it is not only clearly open to the jury, or in this case the judge, to form an opinion, but that is part of its or his task. **It is common for arbitrators, and lay arbitrators at that, to form opinions of their own based upon, but not necessarily fully accepting, the opinions of experts in particular fields of knowledge which go outside the common experience of man.** It is not uncommon for judges to direct juries upon the very same kind of question in the courts from day to day. As to the manner in which a jury should have regard to the opinions of experts upon a matter peculiarly within the knowledge of the witnesses, the following charge was approved in the Supreme Court of the United States:

“You are not bound by the estimate which these witnesses have put upon these services. They are proper to be considered by you, as part of the proof bearing upon the question of value, as the testimony of men experienced in such matters, and whose judgement may aid yours. But it is your duty, after all, to settle and determine this question of value from all the testimony in the case, and to award to the plaintiffs such amount, by your verdict, as the proof satisfies you is a reasonable compensation for the services which, from the proof you find, plaintiff rendered, after deducting the amount the plaintiffs have already received for such services.”

(Emphasis added.)

155 Even when expert evidence goes all one way or is not challenged at the hearing the Court has a discretion to reject it, although it must not be disregarded capriciously: *R v Hall* (1988) 36 A Crim R 368 at 370 per Roden J; *R v Klamo* (2008) 18 VR 644. I note that in the present case Mr Williams’ evidence was challenged both in cross examination and in submissions.

156 The observations of the Full Court in *Taylor v The Queen* (1978) 45 FLR 343 are apposite to the present case. In that matter Connor and Franki JJ held at 364 that the jury was unable to reject unanimous medical evidence, unless there was other evidence which could displace or throw doubt on it: See also *R v Gemmill* (2004) 8 VR 242 at [46]. In the present case there is a great deal of other evidence which could displace or throw doubt on the evidence of Mr Williams. There can be little doubt in those circumstances that the Tribunal was entitled to derogate from his opinion as it did.

D6 The breach of the hearing rule contention

157 The “hearing rule” has been set out by different courts on numerous occasions: see *Mobil Oil Australia Pty Ltd v Federal Commissioner of Taxation* (1963) 113 CLR 475 at 503

to 504; *Kioa v West* (1985) 159 CLR 550 at 584. It is a rule of natural justice that requires a decision maker to give an opportunity to present his or her case to the person whose interests may be adversely affected by a decision.

158 TCL argues that in breach of this rule each of the 14% Starting Point Finding, the Uplift Finding and the Lost Sales Finding were based upon the Tribunal's own opinions and ideas which were not reasonably foreseeable as potential corollaries of the opinions and ideas which were traversed during the hearing, and which TCL may, with adequate notice, have been able to persuade the Tribunal away from. It contends that the Award therefore stands to be set aside as being in conflict with or contrary to public policy.

D.6.1 The operation of the hearing rule

159 There are numerous decisions as to this rule in the context of arbitral hearings. TCL points to the decision of *Fox v PG Wellfair Ltd* [1981] 2 LLR 514. That case concerned an arbitration of a damages claim in relation to the construction of a block of flats. Although the defendant did not appear at the arbitration and did not contest the evidence, the arbitrator rejected the evidence of three expert witnesses called for the plaintiff, preferring the impression that he obtained having attended a view. The arbitrator did not put his view to the parties. At 521 to 522 Lord Denning said that an arbitrator:

... should not use his own knowledge to derogate from the evidence of the plaintiff's experts - without putting his own knowledge to them and giving them a chance of answering it and showing that his own view is wrong.

This may readily be accepted, but as I later explain, it is quite unlike the circumstances in the present case.

160 Another example is *Interbulk Ltd v Aiden Shipping Co Ltd (The Vimeira)* (1984) 2 LLR 66 where the Court dealt with an award which had been made on the basis of a point which had not been raised as an issue or argued before the arbitrator. At 74 to 75 Lord Goff said:

There is plain authority that for arbitrators so to decide a case, without giving a party any warning that the point is one which they have in mind and so giving the party no opportunity of dealing with it, amounts to technical misconduct and renders the award liable to be set aside or remitted... In truth, we are simply talking about fairness. It is not fair to decide a case against a party on an issue which has never been raised in the case without drawing the point to his attention so that he may have

an opportunity of dealing with it, either by calling further evidence or by addressing argument on the facts or the law to the tribunal.

Again, this is not situation in the present case.

161 In the 1984 decision of the Judicial Committee in *Mahon v Air New Zealand Ltd* at 821 the Court held that natural justice requires that a party:

... should not be left in the dark as to the risk of the finding being made and thus deprived of any opportunity to adduce additional material of probative value which, had it been placed before the decision maker, *might* have deterred him from making the finding even though it cannot be predicted that it would inevitably have had that result.

162 However, it is clear that the rules of natural justice do not extend to a requirement that an arbitral tribunal must give notice of its provisional thinking in order that the parties may criticise it. As Lord Diplock said in a often quoted passage in *F Hoffman-La Roche & Co AG v Secretary of State for Trade and Industry* [1975] AC 295 at 369:

...once a fair hearing has been given to the rival cases presented by the parties the rules of natural justice do not require the decision maker to disclose what he is minded to decide so that the parties may have a further opportunity of criticising his mental processes before he reaches a final decision.

163 In the New Zealand High Court decision of *Rotoaira Forest Trust*, Fisher J considered the hearing rule in the context of an application to set aside an arbitral award on the grounds of breach of natural justice. His Honour usefully summarised the principles at 463, and I respectfully agree with his approach. His Honour said:

The principles which need to be applied in the present case therefore appear to be the following:

- (a) Arbitrators must observe the requirements of natural justice and treat each party equally.
- (b) The detailed demands of natural justice in a given case turn on a proper construction of the particular agreement to arbitrate, the nature of the dispute, and any inferences properly to be drawn from the appointment of arbitrators known to have special expertise.
- (c) As a minimum each party must be given full opportunity to present its case.
- (d) In the absence of express or implied provisions to the contrary, it will also be necessary that each party be given an opportunity to understand, test and rebut its opponent's case; that there be a hearing of which there is reasonable notice; that the parties and their advisers have the opportunity to be present

throughout the hearing; and that each party be given a reasonable opportunity to present evidence and argument in support of its own case, test its opponent's case in cross examination, and rebut adverse evidence and argument.

- (e) In the absence of express or implied agreement to the contrary, the arbitrator will normally be precluded from taking into account evidence or argument extraneous to the hearing without giving the parties further notice and the opportunity to respond.
- (f) The last principle extends to the arbitrator's own opinions and ideas if these were not reasonably foreseeable as potential corollaries of those opinions and ideas which were expressly traversed during the hearing.
- (g) On the other hand, an arbitrator is not bound to slavishly adopt the position advocated by one party or the other. It will usually be no cause for surprise that arbitrators make their own assessments of evidentiary weight and credibility, pick and choose between different aspects of an expert's evidence, reshuffle the way in which different concepts have been combined, make their own value judgements between the extremes presented, and exercise reasonable latitude in drawing their own conclusions from the material presented.
- (h) Nor is an arbitrator under any general obligation to disclose what he is minded to decide so that the parties may have a further opportunity of criticising his mental processes before it finally commits himself.
- (i) It follows from these principles that when it comes to ideas rather than facts, the overriding task for the plaintiff is to show that a reasonable litigant in his shoes would not have foreseen the possibility of reasoning of the type revealed in the award, and further that with adequate notice it might have been possible to persuade the arbitrator to a different result.
- (j) Once it is shown that there was significant surprise it will usually be reasonable to assume procedural prejudice in the absence of indications to the contrary.

164 At 461 Fisher J observed:

The key elements are surprise and potential prejudice:[citations omitted]. Of the two, surprise is the more important. Once it is shown that the fact or idea introduced by the decision maker had not been reasonably foreseeable, it will be a very short step indeed to the possibility that a party was procedurally prejudiced.

165 While TCL seeks to rely on *Rotoaira Forest Trust*, in my view it does not assist its argument. For example, it relies on sub-paragraph (f) of Fisher J's reasons but this is a reference to those cases where arbitrators introduced their own ideas without informing the parties, such as in *Fox v PG Wellfair*. This is not such a case.

166 TCL also put forward the decision in *Methanex* where Fisher J said:

- [159] An arbitrator must also be wary of adopting an unforeseen methodology for evaluating the evidence. An award may be set aside where the arbitrator has adopted a valuation method differing from that advanced by the experts for the two parties: *Unit Four Cinemas Ltd v Tosara Investment Ltd* [1993] 2 EGLR 11. On the other hand, it has never been suggested that a tribunal must give notice of its provisional thinking in order that the parties can criticise it: *F Hoffman-La Roche & Co AG v Secretary of State for Trade and Industry* [1975] AC 295.
- [160] ... In the end the unifying question at common law is whether a reasonable litigant placed in the shoes of the objecting party would have foreseen the possibility of reasoning of the type revealed in the award, and hence had the opportunity to present evidence and argument in anticipation of it (*Navrom v Callitsis Ship Management SA (The "Radauti")* [1987] 2 Lloyd's Rep 276 at p 284). It is a test which must ultimately be applied according to the facts of each individual case.
- [161] To summarise, the scope of notice and response rights at common law can be stated in broad terms only because each case must be tailored to the circumstances of the particular case. The overriding objective is to avoid surprise, and therefore lack of opportunity to respond in the way that the parties had envisaged when setting up the arbitration.

I again respectfully agree with his Honours' approach. I do not consider that TCL can meet this test.

167 TCL relies also on a decision of the Supreme Court of South Australia in *Starkey v State of South Australia* [2011] SASC 34 ("*Starkey*") at [74] to [75] per Sulan J. His Honour said:

- 74 The test for whether the hearing rule has been satisfied is the standard of fairness. There are no fixed rules. The standard of fairness is broadly and flexibly applied. What is fair in a given situation depends upon the circumstances (*Mobil Oil Australia Pty Ltd v FCT* (1963) 113 CLR 475). The statutory framework is of crucial importance in determining what is required. In *Mobil Oil*, Kitto J stated:

By the statutory framework I mean the express and implied provisions of the relevant Act and the inferences of legislative intention to be drawn from the circumstances to which the Act was directed and from its subject matter. (*Mobil Oil* at 503 to 504)

- 75 Another relevant factor to consider in determining whether the standard of fairness has been met is the disclosure or otherwise of the provisional views of the decision maker. Although a decision maker is not required to disclose provisional views, the law attaches importance to the need to disclose the critical issue or factor on which the decision is likely to turn, so that the person affected may have the opportunity to deal with it (see *Kioa v West* (1985) 159 CLR 550, 587).

In reliance on this decision TCL seeks to argue that the Tribunal failed to provide it with an opportunity to deal with issues or factors to which it was likely to turn in making its Award.

168 I note however that *Starkey* was handed down in a context which is entirely different to the context of this case. In *Starkey* the Minister for Aboriginal Affairs was involved in a statutory process of consultation with indigenous people prior to making a decision as to whether to authorise a mining company to undertake activities which might damage or interfere with indigenous sites, objects or remains. The consultation occurred largely at a meeting with indigenous representatives. One may more easily understand the need in those circumstances to advise the indigenous representatives of the critical issues or factors which might apply. Of course, such a consultation process is quite different from the process of an international commercial arbitration conducted on pleadings, with witness statements, expert reports, cross examination and legal representation. The requirements for procedural fairness in *Starkey* are quite different to the requirements in the present case.

D.6.2 The application of the hearing rule to this case

169 The application of the hearing rule depends upon the nature of the dispute and the circumstances of the case, being a simple matter of procedural fairness. There is nothing technical or fixed about its operation. TCL must establish that in the particular circumstances of this arbitration a reasonable litigant in its shoes would not have foreseen the possibility of reasoning *of the type* that led to the 14% Starting Point Finding, the Uplift Finding and the Lost Sales Finding or a corollary of it, and that it therefore lost the opportunity to present evidence and argument in anticipation of it. It is difficult for TCL to do so given that evidence capable of supporting these findings was traversed in the hearing.

170 The arbitration was conducted on pleadings in which the key issues were defined and joined, evidence was given by witness statements, expert reports including a joint expert statement from an experts' conclave were provided, and both parties were represented by competent solicitors and senior and junior counsel. The transcript and the Award illustrate that the expert and lay evidence was fully tested in a ten day hearing and that both parties were afforded an equal opportunity to present their case and test the other party's case. No complaint is made by TCL about any of these matters.

171 TCL seeks to strip out the three findings of which it complains to argue that a breach
of the hearing rule occurred in regard to them. In my view its contentions in this regard do
not withstand examination.

172 Before the Tribunal senior counsel for Castel sought, both in cross examination and in
submissions, to throw doubt on the 7.4% estimate by Mr Williams. Mr Williams was cross
examined as to the reliability of the GfK data, and Castel submitted that there were various
deficiencies in his approach, including a contended failure to obtain direct input from those in
the trade. Castel called detailed lay evidence and made submissions that this evidence showed
that Castel's lost sales were far higher than as proposed by Mr Williams. TCL joined issue
and argued its position regarding Castel's lost sales through its witnesses, by cross
examination and by submissions.

173 Castel asked the Tribunal to make its decision on the basis of Mr Acton's evidence of
a 1:1 substitution ratio - or 100% of the OEM product sales. At the time the Tribunal retired
to reach its decision TCL's argument was that Castel had suffered no lost sales, but that if it
had suffered some lost sales then the maximum was 7.4% of OEM product sales as allowed
by Mr Williams. The ambit of the dispute with regard to Castel's lost sales at the time was
therefore between zero and 100% of the OEM product sales.

174 In final submissions Castel relied on the lay evidence and attacked Mr Williams'
estimate. I set out some parts of the submissions in detail as they illustrate the thrust of
Castel's case. Castel submitted:

80 Mr Williams asserted that the conduct at the centre of this dispute involved
versioning, and that "TCL seems to have attempted to sell its low-margin
OEM products with different branding and through different distribution
channels from those used for its TCL-branded product". He did not seek the
obvious instructions which might readily have been available to support such
speculation, which flew in the face of Mr Shi's evidence (at [17] HB:224 of
his witness statement) that TCL took no interest in the distribution channels
through which OEM product was sold. Mr Williams sought to sustain his
view by observing that he would expect the OEM retailers not also the stock
the branded goods. The reason is clear enough: the sales of one would have
cannibalised the others because they were substitute goods. If Mr Williams
had interested himself to enquire whether TCL made a lesser margin on OEM
goods - one concomitant of versioning - he would have learned from his
client that TCL did not. TCL only sold its products (of whatever type) at FOB
- it derived no return from direct sales to retailers or consumers in Australia.
A study of the TCL sales records in exhibit 4 would have shown him that the
price to OEM customers and to Castel of particular capacity products was

much the same.

- 81 The efforts made by TCL to distinguish the OEM goods and the TCL goods showed that the differences were differences of appearance only. No functional difference was pointed to. No evidence was adduced that consumers purchase such goods for other than what they do - that is, for functional reasons - rather than for reasons, or substantially for reasons, of appearance. It was asserted that the Castel goods were superior because of the after-sales service provided, but, as Mr Williams accepted, he would not expect a retailer to draw that to a consumer's attention. He accepted too that the retailer holds considerable sway over the purchaser's decision.
- 82 What is clear is that the OEM goods were known in the market place as TCL goods, and were being sold more cheaply. It is also clear that retailers were getting cross. Mr Francis sought confirmation that the OEM goods were being withdrawn, and told retailers that they had been - as indeed Mr Shi told Mr Kwong - when such was not the case. These assurances would not be sought by retailers and given by a sales manager like Mr Francis unless they were material to preserving sales of TCL branded goods. Mr Williams accepted that retailers would direct their efforts at maximising their profits. This would entail both (a) retailers not buying TCL goods from Castel if equivalent goods were being sold by other retailers at cheaper prices or there was a risk that this would happen; and (b) pointing out the customers, where the retailer had such goods, that the OEM goods which they were selling were effectively identical with the slightly more expensive TCL goods which were allergy friendly.
- ...
- 84 Mr Williams engaged in abstract theorizing to arrive at a figure of additional sales which Castel might have made if TCL had not made unauthorised sales, by reference to the whole of the non-ducted air conditioner market, or some or other stratum of it. He eschewed obtaining direct input from those in the trade or seeking direct instructions from his client. This posture did not do him or TCL any credit. It is to be inferred that TCL judged that informed expert opinion would not have assisted its case.
- ...
- 88 Whether the sales loss ratio was one for one or some other ratio is a matter of judgement on which the tribunal will form its own view. It is submitted that no assistance is to be derived from manipulating industry statistics (which inexplicably did not refer to TCL) or from attempts to distance OEM goods from TCL goods in the product space by averaging prices of models without common features, which are directed to differing applications (wall mount, window mount, split, portable) and which embody different technologies (inverter technology and its predecessor). Again it does TCL and Mr Williams no credit to engage in such manipulations (which include using figures as including TCL figures when they may not do so).
- 89 What is clear is that the OEM and TCL goods were close substitutes, which were being sold in a market where Castel has been promoting TCL goods as premium goods which were allergy friendly. There is clear evidence that OEM retailers knew that the OEM goods and the TCL goods were functional equivalents made by the same company. To maximise sales (and therefore

profits) it would only be natural for the retailers to sell the OEM goods by reference to the TCL goods (as indeed was done in the Chinese newspaper and as Castel retailers complained was the case).

- 90 The tribunal ought to conclude that the ratio adopted by Mr Acton is a reasonable basis upon which to assess loss.

175 Although it eventuated that the Tribunal rejected Mr Acton's expert evidence, to my mind there can be little doubt from the evidence and the submissions that a reasonable litigant in TCL's shoes would have understood the possibility of reasoning of the type that led to the findings. TCL should have been aware of the possibility that the Tribunal might accept Castel's reasoning or potential corollaries of it to reach a higher assessment of Castel's lost sales than 7.4%. TCL also had notice of Castel's argument that the appropriate starting point was 14%. Although there was little in Mr Williams' "concession" in this regard, it had been put to him and there was evidence to support the 14% Starting Point finding.

176 In my view TCL should not have been surprised by the Award. The Tribunal was not required to give notice of its provisional thinking as to how it would address the divergence between the parties' assessments of lost sales and its approach to this question was foreseeable as a potential corollary of the matters traversed in the hearing. The evidence and the arguments with regard to the lost sales were well ventilated and the Tribunal's findings are consistent with the type of reasoning advanced. It cannot be said that the Tribunal's findings as to lost sales resulted from a new point which occurred to it, involving a departure from the course of the litigation which was never raised or argued before it. This was not a case where the Tribunal considered material not put before it by the parties or made a decision based on its own knowledge without giving the parties the opportunity to present a different view. In my view the hearing was procedurally fair and I can see no breach of the hearing rule in connection with the making of the Award.

D7 Exercise of discretion

177 I have previously discussed the authorities that set out the scope of public policy and inform the proper operation of my discretion to set aside the Award as being in conflict with or contrary to public policy. The authorities are clear that I should find a balance between the necessity to ensure that the mechanism for enforcement of international arbitral awards is not frustrated, and the necessity for the Court to be master of its own processes and to apply the

public policy of Australia. An offence to fundamental notions of fairness or justice is required before the discretion to set aside an award is to be exercised.

178 I do not accept that there was any breach of the rules of natural justice in connection with the making of the Award in this case, but for completeness I note that any breach of the no evidence rule or the hearing rule that might be found must be a minor one. The evidence underpinning the findings which are the subject of complaint, the quality of the hearing provided and the careful way in which the Tribunal approached the making of the Award, all indicate that there could be no offence to fundamental notions of fairness or justice. I do not accept that any breach that may be found could constitute a compelling reason to set aside the Award, and I decline to do so.

E THE APPLICATION TO ENFORCE THE AWARD

E.1 Castel's application for enforcement

179 Having been made in Australia the Award in this matter is not a foreign award, and, the approach prescribed in s 9 of the IAA for recognition and enforcement of a foreign award does not apply. Although I found in my earlier judgement in this matter that this Court is competent to enforce a non-foreign Award, there is no procedure set out in the *Federal Court Rules 2011* in this regard.

180 Article 35, which has force of law by operation of s 16 of the IAA, provides that a competent court may recognise an award as binding and shall enforce it upon application in writing. I have previously found that this Court is a "competent court" for this purpose. In order to make an enforcement application art 35 requires only that the party applying to the competent court for enforcement of an award must do so in writing and supply the original award or a copy thereof. Castel has taken these steps.

181 TCL argues that Castel has not applied for recognition of the Award and that recognition is a necessary precondition for its enforcement of an arbitral award. It refers in this regard to the learned authors R Rana and M Sanson in *International Commercial Arbitration* (Lawbook Co, 2011) at [12/05] where the authors state:

Recognition and enforcement are two different but related curial processes. *Recognition* is a reference to a process, whereby an arbitral award is accepted and regarded as the definitive (final) determination of the issues between the parties so

that the parties may not re-litigate the matter. It is a judicial decision which recognises the legal validity of an arbitral decision. It generally acts as a ‘shield’ against attempts to raise issues that have already been decided in arbitration. *Enforcement* refers to the process whereby a court grants the successful party a means for the execution of the order is in the arbitral award in the same way it would fray judgement of the court by imposing legal sanctions against non-compliance with the recognised award.

182 I have no difficulty with accepting the difference between “recognition” and “enforcement” as expressed by the learned authors, but I do not accept TCL’s contention. Article 35 does not indicate any procedure for recognition. There is also no express requirement or procedure in the Federal Court Act or the *Federal Court Rules 2011* which provides for recognition of an award. Foster J made the same point in *Traxys* at [68] although doing so in relation to recognition of foreign awards. However, s 54 of the Federal Court Act sets out that the Court may make an order in the terms of an award on the application of a party to the award. It provides that an order so made is enforceable in the same manner as if made in an action in the Court.

183 The objects of the IAA include encouragement of the use of arbitration as a method of resolving disputes, the facilitation of the recognition and enforcement of arbitral awards, and giving effect to Australia’s obligations under the Convention. The legislation has a pro-enforcement bias and only limited grounds are available to a party opposing enforcement. I do not consider that I should take an overly technical approach to Castel’s application for enforcement: see *Traxys* at [63].

184 Castel’s application is a sufficient basis for me to make an order in the terms of the Award as contemplated by s 54. In my view, the Award will be “recognised” when an order in terms of the Award is made. Once this order is handed down, s 53 of the Federal Court Act allows its enforcement. Rule 41.10 of the *Federal Court Rules 2011* provides the mechanisms for enforcement. Castel’s failure to apply for recognition of the Award cannot be fatal to its application and to accept TCL’s contention in this regard would be to allow a triumph of form over substance.

E.2 The public policy opposition to enforcement

185 In reliance on art 36(1)(b)(ii) of the Model Law TCL opposes recognition or enforcement of the Award. It makes the same arguments as to breaches of the no evidence

rule and the hearing rule as it made in seeking to set the Award aside. It says that the alleged breaches mean that the Award is in conflict with or contrary to public policy and should not be enforced by the Court.

186 In dealing with the setting aside applications I have already held that there was no breach of the no evidence rule or the hearing rule in connection with the making of the Award, and have done so upon a close review of the evidence and the hearing. I can see no offence to fundamental notions of justice or fairness in connection with the making of the Award and I do not consider that the Award is in conflict with or contrary to Australian public policy. That decision also applies in relation to TCL's contention that I should refuse to enforce the Award. Put another way, there is no compelling reason why the Award should not be enforced.

187 I also reiterate the views set out at [34] to [51] and at [177] to [178] in relation to the exercise of my discretion to refuse to enforce the Award. I consider that if any breach of the no evidence rule or the hearing rule could be found it must be a minor one that could not justify the exercise of my discretion.

E.3 TCL's other ground in opposition to enforcement

188 TCL also contends that the application to enforce the Award is premature and an abuse of process because at the time it was made there was no binding award for the Court to enforce. It says this because the application to enforce was made before the time period within which TCL was entitled to make an application to set the Award aside pursuant to art 34(2) and (3).

189 I do not accept this contention. No authority is cited for this proposition and it is not supported by the Model Law. Article 35 of the Model Law provides that:

An arbitral award, irrespective of the country in which it was made, shall be recognised as binding and, upon application in writing to the competent court, shall be enforced.

Article 35 does not provide any exception such that an award shall be not enforced unless and until the setting aside application period has expired, or that it is not binding until that period has expired. If the position as contended by TCL were the case, an award creditor could take

no action to enforce an award at all pending the determination of an application to set the award aside. That is plainly not what art 36 contemplates.

190 The Award was made on 23 December 2010. Castel did not apply to enforce the Award until 18 March 2011 and only did so after TCL had failed to respond to questions as to whether it would meet the Award. Since 22 March 2011 TCL has argued that the Award should be set aside as in conflict with or contrary to public policy. In my view any argument made now that the application for enforcement is premature, and that Castel should start again in its application to enforce, is artificial in the extreme and without merit.

191 I will make an order in the terms of the Award, and Castel may then enforce by the usual Court processes.

F. CONCLUSION

192 I require that within seven days the parties prepare and file draft orders reflecting these reasons and file submissions as to costs.

I certify that the preceding one hundred and ninety-two (192) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Murphy.

Associate:

Dated: 2 November 2012