

FEDERAL COURT OF AUSTRALIA

Australian Competition and Consumer Commission v BlueScope Steel Limited (No 5) [2022] FCA 1475

File number: VID 932 of 2019

Judgment of: **O'BRYAN J**

Date of judgment: 9 December 2022

Catchwords: **COMPETITION** – alleged attempts to induce certain suppliers of flat steel products to contravene the *Competition and Consumer Act 2010* (Cth) (Act) by arriving at an understanding containing cartel provisions – cartel provisions being provisions to control or maintain the price of flat steel products supplied in Australia – whether putative counterparties to the understandings were or were likely to be in competition with each other at the relevant time – market definition – consideration of product and functional dimensions of the markets for the supply of flat steel products – whether overseas steel mills compete with domestic producer – whether respondents intended to induce understandings containing cartel provisions – whether an attempt to induce an understanding requires one party to seek a commitment from the other – means by which an understanding may be reached

STATUTORY INTERPRETATION – meaning of “attempted to induce” a contravention in s 76(1)(d) of the Act – meaning of “understanding” in Pt IV of the Act – meaning of “fixing, controlling or maintaining” prices in Pt IV of the Act – whether s 84(1) of the Act (attribution of state of mind) is applicable to an attempt to induce a contravention within s 76(1)(d) of the Act

Legislation: *Competition and Consumer Act 2010* (Cth) ss 2, 4(1), 4F, 44ZZRB, 44ZZRC, 44ZZRD, 44ZZRJ, 44ZZRK, 48, 76, 84, 86E, 96, 97

Criminal Code Act 1995 (Cth) Sch 1 (Commonwealth Criminal Code) s 11.1

Evidence Act 1995 (Cth) ss 81, 135, 136, 140

Trade Practices Amendment (Cartel Conduct and Other Measures) Act 2009 (Cth)

Trade Practices Revision Act 1986 (Cth)

Explanatory Memorandum, *Trade Practices Amendment (Cartel Conduct and Other Measures) Bill 2008* (Cth)

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Australian Competition and Consumer Commission v Australian Egg Corporation Ltd (2017) 254 FCR 311
Australian Competition and Consumer Commission v Australian Safeway Stores Pty Ltd (2003) 129 FCR 339
Australian Competition and Consumer Commission v BlueScope Steel Ltd (No 3) [2021] FCA 1147
Australian Competition and Consumer Commission v Cascade Coal Pty Ltd [2019] FCAFC 154; 374 ALR 90
Australian Competition and Consumer Commission v CC (NSW) Pty Ltd (No 8) (1999) 92 FCR 375
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Commonwealth Bank of Australia v Kojic (2016) 249 FCR 421

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Vallance v The Queen (1961) 108 CLR 56

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Whitlam v Australian Securities and Investments Commission (2003) 57 NSWLR 559
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Date of hearing: 30, 31 August 2021, 1, 2, 3, 6, 8, 9, 10, 13, 14, 15, 16, 17, 22, 23, 27, 28, 29, 30 September 2021, 1, 26, 29 October 2021, 1 November 2021

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ORDERS

VID 932 of 2019

BETWEEN: **AUSTRALIAN COMPETITION AND CONSUMER
COMMISSION**

Applicant

AND: **BLUESCOPE STEEL LIMITED (ACN 000 011 058)**

First Respondent

JASON THOMAS ELLIS

Second Respondent

ORDER MADE BY: O'BRYAN J

DATE OF ORDER: 9 DECEMBER 2022

THE COURT ORDERS THAT:

1. The matter is listed for hearing on the question of remedies at 10:15 am on 3 April 2023 on an estimated duration of two days.
2. By 27 January 2023, the applicant file and serve any application for discovery from the respondents on the question of remedies.
3. By 3 February 2023, the respondents notify the applicant of any objection to discovery, and provide discovery in any category (or part of a category) that is not objected to.
4. Any dispute with respect to discovery will be heard on a date to be fixed.
5. By 10 March 2023, the applicant file and serve:
 - (a) proposed orders it will seek at the remedies hearing;
 - (b) outline submissions limited to 15 pages; and
 - (c) any witness statements and a list of documents on which it intends to rely at the remedies hearing which are additional to the evidence already adduced in the proceeding.
6. By 20 March 2023, each of the respondents file and serve:
 - (a) any proposed orders they will seek at the remedies hearing;
 - (b) outline submissions limited to 15 pages; and

- (c) any witness statements and a list of documents on which they intend to rely at the remedies hearing which are additional to the evidence already adduced in the proceeding.
7. Any party may apply to vary orders 1 to 6 above by filing and serving an application within 14 days of the date of these orders together with an outline submission in support limited to 5 pages and any evidence relied upon.
 8. If an application is made under order 7, any other party may file a responsive outline submission limited to 5 pages and any evidence relied upon by 20 January 2023.
 9. Any application made under order 7 will be determined on the papers unless any party states in their outline submissions that they seek an oral hearing.

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

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REASONS FOR JUDGMENT

O'BRYAN J:

A. INTRODUCTION

- 1 The Australian Competition and Consumer Commission (**ACCC**) alleges that each of the first respondent, BlueScope Steel Limited (**BlueScope**), and the second respondent, Jason Thomas Ellis (**Mr Ellis**), attempted to induce certain suppliers of flat steel products in Australia to contravene s 44ZZRJ of the *Competition and Consumer Act 2010* (Cth) (**Act**) by making arrangements or arriving at understandings with BlueScope that contained cartel provisions within the meaning of s 44ZZRD of the Act. The type of cartel provision alleged by the ACCC is colloquially referred to as a “price fixing” provision and is defined by s 44ZZRD(2). The ACCC alleges that this conduct occurred during a 10 month period from September 2013 to approximately June 2014 (which I will refer to as the “**relevant period**”).
- 2 At the time of the alleged conduct, s 44ZZRJ prohibited a corporation from making a contract or arrangement or arriving at an understanding that contains a cartel provision. Relevantly, s 44ZZRD provided that a provision of a contract, arrangement or understanding is a cartel provision if two conditions are satisfied: first, in respect of a price fixing provision, the provision has the purpose or has or is likely to have the effect of fixing, controlling or maintaining the price for goods supplied or likely to be supplied by any or all of the parties to the contract, arrangement or understanding; second, two or more of the parties to the contract, arrangement or understanding are or are likely to be in competition with each other in relation to the supply of those goods.
- 3 Flat steel products are used in a wide variety of industries within the construction and manufacturing sectors. They are produced from a material known as “steel slab” and are supplied in a number of product categories.
- 4 Flat steel products sold in Australia are either manufactured in Australia by BlueScope or manufactured by steel mills in other countries and imported into Australia. In the relevant period, BlueScope was the only manufacturer of flat steel products located in Australia. The division of BlueScope responsible for the manufacture and sale of flat steel products was called the BlueScope Coated Industrial Products Australia division. In these reasons, I will refer to that division as “**BlueScope CIPA**”, or simply “**CIPA**”.

- 5 There are two main functional levels of the market for flat steel products: manufacture/importation and distribution. BlueScope (directly and through subsidiaries) is both a manufacturer and distributor of flat steel products. A number of companies conduct business in Australia as importers of flat steel products manufactured by overseas steel mills, and are referred to as import traders. A number of other companies conduct business in Australia as distributors of flat steel products. Some of those companies acquire steel predominantly from BlueScope (and are referred to as BlueScope aligned – or franchised – distributors); others acquire steel predominantly from import traders (and are referred to as non-aligned distributors).
- 6 By 2013, due to a worldwide over-supply of steel and lower demand for steel in the wake of the global financial crisis, steel prices in Australia were low and BlueScope and distributors were under financial pressure. Many countries, including Australia, became increasingly protectionist in relation to their local steel industries, which led to an increase in anti-dumping applications. The ACCC’s allegations centre upon a commercial strategy, allegedly devised by Mr Ellis who had recently returned to Australia and rejoined BlueScope’s Australian operations, to alleviate the consequences of the intense competition arising from this downturn in the market.
- 7 The ACCC alleges that, by in or around September 2013, Mr Ellis had devised a strategy (referred to as the “benchmarking strategy”, the “recommended resale price strategy” or the “RRP strategy”) to increase the value to BlueScope and its distributors of sales of flat steel products. The strategy was for BlueScope to publish a recommended resale price which was to be used by BlueScope, BlueScope’s distributors and import traders as a benchmark for raising their prices for the supply of flat steel products in Australia. In referring to the strategy, many witnesses used the expression “recommended retail price” instead of “recommended resale price” both in contemporaneous correspondence and in giving evidence. It is clear that the witnesses were referring to the same strategy, and the phrases were being used interchangeably. In a commercial context, there is no material difference in meaning between the two phrases. When referring to the strategy in these reasons (as opposed to the evidence of specific witnesses), I will use the expression “**recommended resale price**”, being the expression used by Mr Ellis and which was ultimately used in certain of CIPA’s price lists for the supply of flat steel products to distributors from December 2013 onwards. These reasons also use the common abbreviation “**RRP**” for recommended resale price.

8 The ACCC further alleges that Mr Ellis devised a strategy for addressing competition from overseas steel manufacturers, being to restrict the volume of imported steel coming into Australia and to persuade overseas steel manufacturers to increase the price at which they sold flat steel products to Australian import traders. The ACCC says that the strategy also involved threatening to make anti-dumping applications against overseas steel manufacturers unless the price at which they sold flat steel products in Australia increased.

9 The ACCC contends that, by these strategies, BlueScope and Mr Ellis sought to control or maintain the price of flat steel products supplied or likely to be supplied by BlueScope and distributors in the Australian market. It alleges that, in carrying out these strategies, BlueScope and Mr Ellis attempted to induce arrangements or understandings containing a cartel provision with certain steel suppliers, being seven Australian distributors, one import trader and one overseas steel manufacturer, within the meaning of s 76(1)(d) of the Act. In these reasons, I will refer to the objects of the alleged attempts collectively as the “counterparties”.

10 The words “arrangement” and “understanding” are statutory words that have different shades of meaning, as discussed below. Broadly, an understanding is less formal than an arrangement. In these reasons, I will use the word “understanding” when referring to the ACCC’s allegations of attempts to induce price fixing arrangements or understandings, in part as an abbreviation and in part because the evidence does not suggest that BlueScope or Mr Ellis attempted to induce an arrangement.

11 The ACCC does not allege that the attempts were successful. No understandings were ultimately arrived at. In some instances, the evidence suggests that BlueScope’s proposal, whatever its ultimate characterisation under the Act, was rebuffed because the counterparties believed that the proposal would or might involve a contravention of the law. In other instances, the proposal was ignored because the competitive pressure from imported steel made BlueScope’s proposal commercially unviable.

12 The ACCC seeks a range of remedies including declaratory relief, an order for the payment of pecuniary penalties to the Commonwealth pursuant to s 76 of the Act and an order that Mr Ellis be disqualified from managing a corporation under s 86E of the Act.

13 The trial was generally confined to issues of liability. As noted below, the ACCC adduced evidence in support of an allegation that, at all material times from at least 11 October 2013, the Chief Executive Officer of BlueScope Australia and New Zealand (**BANZ**), Mark Vassella,

was aware of certain aspects of the conduct constituting the alleged attempts to induce the unlawful understandings. It is appropriate to make findings in respect of that allegation even though it does not relate to any issue of liability.

14 The trial was conducted in the second half of 2021 during the height of the COVID-19 pandemic. For that reason, the trial was conducted using video-conference technology. Witnesses gave evidence and were cross-examined via that medium.

15 The preparation of these reasons has taken a considerable period of time. This was due to the wide range of allegations that were contested in the proceeding and the extent of the evidence adduced to address all contested issues. I note, though, that my findings with respect to the credit of all witnesses who gave evidence were prepared during or shortly after the trial of the proceeding.

16 For the reasons that follow, I find the majority of the ACCC's allegations proved. I find that during the relevant period BlueScope and Mr Ellis attempted to induce certain suppliers of flat steel products in Australia, being seven Australian distributors, one import trader and one overseas steel manufacturer, to contravene s 44ZZRJ by arriving at an understanding that contained cartel provisions, within the meaning of s 76(1)(d) of the Act.

B. THE PRINCIPAL ALLEGATIONS

17 This section of the reasons identifies the principal factual allegations that are in dispute in the proceeding.

18 By way of overview, in their respective defences BlueScope and Mr Ellis denied all of the ACCC's allegations concerning attempts to induce unlawful understandings. BlueScope and Mr Ellis also contested aspects of the ACCC's allegations concerning the steel products the subject of the alleged attempts and the structure of the market for the manufacture and distribution of those products, including the nature and extent of competition between BlueScope, distributors, overseas manufacturers and import traders.

19 The range of matters put in issue by BlueScope and Mr Ellis greatly extended the evidence required to be adduced in the case and the length of the trial. In my view, most of the contentions advanced on behalf of BlueScope and Mr Ellis concerning the market for flat steel products and BlueScope's competitors in Australia lacked substance. The witnesses in the proceeding, including BlueScope's own employees, readily identified BlueScope's competitors and confirmed most of the ACCC's allegations concerning the structure of the

market for the manufacture and distribution of flat steel products. It is troubling, to say the least, that the ACCC's allegations, denied by BlueScope, were largely confirmed by a contemporaneous document, prepared by BlueScope, and submitted by BlueScope to the ACCC in connection with an application for informal clearance of a merger. I allowed the tender of the document over BlueScope's objections (see *Australian Competition and Consumer Commission v BlueScope Steel Ltd (No 3)* [2021] FCA 1147 (**BlueScope (No 3)**) at [17]-[33]). Ultimately, there was only one substantive issue in the proceeding that was truly contentious: whether the impugned conduct of Mr Ellis and other representatives of BlueScope rose to the level of an attempt to induce a price fixing understanding.

The market for flat steel products

20 In its pleading, the ACCC defined flat steel products as hot rolled coil, cold rolled coil, steel plate, sheet steel and metallic coated and painted products. The respondents say that the ACCC's classification of flat steel products is incorrect and that flat steel products generally include products in the following categories: steel plate, hot rolled coil, cold rolled coil, sheet steel, metallic coated sheet and coil and painted sheet and coil. Ultimately, the evidence shows that the differences in the parties' terminology is of no moment.

21 The ACCC alleged that there was demand for flat steel products in Australia by steel users who did not intend to re-supply those products (being manufacturers who use flat steel products in their business) and by distributors who acquired flat steel products and then resupplied those products to either steel users or other distributors. The respondents say that the ACCC's description of demand is incomplete in two respects. First, the respondents say that the category of steel users can be further divided between larger manufacturers whose large purchase volumes made it economic and practical to acquire flat steel products directly from BlueScope or import traders and smaller manufacturers who typically purchased flat steel products in smaller volumes and often had different service requirements from larger manufacturers (such as shorter lead times, processing services and/or stock management services that made it uneconomic or impractical to acquire those products directly from BlueScope or import traders). Second, the respondents say that distributors typically performed further processing services required by their customers (including slitting and shearing) and typically supplied their customers with a range of value-added services such as shorter lead times, stock management services, low minimum volumes and other product support.

22 With respect to the supply side of the market, it was common ground that:

- (a) BlueScope carried on business in Australia as a manufacturer of, amongst other things, steel slab (which is a raw material that is an input to manufacturing flat steel products) and various flat steel products. BlueScope supplied flat steel products in Australia to its wholly owned subsidiary, BlueScope Distribution Pty Ltd (**BlueScope Distribution**), other distributors and some steel users.
- (b) BlueScope Distribution operated nationally as a distributor of flat steel products in Australia and traded under business names including Sheet Metal Supplies (**SMS**), Impact Steel and BlueScope Distribution (which I will refer to as **BSD** to distinguish it from the corporate entity, BlueScope Distribution).
- (c) Flat steel products manufactured by overseas steel mills were imported into Australia by a category of trading companies referred to by the parties as **import traders**. In turn, import traders supplied the imported products to distributors or steel users.
- (d) New Zealand Steel Limited (**NZ Steel**), also a wholly owned subsidiary of BlueScope, manufactured various flat steel products in New Zealand which it supplied to New Zealand Steel (Australia) Pty Ltd (**NZSA**), another wholly owned subsidiary of BlueScope. NZSA operated as a steel trader for flat steel products in Australia supplying distributors and occasionally steel users.
- (e) Overseas steel manufacturers that supplied import traders included:
 - (i) Shang Chen Steel Co Ltd and Shang Shing Industrial Co Ltd (together, **Shang Shing**), which were related companies that manufactured flat steel products in Taiwan;
 - (ii) Yieh Phui Enterprise Co. Ltd (**Yieh Phui**), which manufactured flat steel products in Taiwan; and
 - (iii) JSW Steel Ltd (**JSW**), which manufactured flat steel products in India.
- (f) Distributors who acquired flat steel products from BlueScope CIPA or NZSA included:
 - (i) Southern Steel Group Pty Limited (**Southern Steel**) and its wholly owned subsidiaries including Southern Sheet & Coil Pty Ltd (**Southern Sheet & Coil**), Southern Steel Supplies Pty Ltd (**Southern Steel Supplies**), Surdex Steel Pty Limited (**Surdex Steel**) and Brice Metals Australia Pty Limited (**Brice Metals**);
 - (ii) Arrium Limited (**Arrium**) and its wholly owned subsidiary OneSteel Trading Pty Ltd (**OneSteel**) which operated two separate business units known

respectively as OneSteel Metalcentre and OneSteel Sheet & Coil (the latter of which was acquired by BlueScope on 1 April 2014);

- (iii) CMC Steel Distribution Pty Ltd (**CMC Steel**);
- (iv) Apex Steel Pty Ltd (**Apex Steel**);
- (v) Selection Steel Trading Pty Ltd (**Selection Steel**);
- (vi) Celhurst Pty Ltd trading as Selwood Steel (**Selwood Steel**); and
- (vii) Vulcan Steel Pty Ltd (**Vulcan Steel**).

23 The ACCC alleged that import traders acquired flat steel products from overseas steel manufacturers and supplied the products to distributors and steel users in Australia. The respondents said that import traders typically did not operate as distributors of flat steel products in Australia or supply flat steel processing services.

24 The ACCC further alleged that each of Wright Steel (Sales) Pty Ltd (**Wright Steel**) and Citic Australia Commodity Trading Pty Ltd (**Citic**) was an import trader, either in its own right or jointly with the other as parties to an unincorporated joint venture (the **Wright Steel-Citic JV**). That was not admitted by the respondents.

Competition

25 The ACCC alleged that, at all material times:

- (a) BlueScope CIPA and NZSA were in competition with overseas steel manufacturers for the supply of flat steel products to distributors and steel users in Australia; and
- (b) BlueScope CIPA, BlueScope Distribution and NZSA were in competition with distributors for the supply of flat steel products in Australia to steel users.

26 The respondents admitted that BlueScope Distribution (through the SMS and Impact Steel divisions) was in competition with other distributors of flat steel products for the supply of some flat steel products to some distribution customers in Australia, but otherwise contested the ACCC's allegation concerning competition. The principal issues in dispute were whether:

- (a) BlueScope CIPA and NZSA were in competition with the overseas steel manufacturer Yieh Phui (as opposed to the import trader – Wright Steel/Citic – which imported Yieh Phui's flat steel products into Australia); and
- (b) BlueScope CIPA was in competition with distributors for the supply of flat steel products to steel users.

BlueScope employees

27 The ACCC's allegations concern the conduct of a number of BlueScope employees. The parties prepared a *dramatis personae* listing the persons referred to in the proceeding and their positions of employment at the relevant time. It is common ground that the following persons held the following positions in the relevant period:

- (a) Mr Vassella was employed by BlueScope as the Chief Executive Officer of BANZ;
- (b) Mr Ellis was employed by BlueScope as General Manager, Sales & Marketing for CIPA;
- (c) Matthew Hennessy was employed by BlueScope as Executive, National Sales Manager, Distribution for CIPA;
- (d) Brian Kelso was employed by BlueScope as a National Account Manager (with responsibility for the OneSteel account) and as Queensland Sales Manager (with responsibility for the sheet and coil divisions of Vulcan Steel and Queensland Sheet and Coil);
- (e) Luke Sparks was employed by BlueScope as the National Account Manager and Sales Manager for South Australia and Northern Territory (and with responsibility for the Southern Steel account);
- (f) Troy Gent was employed by BlueScope as Sales Manager for New South Wales (with responsibility for CMC Steel) and Acting Sales Manager for Victoria and Tasmania (with responsibility for BlueScope Distribution);
- (g) Denzil Whitfield was employed by BlueScope as an Account Manager based in Victoria (with responsibility for the CMC Steel, OneSteel and Surdex Steel accounts in Victoria); and
- (h) Graham Unicomb was employed by BlueScope as a Pricing Manager Distribution, CIPA.

28 In respect of Mr Gent, the ACCC alleged that he had responsibility for Selection Steel, whereas BlueScope said that he only acquired that responsibility from approximately July 2014.

29 In respect of Dieter Schulz, the ACCC alleged that he was employed by BlueScope as the President of the International Markets Group, whereas BlueScope said he was employed by a related company, BlueScope Buildings North America.

30 The ACCC alleged that the conduct of each of the above employees relied upon in the statement of claim was conduct undertaken in the course of their employment and, as a consequence, each acted on BlueScope’s behalf and within the actual or apparent scope of their authority with respect to the conduct. The respondents generally denied that allegation; however, Mr Ellis admitted that he engaged in conduct in the course of his employment.

31 The ACCC further alleged that, at all material times, Mr Hennessy, Mr Sparks, Mr Gent, Mr Whitfield, Mr Kelso, Mr Schulz and Mr Unicomb acted at the direction of Mr Ellis with respect to their conduct as alleged in the statement of claim. The respondents denied that allegation.

BlueScope’s strategies to increase prices for flat steel products in Australia

32 The ACCC alleged that, by in or around September 2013, Mr Ellis (in his new role within CIPA) had developed a strategy to increase the value to BlueScope and distributors of sales of flat steel products in Australia (the **benchmarking strategy**). The benchmarking strategy comprised:

- (a) providing distributors with a suggested or recommended resale price for flat steel products that would be or was higher than the market price before the implementation of the benchmarking strategy;
- (b) persuading distributors to use the suggested or recommended resale price to set the price at which those distributors would sell flat steel products to steel users if BlueScope caused BlueScope Distribution and NZSA to price in accordance with the suggested or recommended resale price; and
- (c) causing BlueScope Distribution and NZSA to set their prices for flat steel products in accordance with the suggested or recommended resale price, including by limiting the use and availability of tactical pricing.

33 The ACCC alleged that, prior to the introduction of the benchmarking strategy in September 2013, BlueScope had sold flat steel products to BlueScope Distribution, OneSteel, Southern Steel and CMC Steel at additional discounts in order to assist those distributors reduce their prices and meet competition, which was referred to as “**tactical pricing**”.

34 In its pleading, the ACCC refers to the suggested or recommended resale price as the “pricing information”. I prefer to use the term “**CIPA’s Distribution Market price lists**” (or “**CIPA’s price lists**” in shorthand) as that term better describes the documents given by BlueScope to distributors and import traders that is the subject of the allegations.

35 The ACCC further alleged that, between 29 August 2013 and February 2014, Mr Ellis developed a strategy for addressing competition from overseas steel manufacturers whereby he and other BlueScope employees directed by him, on behalf of BlueScope, would seek to:

- (a) restrict the volume of imported steel coming into Australia;
- (b) persuade overseas steel manufacturers to increase the price at which they sold flat steel products to distributors in Australia; and/or
- (c) threaten to make anti-dumping applications against jurisdictions in which overseas steel manufacturers were based unless the price at which they sold flat steel products to distributors in Australia was increased.

36 The respondents denied those allegations.

Attempts to induce arrangements and/or understandings with domestic competitors

37 The ACCC alleged that BlueScope and Mr Ellis attempted to induce eight domestic suppliers of flat steel products in Australia (seven being distributors and one being an import trader of flat steel products, which were alleged to have been in competition with one or more of BlueScope, BlueScope Distribution and NZSA) to arrive at separate understandings with BlueScope which contained cartel provisions within the meaning of s 44ZZRD(1), being provisions which would have had the purpose or effect or likely effect of fixing, controlling or maintaining the price for flat steel products supplied, or likely to be supplied, by one or more of BlueScope, BlueScope Distribution, NZSA or the competitor concerned. It was common ground that, by the operation of s 44ZZRC, BlueScope Distribution and NZSA would be taken to be a party to any understanding reached by BlueScope (as they were related bodies corporate). The ACCC alleged that reaching the understandings would have involved a contravention of s 44ZZRJ of the Act and that, as a result, the attempts to induce the competitors to arrive at those understandings are subject to the imposition of a pecuniary penalty under s 76(1)(d).

38 Those allegations were denied by the respondents.

39 The ACCC alleged that each of BlueScope and Mr Ellis engaged in the attempts within the meaning of s 76(1)(d) of the Act. In the case of BlueScope, the ACCC alleged that the conduct and state of mind of Mr Ellis and certain employees referred to below should be deemed to be the conduct and state of mind of BlueScope by virtue of ss 84(1) and (2) of the Act respectively.

In the case of Mr Ellis, the ACCC relied on Mr Ellis's own conduct and state of mind, including conduct consisting of Mr Ellis directing other employees to undertake certain actions.

40 The principal allegations for each of the alleged understandings are as follows.

Wright Steel understanding

41 The ACCC alleged that BlueScope and Mr Ellis attempted to induce Wright Steel and/or Citic to arrive at an understanding with BlueScope which included one or more of the following provisions:

- (a) that Wright Steel and/or Citic (either in their own right or acting jointly through the Wright Steel-Citic JV) would sell flat steel products to distributors in Australia at increased prices by reference to CIPA's Distribution Market price lists;
- (b) that Wright Steel would take steps to cause other import traders to sell flat steel products to distributors in Australia at increased prices by reference to CIPA's Distribution Market price lists; and/or
- (c) that BlueScope and NZSA would sell flat steel products to distributors in Australia at increased prices by reference to CIPA's Distribution Market price lists,

(the **Wright Steel understanding**).

42 The ACCC alleged that at all material times, Wright Steel and/or Citic (either in their own right or acting jointly through the Wright Steel-Citic JV) were in competition with at least one of BlueScope, BlueScope Distribution and NZSA in relation to the supply of flat steel products to distributors and/or steel users.

43 The ACCC alleged that the conduct constituting the attempt comprised:

- (a) statements made by Mr Ellis to Griff Wright at a dinner meeting at the Crown Casino complex on 12 September 2013, also attended by Mr Hennessy; and
- (b) directions given by Mr Ellis in September and October 2013 for NZSA to increase the prices at which it sold flat steel products to distributors in Australia.

44 In respect of its allegations against each of BlueScope and Mr Ellis concerning the Wright Steel understanding, the ACCC relies on the conduct and state of mind of Mr Ellis.

Selection Steel, Apex Steel, Southern Steel and Vulcan Steel understandings

45 The ACCC alleges that each of BlueScope and Mr Ellis attempted to induce each of Selection Steel, Apex Steel, Southern Steel and Vulcan Steel to arrive at an understanding with BlueScope which included one or more of the following provisions:

- (a) that the relevant distributor would use CIPA's Distribution Market price lists as a benchmark when selling flat steel products to steel users in Australia;
- (b) that BlueScope would limit the use of tactical pricing;
- (c) that BlueScope would increase the price that it sold flat steel products to BlueScope Distribution and NZSA; and/or
- (d) that BlueScope Distribution and NZSA would sell flat steel products to steel users in Australia in accordance with CIPA's Distribution Market price lists,

(respectively, the **Selection Steel understanding**, the **Apex Steel understanding**, the **Southern Steel understanding**, and the **Vulcan Steel understanding**).

46 The ACCC alleged that, at all material times, each of Selection Steel, Apex Steel, Southern Steel and Vulcan Steel respectively was in competition with at least one of BlueScope, BlueScope Distribution and NZSA in relation to the supply of flat steel products to distributors and/or steel users in Australia.

47 In respect of each of the alleged understandings, the ACCC relies on:

- (a) statements made by Messrs Ellis and Hennessy at a meeting held at the ParkRoyal Hotel at Melbourne Airport on 6 September 2013 (the **Melbourne Airport meeting**) with Rod Gregory of Selection Steel, Joe Calleja of Apex Steel, Peter Smaller of Southern Steel and Peter Wells of Vulcan Steel;
- (b) directions given by Mr Ellis to Mr Hennessy on or around 13 September 2013 to release CIPA's Distribution Market price lists for December 2013 to distributors and to speak to distributors to get them to use the price lists to set the price at which they sold flat steel products to steel users;
- (c) statements made and directions given by Mr Hennessy at a CIPA meeting held on 16 September 2013 between the Pricing Managers (including Mr Unicomb) and the Account Managers for each of CMC Steel, OneSteel, Southern Steel and BlueScope Distribution (including Messrs Gent, Kelso and Sparks), particularly in relation to the preparation of what the ACCC referred to as "an internal price list" for products to be

supplied in December 2013 (a label that does not adequately describe the nature of this document, which I address later in these reasons and refer to as the “**December 2013 Benchmark spreadsheet**”);

- (d) directions given by Mr Ellis to Mr Hennessy on or around 16 September 2013 to circulate the December 2013 Benchmark spreadsheet to BlueScope Distribution and other distributors and to discuss the benchmarking strategy with them.

48 In respect of the Selection Steel understanding, the ACCC also relies on:

- (a) statements made by Mr Ellis at a meeting at BlueScope’s office in Mount Waverley in August or September 2013 attended by Messrs Ellis and Hennessy of BlueScope and Gary Collis and Mr Gregory of Selection Steel;
- (b) an email sent by Mr Hennessy to Messrs Collis and Gregory of Selection Steel on 17 September 2013 attaching a version of the December 2013 Benchmark spreadsheet and a conversation between Mr Hennessy and Mr Collis on that day about the price lists and the benchmarking strategy;
- (c) an email sent by Mr Hennessy to representatives of Selection Steel on 19 September 2013 attaching CIPA’s Distribution Market price list for December 2013; and
- (d) an email sent by Mr Hennessy to Mr Collis of Selection Steel on 8 January 2014 attaching CIPA’s Distribution Market price list for March 2014.

49 In respect of its allegations against BlueScope concerning the Selection Steel understanding, the ACCC relies on the conduct of Messrs Ellis, Hennessy and Unicomb and the state of mind of Messrs Ellis and Hennessy. In respect of its allegations against Mr Ellis, the ACCC relies on the conduct of Mr Ellis including alleged directions given to Mr Hennessy.

50 In respect of the Apex Steel understanding, the ACCC also relies on:

- (a) an email sent by Mr Hennessy to Mr Calleja of Apex Steel on 17 September 2013 attaching a version of the December 2013 Benchmark spreadsheet and a conversation between Mr Hennessy and Mr Calleja on that day about the price lists and the benchmarking strategy; and
- (b) the provision of CIPA’s Distribution Market price lists to Apex Steel by BlueScope on 23 December 2013, 5 February 2014, 7 March 2014, 2 April 2014, 6 May 2014 and 2 June 2014.

51 In respect of its allegations against BlueScope concerning the Apex Steel understanding, the ACCC relies on the alleged conduct of Messrs Ellis, Hennessy and Unicom and the alleged state of mind of Messrs Ellis and Hennessy. In respect of its allegations against Mr Ellis, the ACCC relies on the alleged conduct of Messrs Ellis and Hennessy.

52 In respect of the Southern Steel understanding, the ACCC also relies on:

- (a) statements made by Mr Ellis at a meeting at Southern Steel's office in Bankstown, New South Wales, on 2 September 2013 attended by Messrs Ellis and Hennessy of BlueScope and James (Jim) Larkin of Southern Steel;
- (b) statements made by Mr Ellis at a meeting at a coffee shop in Double Bay in Sydney on 4 September 2013 attended by Messrs Ellis and Hennessy of BlueScope and Kevin Smaller and Peter Smaller of Southern Steel;
- (c) a conversation between Mr Sparks of BlueScope and Dave Lander of Southern Steel on 16 September 2013 about CIPA's Distribution Market price lists and the benchmarking strategy;
- (d) an email sent by Mr Hennessy to representatives of Southern Steel on 17 September 2013 attaching a version of the December 2013 Benchmark spreadsheet; and
- (e) the provision of CIPA's Distribution Market price lists to Southern Steel by BlueScope on 20 December 2013, 5 February 2014, 5 March 2014, 1 April 2014, 30 April 2014 and 30 May 2014.

53 In respect of its allegations against BlueScope concerning the Southern Steel understanding, the ACCC relies on the alleged conduct of Messrs Ellis, Hennessy, Unicom and Sparks and the alleged state of mind of Messrs Ellis, Hennessy and Sparks. In respect of its allegations against Mr Ellis, the ACCC relies on the alleged conduct of Mr Ellis including alleged directions given to Mr Hennessy.

54 In respect of the Vulcan Steel understanding, the ACCC also relies on:

- (a) statements made by Mr Ellis at a meeting attended by Messrs Ellis and Hennessy of BlueScope and Jon Gousmett and Adrian Casey of Vulcan Steel which occurred during the Australian Steel Institute Conference on the Gold Coast on 9 and 10 September 2013;

- (b) a conversation between Mr Kelso of BlueScope and one or more representatives of Vulcan Steel on or around 16 September 2013 about CIPA's Distribution Market price lists and the benchmarking strategy;
- (c) an email sent by Mr Hennessy to Mr Casey of Vulcan Steel on 17 September 2013 attaching a version of the December 2013 Benchmark spreadsheet and a conversation between Mr Hennessy and Mr Casey on that day about the price lists and the benchmarking strategy;
- (d) a further conversation between Mr Kelso of BlueScope and David Millard and Andrew Moss of Vulcan Steel on 18 September 2013 about BlueScope's price list and the benchmarking strategy;
- (e) an email sent by Mr Hennessy to Mr Casey of Vulcan Steel on 19 September 2013 attaching CIPA's Distribution Market price list; and
- (f) the provision of CIPA's Distribution Market price lists to Vulcan Steel by BlueScope on 6 January 2014, 13 February 2014, 13 March 2014, 7 April 2014, 6 May 2014 and 5 June 2014.

55 In respect of its allegations against BlueScope concerning the Southern Steel understanding, the ACCC relies on the alleged conduct of Messrs Ellis, Hennessy, Unicomb and Kelso and the alleged state of mind of Messrs Ellis, Hennessy and Kelso. In respect of its allegations against Mr Ellis, the ACCC relies on the alleged conduct of Mr Ellis including alleged directions given to Mr Hennessy.

Selwood Steel understanding

56 The ACCC alleged that BlueScope and Mr Ellis attempted to induce Selwood Steel to arrive at an understanding with BlueScope which included one or more of the following provisions:

- (a) that Selwood Steel would sell flat steel products to steel users in Australia at a higher price than it was doing at that time;
- (b) that Selwood Steel would benchmark its prices based on CIPA's Distribution Market price lists;
- (c) that BlueScope would provide Selwood Steel with the opportunity to purchase BlueScope's flat steel products on a transactional basis; and/or
- (d) that BlueScope Distribution and NZSA would sell flat steel products to steel users in Australia in accordance with CIPA's Distribution Market price lists,

(the **Selwood Steel understanding**).

57 The ACCC alleged that, at all material times, Selwood Steel was in competition with at least one of BlueScope, BlueScope Distribution and NZSA in relation to the supply of flat steel products to distributors and/or steel users in Australia.

58 In respect of the Selwood Steel understanding, the ACCC relies on:

- (a) statements made by Mr Ellis at a meeting held at Selwood Steel's premises in Victoria on 30 October 2013 attended by Messrs Ellis and Whitfield of BlueScope and Dale Wood of Selwood Steel; and
- (b) an email sent by Mr Whitfield to Mr Wood of Selwood Steel on 12 November 2013 attaching CIPA's Distribution Market price lists.

59 In respect of its allegations against BlueScope concerning the Selwood Steel understanding, the ACCC relies on the alleged conduct and state of mind of Messrs Ellis and Whitfield. In respect of its allegations against Mr Ellis, the ACCC relies on the alleged conduct of Mr Ellis.

CMC Steel understanding

60 The ACCC alleged that BlueScope and Mr Ellis attempted to induce CMC Steel to arrive at an understanding with BlueScope which included one or more of the following provisions:

- (a) that BlueScope Distribution and NZSA would sell flat steel products to steel users in Australia in accordance with CIPA's Distribution Market price lists;
- (b) that BlueScope would reduce its tactical pricing; and/or
- (c) that CMC Steel would use CIPA's Distribution Market price lists as a benchmark for setting prices for the sale by CMC Steel of flat steel products to steel users in Australia,

(the **CMC Steel understanding**).

61 The ACCC alleged that, at all material times, CMC Steel was in competition with at least one of BlueScope, BlueScope Distribution and NZSA in relation to the supply of flat steel products to distributors and steel users in Australia.

62 In respect of the CMC Steel understanding, the ACCC relies on:

- (a) statements made by Mr Ellis at a meeting attended by Messrs Ellis and Hennessy of BlueScope and Matthew (Matt) Stedman and Glenn Simpkin of CMC Steel which

occurred during the Australian Steel Institute Conference on the Gold Coast on 9 and 10 September 2013;

- (b) an email sent by Mr Hennessy to representatives of CMC Steel on 17 September 2013 attaching a version of the December 2013 Benchmark spreadsheet;
- (c) a telephone conversation or conversations between Mr Ellis and Neil Lobb of CMC Steel on a date or dates between October 2013 and April 2014 about CIPA's price lists and the benchmarking strategy;
- (d) an email sent by Mr Gent of BlueScope to Mr Lobb of CMC Steel on 27 November 2013 stating that competitors of CMC Steel had already implemented the price increases;
- (e) an email sent by Mr Gent of BlueScope to Mr Lobb and Nick Klingos of CMC Steel on 21 March 2014 attaching copies of letters sent by BlueScope Distribution to steel users setting out an increase in the price at which BlueScope Distribution intended to sell flat steel products to them;
- (f) an email sent by Mr Gent of BlueScope to Mr Lobb of CMC Steel forwarding an email from SMS (a division of BlueScope Distribution) recording that it had provided letters to customers with its new tonne rates and had not had too much backlash, however the competitors of SMS had not yet sent prices out; and
- (g) the provision of CIPA's price lists to CMC Steel by BlueScope on 20 December 2013, 7 February 2014, 7 March 2014, 1 April 2014, 30 April 2014 and 30 May 2014.

63 In respect of its allegations against BlueScope concerning the CMC Steel understanding, the ACCC relies on the alleged conduct of Messrs Ellis, Hennessy, Unicomb and Gent and the alleged state of mind of Messrs Ellis, Hennessy and Gent. In respect of its allegations against Mr Ellis, the ACCC relies on the alleged conduct of Mr Ellis including alleged directions given to Mr Hennessy.

OneSteel understanding

64 The ACCC alleged that BlueScope and Mr Ellis attempted to induce OneSteel to arrive at an understanding with BlueScope which included one or more of the following provisions:

- (a) that OneSteel would use CIPA's price lists as a benchmark when selling flat steel products to steel users in Australia; and/or

(b) that BlueScope Distribution and NZSA would sell flat steel products to steel users in Australia in accordance with CIPA's price lists,

(the **OneSteel understanding**).

65 The ACCC alleged that, at all material times, OneSteel was in competition with at least one of BlueScope, BlueScope Distribution and NZSA in relation to the supply of flat steel products to distributors and steel users in Australia.

66 In respect of the OneSteel understanding, the ACCC relies on:

- (a) statements made by Mr Ellis at a meeting attended by Messrs Ellis and Hennessy of BlueScope and Mark Lewin of OneSteel which occurred during the Australian Steel Institute Conference on the Gold Coast on 9 and 10 September 2013;
- (b) a conversation between Mr Kelso of BlueScope and David Bolzan of OneSteel on 12 September 2013 about CIPA's price lists and the benchmarking strategy;
- (c) statements made by Mr Ellis at a meeting attended by Messrs Ellis and Hennessy of BlueScope and Michael Lambourne and Bruce Birchall of OneSteel at the Qantas Meeting Rooms at Sydney Airport on 13 September 2013 about CIPA's price lists and the benchmarking strategy;
- (d) a conversation between Mr Kelso of BlueScope and one or more representatives of OneSteel on 16 September 2013 about CIPA's price lists and the benchmarking strategy;
- (e) an email sent by Mr Hennessy to Mr Birchall and Glenn Szecsodi of OneSteel on 17 September 2013 attaching a version of the December 2013 Benchmark spreadsheet;
- (f) an email sent by Mr Kelso to Messrs Lewin and Bolzan of OneSteel on 17 September 2013 attaching a version of the December 2013 Benchmark spreadsheet; and
- (g) the provision of CIPA's price lists to OneSteel by BlueScope on 20 December 2013, 4 February 2014, 6 March 2014, 2 April 2014, 30 April 2014 and 2 June 2014.

67 In respect of its allegations against BlueScope concerning the OneSteel understanding, the ACCC relies on the alleged conduct of Messrs Ellis, Hennessy, Unicomb and Kelso and the alleged state of mind of Messrs Ellis, Hennessy and Kelso. In respect of its allegations against Mr Ellis, the ACCC relies on the alleged conduct of Mr Ellis including alleged directions given to Mr Hennessy.

Attempts to induce arrangements and/or understandings with an overseas steel manufacturer – Yieh Phui

68 The ACCC alleged that, on 26 February 2014, Mr Ellis, together with other representatives of BlueScope, attended a meeting with representatives of Yieh Phui at the offices of Yieh Phui in Kaohsiung, Taiwan, and that, at that meeting, BlueScope and Mr Ellis attempted to induce Yieh Phui to arrive at an understanding with BlueScope which included one or more of the following provisions:

- (a) that Yieh Phui would sell flat steel products to import traders at a higher price than it was doing at the time of the Yieh Phui meeting;
- (b) that Yieh Phui would raise the price at which it sold flat steel products to import traders by reference to CIPA's price lists in order to increase the profitability of both Yieh Phui and BlueScope;
- (c) that BlueScope would be taking anti-dumping measures against any overseas steel manufacturer that it considered was selling flat steel products into Australia at a price that was too low; and/or
- (d) that BlueScope Distribution would sell flat steel products to steel users in Australia in accordance with CIPA's price lists,

(the **Yieh Phui understanding**).

69 The ACCC alleged that, at all material times, Yieh Phui was in competition with at least one of BlueScope and NZSA in relation to the supply of flat steel products to distributors and steel users in Australia.

70 In respect of its allegations against each of BlueScope and Mr Ellis concerning the Yieh Phui understanding, the ACCC relies on the alleged conduct and state of mind of Mr Ellis.

Involvement of BlueScope senior management

71 For the purposes of penalty, but not liability, the ACCC alleged that at all material times from at least 11 October 2013, Mr Vassella was aware of certain aspects of the conduct constituting the alleged attempts to induce the unlawful understandings. Evidence was adduced in support of that allegation and it is therefore appropriate to make findings even though the trial concerned issues of liability only.

C. APPLICABLE LEGAL PRINCIPLES

Relevant legislative provisions

72 The following legislative provisions, relevant to the proceeding, are stated as in force at the time of the impugned conduct.

73 The ACCC seeks pecuniary penalties against BlueScope and Mr Ellis under s 76(1)(d) of the Act. Section 76(1) relevantly provided as follows:

- (1) If the Court is satisfied that a person:
 - (a) has contravened any of the following provisions:
 - (i) a provision of Part IV (other than section 44ZZRF or 44ZZRG);
 - (iii) ... ; or
 - (b) has attempted to contravene such a provision; or
 - (c) has aided, abetted, counselled or procured a person to contravene such a provision; or
 - (d) has induced, or attempted to induce, a person, whether by threats or promises or otherwise, to contravene such a provision; or
 - (e) has been in any way, directly or indirectly, knowingly concerned in, or party to, the contravention by a person of such a provision; or
 - (f) has conspired with others to contravene such a provision;

the Court may order the person to pay to the Commonwealth such pecuniary penalty, in respect of each act or omission by the person to which this section applies, as the Court determines to be appropriate having regard to all relevant matters including the nature and extent of the act or omission and of any loss or damage suffered as a result of the act or omission, the circumstances in which the act or omission took place and whether the person has previously been found by the Court in proceedings under this Part or Part XIB to have engaged in any similar conduct.

74 As set out earlier, the ACCC alleged that BlueScope and Mr Ellis attempted to induce certain suppliers of flat steel products in Australia to contravene s 44ZZRJ of the Act by arriving at understandings that contained a cartel provision within the meaning of s 44ZZRD of the Act. The type of cartel provision alleged by the ACCC is a “price fixing” provision as defined by s 44ZZRD(2).

75 Section 44ZZRJ provided as follows:

A corporation contravenes this section if:

- (a) the corporation makes a contract or arrangement, or arrives at an understanding; and

(b) the contract, arrangement or understanding contains a cartel provision.

76 The phrase “arrive at”, in relation to an understanding, was defined in s 4(1) as including reach or enter into. In these reasons, I have used those expressions interchangeably.

77 For completeness, I note that s 44ZZRK(1) provided as follows:

(1) A corporation contravenes this section if:

- (a) a contract, arrangement or understanding contains a cartel provision;
and
- (b) the corporation gives effect to the cartel provision.

78 Section 44ZZRD relevantly provided as follows:

(1) For the purposes of this Act, a provision of a contract, arrangement or understanding is a *cartel provision* if:

- (a) either of the following conditions is satisfied in relation to the provision:
 - (i) the purpose/effect condition set out in subsection (2);
 - (ii) the purpose condition set out in subsection (3); and
- (b) the competition condition set out in subsection (4) is satisfied in relation to the provision.

Purpose/effect condition

(2) The purpose/effect condition is satisfied if the provision has the purpose, or has or is likely to have the effect, of directly or indirectly:

- (a) fixing, controlling or maintaining; or
- (b) providing for the fixing, controlling or maintaining of;
the price for, or a discount, allowance, rebate or credit in relation to:
- (c) goods or services supplied, or likely to be supplied, by any or all of the parties to the contract, arrangement or understanding; or

...

Note 1: The purpose/effect condition can be satisfied when a provision is considered with related provisions — see subsection (8).

Note 2: *Party* has an extended meaning — see section 44ZZRC.

...

Competition condition

(4) The competition condition is satisfied if at least 2 of the parties to the contract, arrangement or understanding:

- (a) are or are likely to be; or
- (b) but for any contract, arrangement or understanding, would be or would

be likely to be;

in competition with each other in relation to:

- (c) if paragraph (2)(c) ... applies in relation to a supply, or likely supply, of goods or services — the supply of those goods or services; or

...

Note: **Party** has an extended meaning — see section 44ZZRC.

...

Recommending prices etc.

- (6) For the purposes of this Division, a provision of a contract, arrangement or understanding is not taken:

- (a) to have the purpose mentioned in subsection (2); or

- (b) to have, or be likely to have, the effect mentioned in subsection (2);

by reason only that it recommends, or provides for the recommending of, a price, discount, allowance, rebate or credit.

...

Purpose/effect of a provision

- (10) For the purposes of this Division, a provision of a contract, arrangement or understanding is not to be taken not to have the purpose, or not to have or to be likely to have the effect, mentioned in subsection (2) by reason only of:

- (a) the form of the provision; or

- (b) the form of the contract, arrangement or understanding; or

- (c) any description given to the provision, or to the contract, arrangement or understanding, by the parties.

...

79 The following words, which appeared in s 44ZZRD, were defined in the Act as follows:

- (a) the word “provision”, in relation to an understanding, was defined in s 4 as meaning any matter forming part of the understanding;
- (b) the word “competition” was defined in s 4 as including (relevantly) competition from imported goods; and
- (c) the word “likely”, in relation to (relevantly) the supply of goods, was defined in s 44ZZRB as including a possibility that is not remote.

80 Section 4F(1) is a deeming provision in relation to the purpose of a provision of a contract, arrangement or understanding. It relevantly provided as follows:

- (1) For the purposes of this Act:

- (a) a provision of a contract, arrangement or understanding or of a proposed contract, arrangement or understanding, or a covenant or a proposed covenant, shall be deemed to have had, or to have, a particular purpose if:
 - (i) the provision was included in the contract, arrangement or understanding or is to be included in the proposed contract, arrangement or understanding, or the covenant was required to be given or the proposed covenant is to be required to be given, as the case may be, for that purpose or for purposes that included or include that purpose; and
 - (ii) that purpose was or is a substantial purpose...

...

81 Section 44ZZRC extended the meaning of being a party to a contract, arrangement or understanding. It provided as follows:

For the purposes of this Division, if a body corporate is a party to a contract, arrangement or understanding (otherwise than because of this section), each body corporate related to that body corporate is taken to be a *party* to that contract, arrangement or understanding.

82 Combining the various elements of the statutory provisions, the ACCC must establish that:

- (a) BlueScope and Mr Ellis attempted to induce certain suppliers of flat steel products in Australia to arrive at understandings;
- (b) each understanding was to contain a provision that had the purpose, or had or was likely to have had the effect, of directly or indirectly, fixing, controlling or maintaining or providing for the fixing, controlling or maintaining of the price for, or a discount, allowance, rebate or credit in relation to, goods supplied, or likely to be supplied, by any or all of the parties to the understanding; and
- (c) at least two of the entities that were to be parties to each understanding were or were likely to have been, or but for the understanding, would have been or would be likely to have been in competition with each other in relation to the supply of the goods the subject of the provision.

83 Each of the statutory elements has been the subject of extensive judicial analysis, which is discussed below.

Attempt to induce a person to contravene

84 The meaning of the words “attempt” and “induce” in the context of s 76 of the Act have been discussed in a number of cases. In considering those cases, it is important to bear in mind the

context in which the words are used within s 76(1). Relevantly, s 76(1) empowers the Court to impose a pecuniary penalty in respect of the following categories of conduct: where a person has contravened a provision of Pt IV (s 76(1)(a)); where a person has attempted to contravene such a provision (s 76(1)(b)); where a person has induced a person to contravene such a provision (s 76(1)(d)); and where a person has attempted to induce a person to contravene such a provision (also s 76(1)(d)). The present case is concerned with the fourth context – an attempt to induce a person to contravene. When reading the decided cases, it is important to bear in mind the specific provision and conduct relied upon, and the legal reasoning that is applicable to that provision and conduct.

85 It is uncontroversial that, in both paras (b) and (d) of s 76(1), an attempt has two elements – conduct and intention: see *Trade Practices Commission v Tubemakers of Australia Ltd* [1983] FCA 99; 47 ALR 719 (*Tubemakers*) at 735-737 per Toohey J and *Australian Competition and Consumer Commission v Australian Egg Corporation Ltd* (2017) 254 FCR 311 (*Australian Egg Corporation*) at [92] per Besanko, Foster and Yates JJ.

The conduct element

86 In the context of s 76(1)(b), the conduct necessary to constitute an “attempt to contravene” a provision of Pt IV has been described as a step towards the commission of the contravention which is immediately and not merely remotely connected with it: *Tubemakers* at 736 per Toohey J. Conduct which is merely preparatory to committing the contravention does not suffice: *Trade Practices Commission v Parkfield Operations Pty Ltd* (1985) 7 FCR 534 (*Parkfield*) at 538-539 per Bowen CJ, Smithers and Morling JJ.

87 The common law requirement that, in order to constitute an attempt, conduct must be more than merely preparatory to the commission of the offence or contravention has been considered in many cases. The requirement has also been adopted as the relevant test of the conduct element of an attempt in s 11.1 of the Commonwealth Criminal Code, being the Schedule to the *Criminal Code Act 1995* (Cth) (which, at the relevant time, was applicable to the criminal offences of making a contract, arrangement or understanding containing a cartel provision – prohibited by s 44ZZRF – and giving effect to a cartel provision of a contract, arrangement or understanding – prohibited by s 44ZZRG). Relevantly, subss 11.1(1) and (2) stipulate that:

- (1) A person who attempts to commit an offence commits the offence of attempting to commit that offence and is punishable as if the offence attempted had been committed.

- (2) For the person to be guilty, the person’s conduct must be more than merely preparatory to the commission of the offence. The question whether conduct is more than merely preparatory to the commission of the offence is one of fact.

88 The meaning of “more than merely preparatory” in s 11.1 of the Commonwealth Criminal Code was considered by the New South Wales Court of Criminal Appeal in *Inegbedion v The Queen* [2013] NSWCCA 291. Justice Rothman (with whom Hoeben CJ at CL and McCallum J agreed) said (at [17]):

Over and above the proof of an intention to commit the crime alleged, the Crown must also prove, beyond reasonable doubt, that the accused, with that intention, performed some act that went towards the commission of the offence, which act was more than merely preparatory of the crime and was immediately connected with the commission of that crime, having no reasonable purpose other than its commission.

89 In *Holliday v The Queen* (2016) 12 ACTLR 16, the Court of Appeal of the Australian Capital Territory considered the meaning of the same phrase as adopted in s 44(2) of the *Criminal Code 2002* (ACT). Chief Justice Murrell referred to the above statement of Rothman J with apparent approval (at [52]). Justice Wigney observed (at [124]-[125]):

124 The conduct referred to by the Crown and the trial judge was capable of being conduct that was more than “merely preparatory” to the commission of the offence of perverting the course of justice. In his summing up, the trial judge used the expression “immediately connected” as a means of explaining or describing the element that the conduct be more than merely preparatory. That expression appears to have been derived from the judgment of Rothman J (with whom Hoeben CJ at CL agreed) in *Inegbedion v The Queen* [2013] NSWCCA 291 at [17] in relation to the similar provision in s 11.1 of the *Criminal Code 1995* (Cth). Another expression that has been used in the authorities to describe or explain the requirement that conduct be “more than merely preparatory” is “sufficiently proximate” to the intended commission of the crime: see *Britten v Alpogut* [1987] VR 929 at 935; *Onuorah* at 10 [30].

125 It is perhaps doubtful whether it is useful to put a gloss on the words used in s 44(2) of the *Criminal Code*. The words “merely preparatory” are ordinary English words that a jury could readily comprehend. It is perhaps not desirable, and probably not possible, to formulate a single test for determining when conduct may be more than merely preparatory. Much will depend on the nature and elements of the substantive offence in question and the facts and circumstances of the particular case. It is ultimately a question of fact for the jury. In the circumstances of Mr Holliday’s case, it is sufficient to say that, if the jury found that Mr Holliday drafted, typed and printed the letter containing the instruction and provided that letter to Mr Powell, it was at least open to the jury to find that those acts were more than merely preparatory to the offence of perverting the course of justice.

90 The tests for the conduct element of an attempt as stated in *Tubemakers* and *Parkfield* were referred to with approval by the Full Court in *Australian Egg Corporation* at [93]. *Tubemakers* and *Parkfield* concerned an alleged attempt to contravene a provision of Pt IV, for which a

penalty was imposed under s 76(1)(b) of the Act. In contrast, *Australian Egg Corporation* concerned an attempt to induce a person to contravene a provision of Pt IV, for which a penalty was imposed under s 76(1)(d). The Full Court in *Australian Egg Corporation* did not comment on the different statutory context, and the different conduct at which the attempt must be directed. Nevertheless, in the context of an attempt to induce a person to contravene, it would seem to be appropriate to refer to the conduct element as requiring a step towards the inducement of the contravention which is more than merely preparatory of the inducement to contravene and which is immediately and not merely remotely connected with the inducement to contravene.

91 The meaning of the word “induce” in s 76(1)(d) and related provisions has been considered in a number of cases. In *Yorke v Lucas* (1983) 49 ALR 672 (affirmed on appeal: *Yorke v Lucas* (1985) 158 CLR 661 (*Yorke v Lucas*)), the Full Court said in obiter remarks that inducing a contravention within the meaning of s 75B(b) of the Act (now s 75B(1)(b)) connotes some act of compulsion by force or threat of force or some act of persuasion or stimulation (at 681). Those observations are consistent with the statutory language which, in both ss 75B(1)(b) and 76(1)(d), indicates that an inducement may be “by threats or promises or otherwise”.

92 In *Heating Centre Pty Ltd v Trade Practices Commission* (1986) 9 FCR 153 (*Heating Centre*), the Full Court considered the meaning of the phrase “inducing or attempting to induce” in the context of s 96(3)(b) of the Act concerned with the practice of resale price maintenance (prohibited by s 48 of the Act). Justice Pincus (with whom Lockhart and Wilcox JJ agreed) concluded (at 164):

Next, it is necessary to consider whether the conversation falls within par (b), properly construed; that is directed against inducing or attempting to induce people not to sell at less than the price specified, where the goods come directly or otherwise from the inducer. Counsel argued that there must be an “inducement” as that word is commonly used in the law. It is true that the word ordinarily refers to some proffered advantage or disadvantage, promised or threatened, to follow from following or failing to follow a stipulated course of action. There is no reason, however, to read into par (b) a necessity to find that anything is offered in exchange, so to speak, for not discounting; mere persuasion, with no promise or threat, may well be an attempt to induce.

93 In *Australian Competition and Consumer Commission v J McPhee & Son (Australia) Pty Ltd (No 3)* [1998] FCA 200, Heerey J referred to the dictionary definitions of the word “induce” as “to lead or move by persuasion or influence, as to some action or state of mind” (Macquarie Dictionary) or “to lead (a person) by persuasion or some influence to some action, condition, belief, etc” (Shorter Oxford).

94 In *Australian Competition and Consumer Commission v SIP Australia Pty Ltd* [2002] FCA 824; ATPR 41-877 (*SIP Australia*), Goldberg J observed (at [112]):

An attempt to induce particular conduct can take a number of forms. As is made clear by s 76(1)(d) of the Act, an inducement may occur although no threat or promise is involved. Section 76(1)(d) of the Act empowers a court to impose a penalty where a person has induced or attempted to induce a person to contravene a provision of the Act “whether by threats or promises or otherwise”. What is required for an inducement is that there be an affirmative or positive act or course of conduct directed to the person who is said to be the object of the inducement. Accordingly “mere persuasion, with no promise or threat, may well be an attempt to induce”: *The Heating Centre Pty Ltd v Trade Practices Commission* (1986) 9 FCR 153 at 164. See also *Yorke v Lucas* (1983) 49 ALR 672, at 681 682 (affirmed on appeal (1985) 158 CLR 661). ...

95 The Full Court in *Australian Egg Corporation* referred to the above statements in *Heating Centre* and *SIP Australia* with approval (at [93]).

96 The respondents drew a distinction between persuading a competitor to increase their price and persuading a competitor to arrive at an understanding containing a provision that they will increase their price. The respondents argued that conduct in the first category is lawful while conduct in the second is unlawful. The distinction can be accepted in theory but is likely to be a fine one in practice. For example, if competitor A says to competitor B that competitor B should increase its prices because they are unprofitable, that might be characterised as mere persuasion (in the form of a persuasive argument) to increase prices and may not involve an inducement to reach an understanding and a contravention of the law. An illustration of such conduct is given by the findings in *Trade Practices Commission v Service Station Association Ltd* (1992) 109 ALR 465 (*Service Station Association*) (see at 488 per Heerey J) (upheld on appeal in *Trade Practices Commission v Service Station Association Ltd* (1993) 44 FCR 206 (*Service Station Association (Full Court)*) at 224-225, 238 per Lockhart J, Spender and Lee JJ agreeing). However, an added statement that competitor A is intending to do likewise may, in appropriate circumstances, be characterised as an attempt to persuade competitor B to arrive at an understanding to increase prices. Further, as Heerey J observed in that case (at 488), the objective likelihood of particular conduct producing a particular result (viz, arrive at an understanding) is relevant to ascertaining what was intended by the conduct (referring to the observations of Windeyer J in *Vallance v The Queen* (1961) 108 CLR 56 at 82).

97 In *Parkfield*, the Full Court concluded (at 539) that an attempt to contravene does not need to have reached an advanced stage before it comes within the purview of s 76(1)(b). In respect of an attempt to induce a contravention within s 76(1)(d), the Full Court said that it is not necessary for any arrangement to be in place, or readily able to be effected – it is sufficient that

the respondents sought to persuade the counterparties to enter into an arrangement to increase prices (also at 539). Those statements were approved by the Full Court in *Australian Egg Corporation* (at [94]):

For the purposes of both elements of an attempt, that is to say intention and conduct, it is not necessary for the precise terms of the proposed arrangement or understanding to have been formulated. This point was made by the Full Court in *Parkfield Operations* (at 539) and another way of putting the point is that it is not necessary for an attempt to be made out to establish that the relevant conduct had reached an advanced stage. Having said this, it is perhaps trite to note that the more advanced the conduct, the more likely it is that the inference of the necessary intention will be drawn.

The intention element

98 The relevant intention that must be established is an intention to bring about that which is attempted: *Tubemakers* at 737 and 743 per Toohey J. However, it is unnecessary to show that the respondent expected that the understanding would be arrived at: *Tubemakers* at 736 per Toohey J. Those statements were referred to with approval by the Full Court in *Australian Egg Corporation* at [92], where the Full Court formulated the requisite intention as “to bring about the proscribed result which in this case is the making of an arrangement or the reaching of an understanding within s 44ZZRJ”. As noted above, *Tubemakers* concerned an attempt to contravene a provision of Pt IV within the meaning of s 76(1)(b), whereas *Australian Egg Corporation* (like this case) concerned an attempt to induce a person to contravene a provision of Pt IV within the meaning of s 76(1)(d). In the context of an attempt to induce a person to arrive at an understanding containing certain provisions, it would seem to be appropriate to refer to the intention element as requiring an intention to induce the person to arrive at that understanding. Otherwise, the distinction between the conduct described in paras (b) and (d) of s 76(1) would be lost. In practice, though, there will not be any material difference between the two descriptions of the requisite intent – the conduct, involving inducement, must be intentionally directed to the making of an arrangement or the reaching of an understanding.

99 It is unnecessary to show that the respondents knew that the contemplated understanding was unlawful. However, knowledge of the essential facts that would have rendered the alleged understanding unlawful is necessary before there can be intent: *Giorgianni v The Queen* (1985) 156 CLR 473 at 505 per Wilson, Deane and Dawson JJ; *Yorke v Lucas* at 667 per Mason ACJ, Wilson, Deane and Dawson JJ; *Rural Press Ltd v Australian Competition and Consumer Commission* (2003) 216 CLR 53 (*Rural Press (HC)*) at [48] per Gummow, Hayne and Heydon JJ.

Arrangement or understanding

100 The ACCC alleged that BlueScope and Mr Ellis attempted to induce certain suppliers of flat steel products in Australia to arrive at arrangements or understandings that contained a cartel provision.

101 The meaning of the words “arrangement” and “understanding” in s 45 of the Act should now be regarded as well established. The meaning given to those terms has not altered in any material way since the earliest case brought under the Act, the decision of the Australian Industrial Court (Joske, Smithers and Evatt JJ) in *Top Performance Motors Pty Ltd v Ira Berk (Qld) Pty Ltd* (1975) 24 FLR 286 (*Top Performance Motors*) (which considered the original form of s 45 of the Act, prohibiting contracts, arrangements and understandings in restraint of trade or commerce).

102 The applicable principles, established by the cases, can be stated as follows:

- (a) The terms “contract”, “arrangement” and “understanding” in s 45 of the Act represent “a spectrum of consensual dealings”: *Australian Competition and Consumer Commission v Leahy Petroleum Pty Ltd* (2007) 160 FCR 321 (*Leahy*) at [24] per Gray J. In many decisions, no distinction is drawn between the terms “arrangement” and “understanding”, although in a number of cases there is a recognition that the statutory language of “arrives at an understanding” connotes a less precise consensus than “makes an arrangement”: see for example *Trade Practices Commission v TNT Management Pty Ltd* (1985) 6 FCR 1 (*TNT*) at 25 per Franki J; *Leahy* at [27]; and *Australian Competition and Consumer Commission v Colgate-Palmolive Pty Ltd (No 4)* [2017] FCA 1590; 353 ALR 460 (*Colgate-Palmolive*) at [49] per Wigney J (affirmed on appeal in *Australian Competition and Consumer Commission v Colgate-Palmolive Pty Ltd* [2019] FCAFC 83 at [53] per Middleton, Perram and Bromwich JJ).
- (b) Each of the terms “arrangement” and “understanding” requires a meeting of minds or consensus between the parties to the arrangement or understanding that they will conduct themselves in accordance with the subject matter of the arrangement or understanding: *Top Performance Motors* at 291 per Smithers J, applying *Re British Basic Slag Ltd’s Agreements* [1963] 1 WLR 727 (*Re British Basic Slag*) at 746 per Diplock LJ. The reasoning of Smithers J has been referred to with approval and adopted in numerous decisions including *Trade Practices Commission v Nicholas Enterprises Pty Ltd (No 2)* (1979) 40 FLR 83 (*Nicholas Enterprises*) at 90 per Fisher J (upheld on

appeal in *Morphett Arms Hotel Pty Ltd v Trade Practices Commission* (1980) 30 ALR 88 (**Morphett Arms**) per Bowen CJ, Brennan and Deane JJ; *Trade Practices Commission v Email Ltd* (1980) 31 ALR 53 (**Email**) at 55-56 per Lockhart J; *Australian Competition and Consumer Commission v CC (NSW) Pty Ltd (No 8)* (1999) 92 FCR 375 (**ACCC v CC**) at [135]-[141] per Lindgren J; *Australian Competition and Consumer Commission v Amcor Printing Papers Group Ltd* [2000] FCA 17; 169 ALR 344 (**Amcor Printing**) at [75] per Sackville J; *Australian Competition and Consumer Commission v Australian Safeway Stores Pty Ltd* (2003) 129 FCR 339 at [409] per Heerey and Sackville JJ, Emmett J agreeing in that regard; *Leahy* at [28] per Gray J; *Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing & Allied Services Union of Australia v Australian Competition and Consumer Commission* (2007) 162 FCR 466 (**CEEEIPPAS v ACCC**) at [150] per Weinberg, Bennett and Rares JJ; and *Country Care Group Pty Ltd v Director of Public Prosecutions (Cth)* (2020) 275 FCR 342 (**Country Care**) at [60] per Allsop CJ, Wigney and Abraham JJ.

- (c) By way of further explication, an “arrangement” and “understanding” requires that the parties to the understanding have, by words or conduct, aroused an expectation in each that they will conduct themselves in accordance with the subject matter of the arrangement or understanding. The expectation must be more than a mere hope, belief or prediction that, as a matter of fact, a person will conduct themselves in the future in a particular way. The expectation must arise out of the dealings between the parties which has resulted in what can alternatively be called the assumption of an obligation, the giving of an assurance or undertaking, or a meeting of minds, that they will act in the future in a particular way: see *Nicholas Enterprises* at 89 per Fisher J; *ACCC v CC* at [141] per Lindgren J; *Rural Press Ltd v Australian Competition and Consumer Commission* (2002) 118 FCR 236 (**Rural Press**) at [79] per Whitlam, Sackville and Gyles JJ; *Apco Service Stations Pty Ltd v Australian Competition and Consumer Commission* (2005) 159 FCR 452 (**Apco**) at [45] per Heerey, Hely and Gyles JJ; *Leahy* at [35]-[38] per Gray J; and *Country Care* at [60] per Allsop CJ, Wigney and Abraham JJ.
- (d) As an arrangement or understanding is not binding on the parties in law (indeed, an arrangement or understanding containing a cartel provision is unlawful), the parties are inevitably free to withdraw from it and act inconsistently with it, notwithstanding their

consent to it: *TNT* at 24 per Franki J (referring to the joint judgment of Gibbs and Mason JJ in *Commissioner of Taxation (Cth) v Lutovi Investments Pty Ltd* (1978) 140 CLR 434 at 444); *Leahy* at [34] per Gray J.

- (e) Conduct which founds an understanding can be arrived at by words or conduct and may be tacit: *Leahy* at [28] per Gray J: *Australian Competition and Consumer Commission v Air New Zealand Ltd* [2014] FCA 1157; 319 ALR 388 (*Air New Zealand*) at [463(1) and (3)] per Perram J (overturned on appeal in *Australian Competition and Consumer Commission v PT Garuda Indonesia Ltd* (2016) 244 FCR 190 (*PT Garuda*) but without criticism of his Honour's statement of principles in respect of "arrangement or understanding"); *Australian Egg Corporation* at [95] per Besanko, Foster and Yates JJ; *Colgate-Palmolive* at [50] per Wigney J (affirmed on appeal).
- (f) The existence of an arrangement or understanding can be inferred from circumstantial evidence, including the course of dealings between the putative parties which might provide the occasion for the formation of an arrangement or understanding, their trading conduct and its consistency with the putative arrangement or understanding, and any attempt to enforce compliance with the putative arrangement or understanding: *R v Associated Northern Collieries* (1911) 14 CLR 387 at 400 per Isaacs J; *TNT* at 24 per Franki J (referring to the observations of Fisher J, with whom Brennan and Deane JJ agreed, in *Federal Commissioner of Taxation v Cooper Brookes (Wollongong) Pty Ltd* (1979) 41 FLR 277 at 301-302); *Email* at 55-56 per Lockhart J; *Service Station Association* at 485 per Heerey J (upheld on appeal in *Service Station Association (Full Court)*); *CEEEIPPAS v ACCC* at [136] per Weinberg, Bennett and Rares JJ.
- (g) Although in business it might be expected that a person would not make an arrangement or understanding in the absence of reciprocal or mutual obligations, that has never been authoritatively held to be a necessary element of an arrangement or understanding prohibited by s 45: *Morphett Arms* at 91-92 per Bowen CJ, Brennan and Deane JJ (qualifying the Court's agreement with the applicable principles stated by Fisher J in *Nicholas Enterprises*); *Email* at 64 per Lockhart J; *Service Station Association (Full Court)* at 231 per Lockhart J and at 238 per Spender and Lee JJ; *Ancor Printing* at [75] per Sackville J; *Australian Egg Corporation* at [96] per Besanko, Foster and Yates JJ. It can be added that a requirement of reciprocal or mutual obligations would be difficult to reconcile with the terms of ss 44ZZRJ and 44ZZRK which refer to a contract, arrangement or understanding containing a cartel provision, and the terms of

ss 44ZZRD which defines a cartel provision as being binding on *any* of the parties to the contract, arrangement or understanding.

103 The use of the word “obligation” to explain the conception of an “understanding” within the meaning of the Act has the potential to cause confusion, particularly for business people. The word “obligation” is most commonly associated with the law of contract and is usually understood as conveying a legal obligation. In contrast, an understanding containing a cartel provision is unlawful, creates no legal obligations, will often be arrived at in secret and with stealth and may break down through cheating (non-compliance) or parties resiling from the understanding.

104 The use of the word “obligation” in this field of discourse can be traced to the decision of the Court of Appeal in *Re British Basic Slag* which concerned s 6 of the *Restrictive Trade Practices Act 1956* (UK) (**UK Act**). The UK Act can be described as a forerunner of Australia’s trade practices legislation; however, s 6 of the UK Act applied to agreements and arrangements, not understandings. Relevantly, s 6(1) stipulated that the UK Act applied to any agreement between two or more persons carrying on business within the United Kingdom in the production or supply of goods, being an agreement under which restrictions are accepted by two or more parties in respect of specified matters, including (a) the prices to be charged for goods supplied, offered or acquired, (b) the terms or conditions of supply or acquisition, (c) the quantities or descriptions of goods to be produced, supplied or acquired, (d) the processes of manufacture to be applied to any goods, and (e) the persons or classes of persons to or from whom, or the areas or places in or from which, goods are to be supplied or acquired. Section 6(3) stipulated that the word “agreement” included any agreement or arrangement, whether or not it was or was intended to be enforceable by legal proceedings, and that the word “restriction” included any negative obligation, whether express or implied and whether absolute or not. In that context, Willmer LJ concluded that the UK Act “clearly contemplates that there may be arrangements which are not enforceable by legal proceedings, but which create only moral obligations or obligations binding in honour” and that “...when each of two or more parties intentionally arouses in the others an expectation that he will act in a certain way, it seems to me that he incurs at least a moral obligation to do so” (at 739). Lord Justice Diplock explained the concept of an arrangement within the meaning of the UK Act as a “meeting of minds” by which “each party, assuming he is a reasonable and conscientious man, would regard himself as being in some degree under a duty, whether moral or legal, to conduct himself in a particular way or not to conduct himself in a particular way as the case may be, at any rate so long as the

other party or parties conducted themselves in the way contemplated by the arrangement” (at 746-747). Lord Justice Diplock further explained that there are many ways in which arrangements may be made, but “it is sufficient to constitute an arrangement between A and B, if (1) A makes a representation as to his future conduct with the expectation and intention that such conduct on his part will operate as an inducement to B to act in a particular way, (2) such representation is communicated to B, who has knowledge that A so expected and intended, and (3) such representation or A’s conduct in fulfilment of it operates as an inducement, whether among other inducements or not, to B to act in that particular way” (at 747). The approach adopted in *Re British Basic Slag* was followed in each of *Top Performance Motors* and *Nicholas Enterprises*, which cases became the foundation for subsequent authorities.

105 In *Top Performance Motors*, Smithers J drew a distinction between an “arrangement” and an “understanding”. In respect of an arrangement, his Honour adopted what had been said by Diplock LJ and concluded (at 291): “...the existence of an arrangement of the kind contemplated in s. 45 is conditional upon a meeting of the minds of the parties to the arrangement in which one of them is understood, by the other or others, and intends to be so understood, as undertaking, in the role of a reasonable and conscientious man, to regard himself as being in some degree under a duty, moral or legal, to conduct himself in some particular way, at any rate so long as the other party or parties conducted themselves in the way contemplated by the arrangement”. In respect of an understanding, his Honour said (also at 291):

It seems to me also that an understanding must involve the meeting of two or more minds. Where the minds of the parties are at one that a proposed transaction between them proceeds on the basis of the maintenance of a particular state of affairs or the adoption of a particular course of conduct, it would seem that there would be an understanding within the meaning of the Act.

106 The different language used by Smithers J to explain an “arrangement” and an “understanding” within the meaning of s 45 of the Act identifies a subtle but important point. By the use of three different words, contract, arrangement and understanding, Parliament has prohibited three forms of conduct that are considered to be harmful to competition and, thereby, the welfare of Australians (as per s 2 of the Act). Each of the three words should be given meaning and effect: *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at [71] per McHugh, Gummow, Kirby and Hayne JJ. While an arrangement is well described in terms of undertaking obligations or duties, albeit not legally enforceable, an understanding is more aptly described as arriving at a common mind (or consensus) as to a particular course to be followed.

Cartel conduct is the antithesis of competitive conduct and, for that reason, is a criminal offence under the Act. Businesses tempted to engage in such conduct will rarely do so openly and will usually seek to do so through hidden or subtle communications with competitors which may take the form of words or conduct. If through such communications competitors arrive at a common mind as to the adoption of a particular course of business conduct that answers the description of a cartel provision, competition and the welfare of Australians will be harmed. It is consistent with the statutory text and purpose to describe such conduct as an understanding within the meaning of the Act.

107 In *Nicholas Enterprises*, Fisher J referred to the above reasons of Smithers J with apparent approval (at 90). In the immediately preceding passage, Fisher J summarised the principles that emerged from *Re British Basic Slag* as follows (at 89):

A significant feature of each of the above passages is the emphasis placed upon the necessity for each of the parties to have communicated with the other, for each to have raised an expectation in the mind of the other, and for each to have accepted an obligation qua the other. These are in my opinion the essential elements of the requisite meeting of minds.

108 Since those earliest decisions, different cases have used the expressions “meeting of minds” “arousing expectations”, “assuming an obligation” or “giving an assurance” somewhat interchangeably. In *ACCC v CC*, Lindgren J explained that a mere expectation that, as a matter of fact, a party will act in a certain way is not sufficient to constitute an understanding within the meaning of the Act, even if the expectation has been engendered by conduct of that party (at [141]). It was in that context that his Honour said that what is required is that at least one party “assume an obligation” or give an “assurance” or “undertaking” that it will act in a certain way. Those observations of Lindgren J have been referred to with approval by the Full Court on many occasions, including in *Rural Press* at [79], *Apco* at [45] and *Country Care* at [60]. In *Apco*, the Full Federal Court used the word “hope” interchangeably with expectation, endorsing the proposition that “a mere hope or expectation that a party will act in a particular way is insufficient to constitute an ‘understanding’” (at [47]). That proposition is not inconsistent with the description of an understanding given by Smithers J in *Top Performance Motors*. A meeting of minds as to a course of conduct to be followed by one or more persons cannot arise unless those persons have communicated their assent to adopting that course of conduct. It is important to emphasise, though, that in the context of an understanding containing an unlawful cartel provision, the assumption of an obligation means no more than the communication of assent to a particular course of conduct proposed by a competitor, where the communication

may be by words or conduct. Language of obligation, commonly used in the law of contract, should not obscure the nature of an understanding and the means and circumstances in which it may be arrived at.

Price fixing provision

109 The type of cartel provision alleged by the ACCC is a “price fixing” provision as defined by s 44ZZRD(2). A price fixing provision is a provision that (relevantly) has the purpose, or has or is likely to have the effect, of directly or indirectly, fixing, controlling or maintaining or providing for the fixing, controlling or maintaining of the price for, or a discount, allowance, rebate or credit in relation to, goods supplied, or likely to be supplied, by any or all of the parties to the understanding.

Purpose of a provision

110 Although s 44ZZRD(2) refers to the purpose of the provision, the relevant purpose is the subjective purpose of the individuals by whom the provision was included in the understanding: *ASX Operations Pty Ltd v Pont Data Australia Pty Ltd (No 1)* (1990) 27 FCR 460 at 474-477 per Lockhart, Gummow and von Doussa JJ; *News Ltd v South Sydney District Rugby League Football Club Ltd* (2003) 215 CLR 563 (*News v South Sydney*) at [18] per Gleeson CJ, [41] per McHugh J, [62] per Gummow J and [212] per Callinan J. Purpose means the end sought to be accomplished by the proposed conduct (the subject of the provision) rather than the reason or motive for seeking that end: *News v South Sydney* at [18] per Gleeson CJ, [63] per Gummow J.

111 The purpose of a provision may be inferred from the nature and effect of the provision and the circumstances in which the understanding was arrived at: *News v South Sydney* at [18] per Gleeson CJ, [44]-[45] per McHugh J, [65] per Gummow J, and [216] per Callinan J. As stated by Gleeson CJ, in a given case the manifest effect of a provision in an agreement may be the clearest indication of its purpose (at [18]). Where conduct is part of a wider commercial strategy, the purpose of that strategy can be relevant to determining the purpose of the conduct: *Australian Competition and Consumer Commission v Olex Australia Pty Ltd* [2017] FCA 222 (*Olex*) at [494] per Beach J.

112 A provision of an understanding has a particular purpose if it was included in the understanding for purposes that included that purpose, and that purpose was a substantial purpose (s 4F of the Act). To be “substantial”, the purpose must be “considerable or large” or a “real purpose for

the inclusion of the provision”: *Seven Network Ltd v News Ltd* (2009) 182 FCR 160 at [858] per Dowsett and Lander JJ; *Olex* at [496] per Beach J.

Effect of a provision

113 The word “effect” requires no further explication. The word “likely”, in relation to (relevantly) the supply of goods or services, is defined by s 44ZZRB as including a possibility that is not remote. The definition would appear to be applicable to the use of the word in the phrase “likely to have the effect” in s 44ZZRD(2) as the effect concerns (relevantly) fixing, controlling or maintaining the price for goods or services supplied. The definition reflects the meaning that has been given to the word “likely” in other provisions of the Act: see generally *Australian Competition and Consumer Commission v Pacific National Pty Ltd* (2020) 277 FCR 49 (***Pacific National***) at [243]-[246] per Middleton and O’Bryan JJ.

114 The statutory definition stipulates that the required effect of fixing, controlling or maintaining prices may be direct or indirect. The concept of “indirectly” fixing prices has not been judicially considered in Australia. The Explanatory Memorandum for the *Trade Practices Amendment (Cartel Conduct and Other Measures) Bill 2008* (Cth) (**2008 Explanatory Memorandum**) stated (at [1.25]) that the provision:

... will apply both to situations where the price of particular goods or services are directly fixed, as well as where a price is fixed indirectly, for example by reference to some other price or measure.

Fixing, controlling or maintaining prices

115 The phrase “fixing, controlling or maintaining” prices has been considered in many cases and a distinct meaning has been attributed to each word.

116 A price will be fixed if it is made “fast, firm or stable”: *Apco* at [44] per Heerey, Hely and Gyles JJ citing the definitions in the Macquarie and Shorter Oxford dictionaries. An agreement to increase a price to a certain figure will constitute price fixing regardless of whether there is any provision as to when, or by what machinery, or in what amount, a further change may take place: *Trade Practices Commission v Parkfield Operations Pty Ltd* (1985) 5 FCR 140 at 143 per Fox J. There is no requirement that the provision should have the purpose or effect of fixing (or controlling or maintaining) a price for any length of time: *Parkfield* at 540 per Bowen CJ, Smithers and Morling JJ.

117 The natural or ordinary meaning of the word “control” is to exercise restraint or direction over and an arrangement or understanding will have the effect of “controlling price” if it restrains a

freedom that would otherwise exist as to a price to be charged, even if the restraint is not total: *ACCC v CC* at [168] per Lindgren J, referred to with approval by Dowsett and Edelman JJ in *PT Garuda* at [554]-[555]. Specificity as to price is not a necessary element of the notion of “controlling” price within the meaning of the statute: *ACCC v CC* at [176] per Lindgren J; followed in *Australian Competition and Consumer Commission v Yazaki Corporation (No 2)* [2015] FCA 1304; 332 ALR 396 (*Yazaki*) at [140]-[145] per Besanko J; see also *PT Garuda* at [555] per Dowsett and Edelman JJ.

118 The meaning of “maintain” was first considered in *Radio 2UE Sydney Pty Ltd v Stereo FM Pty Ltd* (1982) 62 FLR 437 (*Radio 2UE*). Justice Lockhart said (at 449):

The verb “maintain” is defined by the *Shorter Oxford English Dictionary* as: “To continue, persevere in; . . . to continue in, preserve, retain.” The *Macquarie Dictionary* defines the word as: “1. To keep in existence or continuance; preserve; retain ... 3. To keep in a specified state, position etc.”

In my view “maintain”, where used in s. 45A, has a similar connotation to the verb “fix” in that it involves some element of continuity, not merely being momentary or transitory. Generally, to maintain a price assumes that it has been fixed beforehand.

119 In *ACCC v CC*, Lindgren J (at [133]) expressed some doubt whether the statutory concept of “maintaining” a price necessarily assumes that the price has been fixed beforehand. It was unnecessary for his Honour to express a concluded view because the notion of “controlling” a price best fit the case before him.

120 I do not consider that the statement of Lockhart J in *Radio 2UE*, that to maintain a price generally assumes that it has been fixed beforehand, is to be understood as definitional. The use of the word “generally” indicates otherwise. I also consider the statement to be obiter. The statutory context and purpose support the conclusion that the verb “maintain” takes its ordinary meaning of keeping in a specified state or position. As discussed further below, one of the desired outcomes of market competition is downward pressure on prices, thereby enhancing the welfare of Australians. In the context of the cartel prohibitions, a provision that has the purpose or effect of maintaining a price is a provision that has the purpose or effect of keeping the price from declining. A provision of that kind does not require or presuppose that the price has been fixed beforehand.

121 There may be an arrangement or understanding to fix, control or maintain prices notwithstanding that there is no agreement to charge identical prices: *Service Station Association* at 483-484 per Heerey J, approved on appeal in *Service Station Association (Full Court)* at 228 per Lockhart J (Spender and Lee JJ concurring) and referred to with approval in

PT Garuda at [555] per Dowsett and Edelman JJ. In *Yazaki*, Besanko J accepted that a provision had the effect of “controlling” prices in circumstances where the provision set the initial price at which tenders would be submitted, but where the tenders were followed by a process of negotiation: at [174]-[178].

122 A provision of an arrangement or understanding will be a cartel provision if it fixes, controls or maintains the price for goods or services or a discount, allowance, rebate or credit in relation to goods or services. Two recent cases have considered whether the definition of cartel provision extends to a provision that fixes a component of a price (not being a discount, allowance, rebate or credit). In *Olex*, the ACCC alleged that a provision of an arrangement or understanding that fixed the amount to be charged for the service of cutting electrical cable, which charge was added to the price of the length of cable supplied, was alternatively a price fixing provision in relation to the supply of cutting services or the supply of cable. Applying the definition of “services” in s 4 of the Act and the definition of “supply of goods” in s 4C(c), Beach J concluded (at [652]-[654]) that the supply of the cutting service together with the cable is treated as one supply of goods for the purpose of the Act. Justice Beach further concluded (at [655]-[657]) that the cutting fees were a modest component of the overall price of electrical cable and that there was no commercially realistic ability to control the *overall* price of electrical cable by controlling the price charged for cutting services. The facts and outcome in *Olex* can be contrasted with *Air New Zealand* in which the ACCC alleged that a provision of an arrangement or understanding that fixed the amount of a fuel surcharge to be charged by competing airlines in respect of the carriage of air freight had the purpose or likely effect of controlling the price for air freight services. Justice Perram concluded that the purpose and likely effect of the arrangement or understanding was to increase the price for air freight services by the amount of the surcharge, thereby satisfying the statutory test of controlling the price charged for air freight services (at [615]-[620]). Those conclusions were upheld on appeal in *PT Garuda* at [558]-[571] per Dowsett and Edelman JJ.

Competition condition

123 An understanding will not contain a cartel provision unless at least two of the parties to the understanding are, or are likely to be, in competition with each other in relation to, relevantly, the supply of goods the subject of the cartel provision. As noted earlier, if a body corporate is a party to an understanding, each body corporate that is related to that body corporate is taken to be a party to the understanding: s 44ZZRC. Accordingly, the competition condition will be

satisfied if a party's related entity is in competition with one or more of the counterparties to the understanding even if the first party does not itself compete with any of the counterparties.

124 The meaning of the word “competition” in the Act is well established, if somewhat difficult to state in a short form. The meaning given to the word has not altered in any material way since the first decision of the (then named) Trade Practices Tribunal in *Re Queensland Co-operative Milling Association Ltd* (1976) 8 ALR 481 (*QCMA*). As the Tribunal there observed, competition (in a business or economic sense) is a rich concept containing a number of ideas (at 511). As illustrated by the discussion in *QCMA*, competition is best described by reference to its aim, mechanism and effect.

125 The basic aim of business competition is to win sales: *Queensland Wire Industries Pty Ltd v Broken Hill Proprietary Co Ltd* (1989) 167 CLR 177 (*Queensland Wire*) at 191 per Mason CJ and Wilson J. Competitors strive to replace each other in the supply of products (whether goods or services) sought by customers: *QCMA* at 513. Hence, competition describes rivalrous behaviour in all aspects of the price-product-service package offered to customers: *QCMA* at 511-512.

126 As to mechanism, competition occurs within markets which are defined by three practical dimensions: the type of product sought by customers (product dimension); the geographic region in which customers are located and seek the supply of products (geographic dimension); and the functional level of the supply chain occupied by the supplier and customer – typically described as manufacture, wholesale, distribution, retail and end consumer (functional dimension): *QCMA* at 513; *Australian Competition and Consumer Commission v Flight Centre Travel Group Ltd* (2016) 261 CLR 203 (*Flight Centre*) at [66]-[67] per Kiefel and Gageler JJ. The key mechanism of competition is through substitution – to supply products to customers in place of another competitor's supply. As explained in *QCMA* (at 513), within the bounds of a market there is substitution between one product and another, and between one source of supply and another, in response to changing prices. Substitution occurs on the demand side, whereby customers substitute one product or source of supply for another, and on the supply side, whereby suppliers adjust their production mix to substitute one product for another or one area of supply for another: see generally *Queensland Wire* at 188 per Mason CJ and Wilson J, at 195 per Deane J and at 198-199 per Dawson J; *Singapore Airlines Ltd v Taprobane Tours WA Pty Ltd* (1991) 33 FCR 158 (*Singapore Airlines*) at 174-178 per French J (Spender and O'Loughlin JJ agreeing); *Flight Centre* at [66]-[67] per Kiefel and Gageler JJ, [126] per Nettle

J; *Air New Zealand v Australian Competition and Consumer Commission* (2017) 262 CLR 207 (*Air New Zealand (HC)*) at [12]-[13] per Kiefel CJ, Bell and Keane JJ. Competitors strive to bring about substitution in a number of ways: through lowering their costs of production to enable them to profitably lower their prices; through improving the quality of their product and thereby increasing the value of the product to customers; and through inventing new products to meet the needs and wants of customers in new or better ways. Generally, firms compete with other firms at the same functional level of the supply chain. However, some firms operate at more than one functional level of the supply chain, either through a single corporate entity or through subsidiaries. Further, in certain circumstances, a firm may face indirect competitive constraint from other firms operating at another functional level of the supply chain: *Australian Competition and Consumer Commission v Metcash Trading Ltd* [2011] FCA 967; 282 ALR 464 at [267] per Emmett J, affirmed on appeal in *Australian Competition and Consumer Commission v Metcash Trading Ltd* (2011) 198 FCR 297 (*Metcash*) at [384]-[385] per Yates J, Finn and Buchanan JJ agreeing.

127 As to effect, competition enhances the welfare of Australians by creating incentives and pressure for suppliers to reduce their costs of production and their prices (which, in the language of economics, is referred to as an improvement in productive efficiency), to commit resources to the production of goods and services most wanted by customers and to improve the quality of those products (which, in the language of economics, is referred to as an improvement in allocative efficiency) and to invest in innovation with the object of inventing new products to meet the needs and wants of customers (which, in the language of economics, is referred to as an improvement in dynamic efficiency). As explained by the Tribunal in *QCMA* (at 511), through the signals of prices and profits, competition is a mechanism for discovery of market information (the kinds of goods and services the community wants and the manner in which these may be supplied in the cheapest possible way) and for enforcement of business decisions in light of this information (if firms disregard the signals, other firms, either currently in existence or which will be formed, will encroach upon their sales and ultimately supplant them). The commercial pressure created by competition is commonly referred to as competitive constraint.

128 The phrase “in competition with each other” in s 44ZZRD(4) incorporates the concepts described above. As explained by Beach J in *Olex* (at [489]), firms are in competition with each other if they are rivals or constrain each other in respect of the supply or acquisition of goods or services to which the cartel provision relates. Firms constrain each other if they supply

substitutable goods or services to the same class of customers or if they would do so given a sufficient price incentive. In other words, firms are in competition with each other if they compete in the same market. That does not mean that it is necessary to delineate the market in which the firms compete as an element of the statutory proscription. It does mean, though, that the statutory requirement of competition must be addressed within that conceptual framework. The significance of this point is that the phrase “in competition” connotes a minimum degree of competitive constraint between two firms which is satisfied if the firms compete in the same market.

129 The word “likely” in the phrase “are likely to be in competition with each other” has been construed as meaning a possibility that is not remote or a real chance: *Olex* at [490] per Beach J; *Australian Competition and Consumer Commission v Cascade Coal Pty Ltd* [2019] FCAFC 154; 374 ALR 90 (*Cascade Coal*) at [148] per Jagot, Beach and Bromwich JJ. In *Olex*, Beach J considered that the meaning of the word “likely” in s 44ZZRD(4) in reference to competition was governed by the definition appearing in s 44ZZRB being a “possibility that is not remote”. However, the definition is stated to apply “in relation to” the supply and acquisition of goods or services, the production of goods and the capacity to supply services. It is not entirely clear that the definition is intended to apply to the likelihood of competition. Regardless, the word “likely” should be given a meaning consistent with that which applies in the context of a similar statutory concept, the likely effect on competition. In that context “likely” has been construed as meaning “real commercial likelihood”, but not necessarily more probable than not: *Pacific National* at [243]-[246] per Middleton and O’Byrne JJ. The phrase “likely to be in competition” recognises the present competitive constraint afforded by potential competitors and the dynamic nature of competition.

130 Whether parties are in competition with each other or likely to be in competition with each other in the future involves a question of fact which is to be answered having regard to commercial reality and the context in which the suggested competition occurs: *Cascade Coal* at [139] per Jagot, Beach and Bromwich JJ. Their Honours observed (at [147]):

It is not in doubt that the economic meaning of “competition” must be applied in a practical way to accommodate the concerns of the legislation with business and commerce. Any analysis of the competitive process is to be approached as a practical matter of business and is not to be divorced from the commercial context of the conduct in question. So assessed, the essence of competition is rivalrous behaviour in the course of which the matching of supply with demand occurs. But where an alleged rival has neither the resources nor the intention to engage in the process of supply and demand, such rivalrous behaviour is absent.

Recommended resale prices

131 As the present proceeding concerns conduct that purported to involve recommended resale prices, it is necessary to consider the place of recommended resale prices in the scheme of the prohibitions in Pt IV of the Act.

132 The practice of a supplier recommending resale prices to its resellers (whether distributors or retailers) is well known in commerce. Recommended resale prices are often a valuable element of a supplier's sales and marketing strategy. By publicising recommended resale prices to the ultimate consumers of its products, the supplier promotes its view of the value of its products in the market for its own benefit and the benefit of its distributors or retailers. Ordinarily, recommended resale prices are set at a level that permits the distributors or retailers to earn an appropriate profit margin if the products are sold by them at that price. The Act recognises and permits the commercial practice of recommending resale prices, while prohibiting certain forms of conduct that go beyond the mere recommendation of prices. The Act addresses the practice in the context of a supply relationship between suppliers and resellers (in s 48 and Pt VIII of the Act) and also in the context of a competitive relationship between traders (in Div 1 of Pt IV of the Act) in a similar way.

133 In the context of a supply relationship, s 48 of the Act prohibits the practice of resale price maintenance which is defined in Pt VIII of the Act. Under s 96, a supplier of goods or services to a second person (the reseller) engages in the practice of resale price maintenance where (amongst other practices) the supplier induces or attempts to induce the reseller not to sell the goods or resupply the services at a price less than a price specified by the supplier. Under s 97, the supplier will not be taken to have engaged in that practice by reason only of having communicated recommended resale prices in ways specified in the section.

134 In the context of a competitive relationship between traders, and as discussed above, ss 44ZZRJ and 44ZZRK prohibited making and giving effect to contracts, arrangements and understandings that contain a price fixing provision within the meaning of s 44ZZRD(2). Under s 76(1)(d), a person who attempted to induce a contravention of those provisions is liable to the imposition of a pecuniary penalty. However, s 44ZZRD(6) provided that a provision of a contract, arrangement or understanding is not taken to be a price fixing provision within the meaning of s 44ZZRD(2) by reason only that it recommends, or provides for the recommending of, a price, discount, allowance, rebate or credit.

135 The enactment of s 44ZZRD(6) by the *Trade Practices Amendment (Cartel Conduct and Other Measures) Act 2009* (Cth) (**2009 Amendment Act**) introduced a subtle change to the form of the previous law. The predecessor to s 44ZZRD(6) was s 45A(6) which provided as follows:

For the purposes of this Act but without limiting the generality of sub-section (5), a provision of a contract, arrangement or understanding, or of a proposed contract, arrangement or understanding, shall not be taken not to have the purpose, or not to have or to be likely to have the effect, of fixing, controlling or maintaining, or providing for the fixing, controlling or maintaining of, the price for, or a discount, allowance, rebate or credit in relation to, goods or services by reason only that the provision recommends, or provides for the recommending of, such a price, discount, allowance, rebate or credit if in fact the provision has that purpose or has or is likely to have that effect.

136 It can be seen that s 45A(6) used a double negative to specify that particular conduct did not fall outside the prohibition of price fixing. The particular conduct was a provision that recommends, or provides for the recommending of, a price, discount, allowance, rebate or credit if in fact the provision is a price fixing provision. Effectively, s 45A(6) required the court to look to the substance of the provision over its form. A general requirement to that effect was also previously found in s 45A(5) (and, as at the date of the impugned conduct, was contained in s 44ZZRD(10)).

137 It is apparent from the 2008 Explanatory Memorandum that the legislature did not believe that, by the introduction of s 44ZZRD(6), it was altering the effect of the previous law (see para 1.28).

138 It might be thought that s 44ZZRD(6) was an unnecessary provision and perhaps was included out of an abundance of caution. The common business practice by which a supplier provides to its customers a recommended selling price, by way of recommendation only, would not usually give rise to an arrangement or understanding, let alone one that contains a provision that has the purpose or likely effect of fixing, controlling or maintaining prices. In that respect, it is important to note the limited effect of s 44ZZRD(6) – it applies only to a price recommendation. If a company publishes recommended prices and reaches an arrangement or understanding with its competitors that they will follow the recommended prices, the conduct will constitute unlawful cartel conduct: see *Service Station Association* at 485 per Heerey J, referred to with approval in *Flight Centre* at [182] by Gordon J.

139 As noted above, the practice of a supplier recommending resale prices to its resellers (whether distributors or retailers) is well known in commerce, and has a well understood commercial justification. In contrast, the practice of one competitor recommending selling prices to another

competitor has no commercial justification. On occasions, industry associations may publish recommended selling prices for an industry, but typically the industry association will not be a participant in the market in the sense of being a competing supplier.

140 As discussed below, the present case involves unusual conduct. The respondents contend that BlueScope did no more than provide distributors with recommended resale prices. However, it is uncontroversial that BlueScope not only provided its recommended resale prices to distributors who were reselling BlueScope products, but BlueScope also provided its recommended resale prices to distributors who were not reselling BlueScope products but were selling imported products in competition with distributors who were reselling BlueScope products. BlueScope and Mr Ellis conceded that they proposed to such import distributors that they use BlueScope's recommended resale prices when setting their prices for the resale of imported products.

141 It is also uncontroversial that BlueScope began to prepare recommended resale prices for processing services supplied by distributors. The expression "recommended resale price" in that context is a misnomer. Processing services were not resupplied by distributors; those services were simply supplied by distributors in conjunction with the resupply of flat steel products. Thus, the so-called recommended resale prices for processing services were nothing more than recommended prices. BlueScope began to prepare those recommended prices, and discussed them with distributors, in circumstances where BlueScope's subsidiary, BlueScope Distribution, competed with distributors in the supply of processing services.

Seeking a commitment

142 In the course of cross-examination by the respondents, two of the ACCC's witnesses, Messrs Hennessy and Kelso, agreed that they never asked any distributor for a commitment that the distributor would use BlueScope's price list as a benchmark when setting their prices for flat steel products. That evidence is considered in detail below. The respondents placed considerable reliance upon it, in effect submitting that the evidence is fatal to the ACCC's case. The submission was put on two bases, reflecting the conduct and intention elements of an attempt. First, in respect of the conduct element, the respondents submitted that there cannot be an attempt to induce distributors to reach a price fixing understanding if BlueScope and Mr Ellis never sought a commitment from any distributor to price in accordance with BlueScope's price list. Second, in respect of the intention element, the respondents submitted that there

cannot be an attempt to induce distributors to reach a price fixing understanding if BlueScope and Mr Ellis never intended to seek such a commitment from distributors.

143 The question whether BlueScope and Mr Ellis sought a commitment with respect to prices, or intended that there be such a commitment, was a central part of the respondents' defence of the proceeding. It is therefore necessary to address the question whether the ACCC's case depends, as a matter of law, on affirmative findings on those matters.

144 As to the conduct element of an attempt to induce, in my view a person may be found to have attempted to induce a counterparty to reach a price fixing understanding notwithstanding that the person never expressly asked the counterparty for a commitment with respect to the counterparty's prices. The respondents' submission to the contrary has a number of difficulties: it seeks to frame the applicable legal principles in a narrow and rigid manner and also has the effect of substituting the word "commitment" in place of the word "understanding" in the Act.

145 As discussed above, there has been considerable judicial explication of the words "arrangement" and "understanding" as used in the Act. Reducing those words to the single notion of a "commitment", however that might be conceived, is an erroneous reduction in legal principle. The statutory words have a broader meaning. They require that the parties have, by words or conduct, aroused an expectation in each that they will conduct themselves in accordance with the subject matter of the arrangement or understanding. The expectation must be more than a mere hope, belief or prediction that, as a matter of fact, a person will conduct themselves in the future in a particular way. The expectation must arise out of the dealings between the parties which has resulted in what can alternatively be called the assumption of an obligation, the giving of an assurance or undertaking, or a meeting of minds, that they will act in the future in a particular way. While an arrangement is well described in terms of undertaking obligations or duties, albeit not legally enforceable, an understanding is more aptly described as arriving at a common mind (or consensus) as to a particular course to be followed. Conduct which founds an understanding can be arrived at by words or conduct and may be tacit. Further, as an arrangement or understanding is not binding on the parties in law, the parties are inevitably free to withdraw from it and act inconsistently with it, notwithstanding their consent to it.

146 It follows from the judicial explication of the concept of an "understanding" that there is no requirement in law for one of the parties to have expressly sought a commitment from the other party to assume some obligation. An understanding may be reached through a course of

dealings between the parties that makes clear the desired outcome and through which a meeting of minds on pursuing the outcome is achieved. A course of dealings between parties is capable of arousing an expectation in each party that they will conduct themselves in accordance with the communicated outcome.

147 It necessarily follows that an attempt to reach a price fixing understanding within s 76(1)(b) does not require, as a matter of law, that the relevant person has expressly sought a commitment from a competitor to price in a particular way. There are other ways in which a price fixing understanding may be brought about. That conclusion is even stronger in the case of inducing or attempting to induce a person to reach a price fixing understanding within s 76(1)(d). An inducement ordinarily refers to some proffered advantage or disadvantage, promised or threatened, which will follow if the object of the inducement adopts or fails to adopt a stipulated course of action. Mere persuasion, with no promise or threat, may also constitute an attempt to induce. It is not possible to define in any rigid or narrow manner the categories or types of conduct that may constitute inducing or attempting to induce a person to reach a price fixing understanding within s 76(1)(d). The conduct may involve a course of meetings, communications and other dealings in which inducements are proposed or offered and which are directed at reaching a consensus, or a meeting of minds, about the level of prices to be charged by one or more of the parties. It can be accepted that, for a consensus or meeting of minds to be finally arrived at, there must be some communication or indication of assent from one party to the other whether by words or by conduct. However, an attempt to induce a person to reach a price fixing understanding does not require assent to be achieved; it requires a step towards the inducement of the understanding which is more than merely preparatory and which is immediately and not merely remotely connected with the inducement to reach the understanding. It should also be reiterated that, in the context of an attempt and an attempt to induce, it is not necessary for the conduct to have reached an advanced stage or for the precise terms of the proposed understanding to have been formulated.

148 As to the intention element of an attempt to induce, a person may only be found to have attempted to induce a counterparty to reach a price fixing understanding if the person intended, by their conduct, to take steps which were directed at inducing the counterparty to reach the understanding. In other words, it is necessary that the understanding be in contemplation and be the intended outcome of the attempt to induce. It is not sufficient for the person to merely intend that the counterparty reflect on the prices they are charging. The intention must be directed to the ultimate end of reaching an understanding. Again, though, the use of the word

“commitment” in that context is unduly limiting. The intention must be to induce the counterparty to reach an understanding, which requires a consensus or meeting of minds about acting in accordance with the subject of the understanding. It is sufficient that, by the acts that constitute the attempt to induce, the person offers promises or threats or otherwise engages in persuasive conduct that is intended to induce a consensus, however the ultimate assent may be communicated.

Attribution of conduct and intention to a body corporate

149 In its case against BlueScope, the ACCC must establish that BlueScope engaged in conduct constituting an attempt to induce certain suppliers of flat steel products to arrive at the alleged price fixing understandings and that it intended to bring that about. Section 84 facilitates the proof of conduct by, and intent of, a body corporate in certain circumstances.

150 In relation to intent, s 84(1) (at the relevant time) provided that where, in a proceeding under Pt VI in respect of conduct engaged in by a body corporate in relation to which (relevantly) s 44ZZRJ applies, it is necessary to establish the state of mind of the body corporate, it is sufficient to show that:

- (a) a director, employee or agent of the body corporate engaged in that conduct; and
- (b) the director, employee or agent was, in engaging in that conduct, acting within the scope of his or her actual or apparent authority; and
- (c) the director, employee or agent had that state of mind.

151 Section 84(5) provided that a reference to the state of mind of a person includes a reference to the knowledge, intention, opinion, belief or purpose of the person and the person’s reasons for the person’s intention, opinion, belief or purpose.

152 In relation to conduct, s 84(2) provided that any conduct engaged in on behalf of a body corporate:

- (a) by a director, employee or agent of the body corporate within the scope of the person’s actual or apparent authority; or
- (b) by any other person at the direction or with the consent or agreement (whether express or implied) of a director, employee or agent of the body corporate, where the giving of the direction, consent or agreement is within the scope of the actual or apparent authority of the director, employee or agent,

shall be deemed, for the purposes of the Act, to have been engaged in also by the body corporate.

153 In the present case, the ACCC seeks to attribute to BlueScope the conduct and intention of BlueScope’s employees, relying upon ss 84(1) and (2). For reasons that will become apparent, it is convenient to consider s 84(2), which concerns attribution of conduct, before considering s 84(1), which concerns attribution of intention.

Attribution of conduct

154 Section 84(2) applies to conduct engaged in *on behalf of* a body corporate by, relevantly, an employee within the scope of the person’s *actual or apparent authority*.

155 The phrase “on behalf of” in s 84(2) has been considered in a number of cases. In *Walplan Pty Ltd v Wallace* (1985) 8 FCR 27, Lockhart J (with whom Sweeney and Neaves JJ agreed) said (at 37) that the phrase suggests some involvement by the person concerned with the activities of the company and that the words convey a meaning similar to the phrase “in the course of the body corporate’s affairs or activities”. In *NMFM Property Pty Ltd v Citibank Ltd (No 10)* (2000) 107 FCR 270, Lindgren J concluded (at [1244]) that:

It seems to me that an act is done “on behalf of” a corporation for the purpose of s 84(2) if either one of two conditions is satisfied: that the actor engaged in the conduct intending to do so “as representative of” or “for” the corporation, or that the actor engaged in the conduct in the course of the corporation’s business, affairs or activities. This view accords with what Kiefel J said in *Lisciandro v Official Trustee in Bankruptcy* [1995] ATPR ¶41- 436 at 40,903-40,904.

156 Section 84(2) took its present substantive form following amendments made by s 53 of the *Trade Practices Revision Act 1986* (Cth). Those amendments introduced the phrase “within the scope of the person’s actual or apparent authority”. That phrase invokes common law principles concerning the authority of employees and agents.

157 In *Freeman & Lockyer v Buckhurst Park Properties (Mangal) Ltd* [1964] 2 QB 480 (***Freeman & Lockyer***), Diplock LJ explained (at 502) that actual and apparent authority are independent of each other. The scope of a person’s actual authority (whether as employee or agent) is ascertained from the terms of the contract governing the relationship, including any proper implications from the express words used. Thus, the scope of an employee’s actual authority is determined by reference to his or her contract of employment and includes authority in respect of the employee’s express powers as well as any implied powers necessary for, and ordinarily incidental to, carrying out those express powers. In contrast, apparent (or ostensible)

authority arises from a representation made by the principal as to the scope of authority (at 503). As Diplock LJ further explained, the representation which creates the apparent authority “may take a variety of forms of which the commonest is representation by conduct, that is, by permitting the agent to act in some way in the conduct of the principal’s business with other persons” (at 503).

158 The principles stated in *Freeman & Lockyer* were referred to with approval by the High Court in *Crabtree-Vickers Pty Ltd v Australian Direct Mail Advertising & Addressing Co Pty Ltd* (1975) 133 CLR 72 at 78.

159 In *Australian Competition and Consumer Commission v Leahy Petroleum Pty Ltd* (2004) 141 FCR 183, Merkel J referred to those principles in the context of s 84(2) as follows (at [106]):

Insofar as s 84(2) refers to ostensible authority the principles in that regard are also well established. Apparent authority can arise where the employer by words or conduct has represented that the employee, who has purported to act on behalf of the employer, is authorised to do what he is purporting to do: see *Armagas Ltd v Mundogas SA* [1986] AC 717 at 783; *Clayton Robard Management Ltd v Siu* (1987) 6 ACLC 57; *Lloyd v Grace; Freeman & Lockyer (a Firm) v Buckhurst Park Properties (Mangal) Ltd* [1964] 2 QB 480 per Diplock LJ at 643-646. In *Clayton Robard* Kirby P (at 60) explained the rule as follows:

The basis of our law on ostensible authority is fundamentally that of estoppel by representation. See Pearson L.J. in *Freeman & Lockyer* (supra) at p 498. The intermediary professes to act on behalf of the principal. He thereby impliedly represents and warrants that he has authority from the principal to do so. The principal must be shown to know of and to acquiesce in the intermediary’s professing to act on its behalf to become bound by such profession. Thereby it impliedly represents that he has the principal’s authority to act as he does. In these circumstances, the principal is considered to have made the representation or to have caused it to be made or “at any rate to be responsible for it”, *Freeman & Lockyer*, loc. cit.:

Accordingly, as against the other contracting party, who has altered his position in reliance on the representation, the company is estopped from denying the truth of the representation.

...

160 It will usually be the case that an employee’s actual authority does not extend to the commission of unlawful acts (although, in some instances, an employee may be directed to engage in unlawful conduct). Despite the absence of express or implied actual authority to engage in an unlawful act, s 84(2) will apply where the unlawful conduct is within the scope of the employee’s apparent authority: *Trade Practices Commission v Queensland Aggregates Pty Ltd (No 3)* (1982) 61 FLR 52 at 64 per Morling J. As observed by Toohey J in *Tubemakers* at 742:

It may be assumed to be an implied term in every contract of employment that the

servant or agent will not act unlawfully. And that will have consequences between employer and employee. Yet unlawful conduct has not been held inevitably to be outside the scope of employment.

On the contrary, if a servant or agent has authority to enter into transactions of the sort in question, it is no answer for a principal to say that in the particular circumstances the servant or agent acted wrongfully: *Australasian Brokerage Ltd v Australia and New Zealand Banking Corporation Ltd* (1934) 52 CLR 430 at 451-2.

Attribution of state of mind

161 BlueScope submitted that s 84(1) is not applicable in this case because the proceeding is not in respect of conduct engaged in by BlueScope in relation to which s 44ZZRJ applies. That is because the proceeding does not involve an allegation that BlueScope's conduct contravened s 44ZZRJ; it only involves an allegation that BlueScope attempted to induce a contravention of s 44ZZRJ within the meaning of s 76(1)(d). BlueScope submitted that, as a result, common law principles apply, under which the applicable rule of attribution depends upon the proper construction of the relevant rule of responsibility, liability or proscription as explained by the Privy Council in *Meridian Global Funds Management Asia Ltd v Securities Commission* [1995] 2 AC 500 (*Meridian*) at 506-511. BlueScope submitted that, in the present case, which concerns alleged attempts to induce entry into a proscribed arrangement or understanding, the relevant employee whose state of mind can be attributed to the corporation is the employee who has the authority to enter into that arrangement or understanding on the corporation's behalf. BlueScope submitted that the only employees of BlueScope answering that description were Messrs Ellis and Hennessy and not Messrs Sparks, Gent, Whitfield and Kelso.

162 I accept BlueScope's submission that s 84(1) is not applicable to the proof of the mental element required to establish ancillary liability under s 76(1)(d) (the attempt to induce a contravention). However, I do not accept BlueScope's submission concerning the application of the common law principles of attribution in this case.

163 Section 84(1) has received surprisingly little judicial consideration since it was first enacted (in contrast to s 84(2)). However, it is clear from the statutory text and the legislative history that s 84(1) is not intended to apply with respect to the proof of the state of mind or intention associated with the accessorial and ancillary liability of a body corporate under ss 76(1)(b) to (f) and cognate provisions in Pt VI (in particular, s 75B as incorporated into ss 82 and 87). Rather, s 84(1) is confined to the proof of the state of mind of a body corporate that is a requisite element of certain of the prohibitions in the Act.

164 When first enacted, s 84(1) provided:

Where, in a proceeding under this Part in respect of any conduct engaged in by a body corporate, being conduct in relation to which a provision of Part V applies, it is necessary to establish the intention of the body corporate, it is sufficient to show that a servant or agent of the body corporate by whom the conduct was engaged in had that intention.

165 The following features of the original provision can be noted. First, the section was confined to proceedings under Pt VI in respect of conduct engaged in by a body corporate in relation to which a provision of Pt V applied. Second, the phrase “it is necessary to establish the intention of the body corporate” was implicitly qualified by the preceding phrase. The necessity to establish the intention of the body corporate concerned the necessity that arose in the proceeding in respect of conduct engaged in by a body corporate in relation to which a provision of Pt V applied. In other words, the intention to which the section referred was the intention of the body corporate as an element of the applicable provision of Pt V. Third, in its original form, s 84(1) had no application to a proceeding in respect of conduct to which a provision of Pt IV applied. The original limitation of s 84(1) to proceedings in respect of conduct to which Pt V applied is explicable by the fact that, at that time, the conduct to which Pt V applied was classified as an offence under the Act punishable by a fine (see original s 79) whereas conduct to which Pt IV applied was subject to the imposition of a civil penalty.

166 When first enacted, s 76(1) was in a similar form to its current form (but applicable only to proceedings concerning the provisions of Pt IV). Under s 76, pecuniary penalties could be sought against a person (including a body corporate) who had:

- (a) contravened a provision of Pt IV;
- (b) attempted to contravene such a provision;
- (c) aided, abetted, counselled or procured a person to contravene such a provision;
- (d) induced, or attempted to induce, a person, whether by threats or promises or otherwise, to contravene such a provision;
- (e) been in any way, directly or indirectly, knowingly concerned in, or party to, the contravention by a person of such a provision; or
- (f) conspired with others to contravene such a provision.

167 As discussed above, the accessorial or ancillary conduct in each of categories (b) to (f) above requires proof of intention, based upon knowledge of the essential facts that would have rendered the contravening conduct a contravention: *Yorke v Lucas* at 667, 670 per Mason ACJ, Wilson, Deane and Dawson JJ. It is clear that, from its enactment, s 84(1) did not apply to proof

of that intention as the section was confined to proceedings under Pt VI in respect of conduct to which a provision of Pt V applied (and the proof of intention as a necessary element of the contravention of the provision).

168 Section 84 was substantially amended by s 53 of the *Trade Practices Revision Act 1986* (Cth). However, the application of the section was amended in only a minor way: to extend it to proceedings under Pt VI in respect of conduct engaged in by a body corporate in relation to which s 46 applied. The extension to s 46 is explicable by the fact that, at that time, it was the only prohibition in Pt IV which required proof, as an element of the prohibition, of the purpose of a corporation (as opposed to the purpose of conduct or the purpose of a provision of a contract, arrangement or understanding). This is confirmed by the Explanatory Memorandum to the *Trade Practices Revision Bill 1986* (Cth) (**1986 Explanatory Memorandum**) which stated (at [184]):

New sub-s.84(1) also applies to conduct to which s.46 applies (the current sub-section only applies to conduct to which Part V applies), as a contravention of s.46 requires it to be established that a corporation took advantage of its power in a market for one of the proscribed purposes in sub-s.46(1).

169 The 1986 Explanatory Memorandum reinforces the conclusion, which can be drawn from the legislative text having regard to the legislative history, that s 84(1) was not intended to have general application to proceedings under Pt VI, and was not intended to have application to proof of intention associated with accessorial and ancillary liability under provisions such as s 76(1)(b) to (f).

170 When the cartel conduct prohibitions were introduced by the 2009 Amendment Act, s 84(1) was again amended to include specific reference to a prosecution for an offence against ss 44ZZRF or 44ZZRG in respect of conduct engaged in by a body corporate and a proceeding under Pt VI in respect of conduct engaged in by a body corporate in relation to which ss 44ZZRJ and 44ZZRK applied. Those extensions of the section are again explicable by the facts that:

- (a) a prosecution for an offence against ss 44ZZRF or 44ZZRG required proof of intention in accordance with the Commonwealth Criminal Code; and
- (b) a proceeding in respect of conduct to which ss 44ZZRJ and 44ZZRK applied required proof of a cartel provision, which potentially required proof of the intention of the provision under s 44ZZRD(2) or the purpose condition in s 44ZZRD(3).

171 Having regard to the legislative text and history, it is clear that the extension of s 84(1) to (relevantly) s 44ZZRJ is consistent with, and indeed confirms, the view that s 84(1) applies to proof of the intention element of cartel conduct, not proof of intention associated with accessory or ancillary liability under ss 76(1)(b) to (f) and cognate provisions in Pt VI.

172 It follows that the requisite intention of BlueScope in respect of the alleged attempt to induce counterparties to arrive at understandings must be proved through the application of common law principles of attribution. As discussed by Edelman J in *Commonwealth Bank of Australia v Kojic* (2016) 249 FCR 421 (at [97]-[98], with whom Allsop CJ generally agreed at [62]-[63]), the “directing mind and will” rule of attribution was rejected as a universal rule in *Meridian*. In that case, Lord Hoffmann (delivering the judgment of the Privy Council) concluded that the determination of the applicable rule of attribution to apply in a given legal setting is a matter of construction of the relevant substantive law being applied (at 507); the question of construction is whether the substantive law requires that the knowledge that an act has been done, or the state of mind with which it was done, should be attributed to the company (at 511).

173 In the present case, the substantive law is s 76(1)(d) of the Act which provides for the imposition of a pecuniary penalty against a person, including a body corporate, that attempts to induce another person to contravene (relevantly) a provision of Pt IV. The prohibitions in Pt IV concern trading practices of corporations. The trading practices the subject of the prohibitions are diverse, ranging from price fixing agreements with competitors (relevantly, ss 44ZZRJ and 44ZZRK), through to restrictions contained in supply arrangements (ss 47 and 48) and mergers and acquisitions (s 50). A wide range of trading practices may be prohibited by s 46 which concerns unilateral conduct of corporations with substantial market power.

174 As noted above, BlueScope submitted that, in a case such as this which concerns alleged attempts to induce entry into a price fixing understanding, the relevant employee whose state of mind can be attributed to the corporation is the employee who has the authority to enter into that understanding on the corporation’s behalf. In my view, the applicable rule of attribution would extend at least that far. However, in a case such as the present, I consider that the applicable rule extends to employees who have the *actual* or *ostensible* authority to enter into the understanding on the corporation’s behalf. That is for two principal reasons. First, it is consistent with the statutory rule of attribution of conduct that applies in this case under s 84(2), by which conduct of an employee within the scope of the employee’s actual or apparent authority is attributed to the corporation. If the legislature considered that such conduct should

be attributed to the corporation in a proceeding under s 76(1), it is reasonable to assume that the state of mind of the employee engaging in that conduct is also to be attributed to the corporation for the same purpose. It is that employee's state of mind that will be the most relevant in assessing the liability of the corporation under the Act. Second, it is consistent with the general principles established in company law concerning attribution, as recently summarised by Lords Toulson and Hodge JJSC in *Bilta (UK) Ltd (in liq) v Nazir* [2016] AC 1 at [183]-[189], particularly at [188], under which a company can incur direct liability through the transactions of agents within the scope of their actual or apparent authority.

175 It follows, in my view, that it is relevant to consider the state of mind of each of the BlueScope employees allegedly engaged in the unlawful conduct, and not just the state of mind of Messrs Ellis and Hennessy. I note, though, that even if BlueScope were correct and only the intention of Messrs Ellis and Hennessy were to be attributed to BlueScope, the analysis of the evidence would not alter in any material way. As BlueScope acknowledged, the understanding of Messrs Sparks, Gent, Whitfield and Kelso about BlueScope's strategy remains relevant and probative of the content and intent of the strategy because the strategy was communicated within BlueScope and those employees had a role in implementing it.

Burden of proof

176 The ACCC bears the burden of proof on all issues, which is the balance of probabilities: s 140(1) of the *Evidence Act 1995* (Cth) (**Evidence Act**). Section 140(2) stipulates that:

Without limiting the matters that the court may take into account in deciding whether it is so satisfied, it is to take into account:

- (a) the nature of the cause of action or defence; and
- (b) the nature of the subject-matter of the proceeding; and
- (c) the gravity of the matters alleged.

177 Section 140(2)(c) reflects the approach to fact finding described by Dixon J in *Briginshaw v Briginshaw* (1938) 60 CLR 336 (**Briginshaw**), where his Honour explained that the application of the burden of proof in civil proceedings is anything but the mechanical application of probabilities. In the context of proceedings in which the facts are determined by the judge, it involves the judge being reasonably satisfied of the facts sought to be proved. In the often cited passage, Dixon J stated (at 361-363):

The truth is that, when the law requires the proof of any fact, the tribunal must feel an actual persuasion of its occurrence or existence before it can be found. It cannot be found as a result of a mere mechanical comparison of probabilities independently of

any belief in its reality. No doubt an opinion that a state of facts exists may be held according to indefinite gradations of certainty ... Except upon criminal issues to be proved by the prosecution, it is enough that the affirmative of an allegation is made out to the reasonable satisfaction of the tribunal. But reasonable satisfaction is not a state of mind that is attained or established independently of the nature and consequence of the fact or facts to be proved. The seriousness of an allegation made, the inherent unlikelihood of an occurrence of a given description, or the gravity of the consequences flowing from a particular finding are considerations which must affect the answer to the question whether the issue has been proved to the reasonable satisfaction of the tribunal. In such matters “reasonable satisfaction” should not be produced by inexact proofs, indefinite testimony, or indirect inferences. Everyone must feel that, when, for instance, the issue is on which of two dates an admitted occurrence took place, a satisfactory conclusion may be reached on materials of a kind that would not satisfy any sound and prudent judgment if the question was whether some act had been done involving grave moral delinquency ... This does not mean that some standard of persuasion is fixed intermediate between the satisfaction beyond reasonable doubt required upon a criminal inquest and the reasonable satisfaction which in a civil issue may, not must, be based on a preponderance of probability. It means that the nature of the issue necessarily affects the process by which reasonable satisfaction is attained.

178 As the above passage explains, and as reflected in s 140 of the Evidence Act, there is only one civil standard of proof, being the balance of probabilities. However, satisfaction on the balance of probabilities is affected by the nature of the issues being determined and their gravity. Issues which have serious consequences, including particularly the imposition of civil penalties, are weighed carefully by the Court. In reaching my findings and determining whether I am satisfied that the ACCC’s case has been proved on the balance of probabilities, I have taken into account the gravity of the matters alleged.

179 In their submissions, the respondents placed emphasis on the statement of Dixon J in *Briginshaw* that “reasonable satisfaction” should not be produced by inexact proofs, indefinite testimony or indirect inferences. As discussed below, the respondents criticised the evidence adduced by the ACCC in the proceeding, arguing that it was not sufficient to enable the Court to be reasonably satisfied of the ACCC’s allegations.

180 As emphasised by the High Court in *Neat Holdings Pty Ltd v Karajan Holdings Pty Ltd* [1992] HCA 66; 110 ALR 449 at 450, statements that “clear” or “cogent” or “strict” proof is necessary where serious matters such as fraud are to be found are not to be understood as directed to the standard of proof. The majority (Mason CJ, Brennan, Deane and Gaudron JJ) further observed (at 450) that there are “circumstances in which generalisations about the need for clear and cogent evidence to prove matters of the gravity of fraud or crime are, even when understood as not directed to the standard of proof, likely to be unhelpful and even misleading”. Cases involving alleged cartel conduct (or attempted cartel conduct) frequently give rise to difficulties of proof. Commonly, the communications that are central to the allegations are oral, and there

is no written record of the communication. Furthermore, evidence relating to intention will often be circumstantial. In such cases, the Court must assess the totality of the evidence in reaching a conclusion whether the allegations are made out to the reasonable satisfaction of the Court. In doing so, the Court is permitted to draw inferences from the proved conduct, communications and circumstances. The applicable principles were summarised by Beach J in *Olex* as follows (at [479]-[481]):

479 A finding may be made in the absence of direct evidence. All that is necessary is that the more probable inference from the circumstances that sufficiently appear by evidence, left unexplained, justifies the conclusion. “More probable” means no more than that upon the balance of probabilities, such an inference has a greater degree of likelihood. A party who relies on circumstantial evidence must show that the circumstances raise the more probable inference in favour of what is alleged. It is not sufficient that the circumstances give rise to conflicting inferences of an equal degree of probability or plausibility or that the choice between them can only be made by conjecture. I accept though that the process of inference may involve an intuitive element that is not susceptible to detailed support or explanation.

480 There is a distinction between inference and conjecture even if the reasoning process occurs on a continuum in which there is no bright line division (*Seltsam Pty Ltd v McGuinness* (2000) 49 NSWLR 262 at [84] to [88]). A conjecture, even though plausible, is no more than a guess, whereas an inference is a deduction from the evidence. If the deduction is reasonable, the inference may rise to legal proof (*Jones v Great Western Railway Co* (1931) 144 LT 194 at 202). But there must be objective facts from which the inference could be drawn, otherwise what is left is mere speculation or conjecture (*Caswell v Powell Duffryn Associated Collieries Ltd* [1940] AC 152 at 169 and 170 per Lord Wright).

481 Generally, the proper inference to be drawn on the balance of probabilities depends upon a practical and reasonable assessment of the evidence as a whole (*BGC Residential Pty Ltd v Fairwater Pty Ltd* [2012] WASCA 268 at [51] per Pullin JA and *Siegwerk Australia Pty Ltd (In liq) v Nuplex Industries (Aust) Pty Ltd* (2016) 334 ALR 443; [2016] FCA 158 at [85] to [88] per Beach J).

181 In a case depending upon circumstantial evidence (particularly as to proof of intention), the Court is required to consider the “weight which is to be given to the united force of all the circumstances put together”: per Lord Cairns in *Belhaven and Stenton Peerage* (1875) 1 App Cas 278 at 279, cited in *Chamberlain v The Queen (No 2)* (1984) 153 CLR 521 at 535 per Gibbs CJ and Mason J. As observed by Winneke P in *Transport Industries Insurance Co Ltd v Longmuir* [1997] 1 VR 125 (*Longmuir*) at 129, that principle is as much applicable to civil cases as to criminal cases. *Longmuir* concerned a claim under a home insurance policy, where the insurer refused indemnity on the basis that the insured had lit the fire which damaged his house. Winneke P continued:

The task of the learned judge was to consider the weight of the combination of facts

proved to his satisfaction and then to determine whether the combined weight of those facts and circumstances supported the inference, as a matter of probability, that the respondent lit the fire. The onus of proof is only to be applied at the final stage of the reasoning process. It is, erroneous to divide the process into stages and, at each stage, apply some particular standard of proof. To do so destroys the integrity of circumstantial case ...

182 Similarly, in *CEEEIPPAS v ACCC*, the Full Court explained (at [143]):

We reject the CEPU's approach of dissecting each piece of evidence in isolation from other evidence. That approach distorts unacceptably the function of the tribunal of fact. The court can consider the whole of the evidence in arriving at a decision on any fact or facts. A circumstantial case can be proved if the tribunal of fact considers that the evidentiary mosaic coheres into a clear design. But a circumstantial case may fail if, at the end of the day, it remains a collection of disparate and not necessarily connected matter.

183 These principles are applicable to the present case which is based upon direct and circumstantial evidence.

D. OVERVIEW OF THE EVIDENCE

184 Evidence in the proceeding comprised affidavits or witness statements from 19 witnesses, oral testimony from 13 of those witnesses, a small number of transcripts of examinations conducted by the ACCC pursuant to s 155 of the Act and a large number of documents, generally business records.

185 Voluminous objections were taken to the evidence. For most of the objections, I made rulings in the course of receiving the evidence. In respect of the more complex objections, I provided written reasons for my rulings in *BlueScope (No 3)*.

186 Before trial, the parties prepared a court book that contained documents that were likely to be tendered in the trial. I informed the parties that I would regard a document as tendered if it was referred to and exhibited or annexed to an affidavit or witness statement, or had been referred to in written or oral submissions, without objection being taken to the document. At the conclusion of the trial, the parties prepared a final version of the court book which was intended to contain those parts of affidavits and witness statements read into evidence, documents tendered in evidence and the transcripts of the hearing. For reasons not explained, a small number of documents that were exhibited or annexed to an affidavit or witness statement were excluded from the final version of the court book provided to the Court. All such documents had been tendered in accordance with the direction I had given during the trial. No application was made to withdraw the tender of those documents. I have therefore had regard to those

documents in preparing these reasons despite their omission from the final version of the court book provided to the Court.

187 Many of the documents tendered were business records. One type of document requires explanation. BlueScope maintained an internet-based customer relationship management system called “Salesforce” which the CIPA Distribution Markets sales team used to record interactions (meetings and telephone calls) with customers. A significant number of Salesforce records were in evidence concerning relevant meetings or telephone calls. Having reviewed those records in light of all the evidence adduced in the proceeding, I make the following observations and findings about the records. First, the records frequently contain a very brief summary of what was discussed at the meeting or telephone call (often only a few words). It is apparent that such brief summaries are not a full record of the discussion at the meeting or in the telephone call. Occasionally, though, the record provides a more detailed statement of the interaction. Second, the records are in the form of a database table, where the data is organised in a row and column format similar to a spreadsheet. Each record has numerous data fields such as “Call ID”, “Account Name”, “Account Record Type”, “Call Date”, “Call Type”, “EventObject_DateTime”, “Location” and “Method”. In his written statement, Mr Hennessy confirmed that the Salesforce system had “drop down” menus. Having reviewed many Salesforce entries that were in evidence, I infer that the system automatically generated certain standardised entries which could be manually changed from a drop down menu. In particular, the time of the “event” (being a meeting or telephone call) was frequently recorded as 8.00 am, despite other evidence showing that the meeting occurred at a different time. That time seemed to be the default entry that would be recorded unless manually changed. So too, the field titled “Method” was frequently recorded as “face-to-face” despite other evidence showing that the interaction was by phone. Again, that method seemed to be the default entry that would be recorded unless manually changed. The system was therefore vulnerable to the risk that the person entering the data did not manually input data into all relevant fields in the database. While I have placed reliance on the Salesforce records in evidence, I have also been conscious of the possibility of error in some of the data fields in the records.

188 The testimonial evidence included recollections of conversations that occurred years ago in circumstances where few contemporaneous notes or documentary records were made of those conversations. The respondents submitted, and I accept, that the Court must approach the evidence of conversations with the usual degree of caution that applies to evidence based on fallible human memory years after the event: see *Watson v Foxman* (1995) 49 NSWLR 315 at

319. I also take into account, though, two countervailing factors. First, the conversations concerned a proposition advanced by BlueScope that involved a change in industry practice (at that time) and that was therefore “out of the ordinary”. BlueScope was proposing that distributors set their prices for flat steel products by reference to BlueScope’s recommended resale price. As such, the conversations are likely to have been more memorable for distributors. Second, there is a large body of testimonial and documentary evidence, discussed in these reasons, that has a tendency to corroborate the recollections of the witnesses.

189 In giving evidence, each of the witnesses acknowledged that they were unable to remember the precise words used in conversations that occurred many years ago. The witnesses were seeking to convey the gist of the conversations as they recalled them. It is also apparent that the witnesses could only recall, and were only giving evidence about, part of the conversations and not the entirety of the conversations. Again, though, the evidence concerned the parts of the conversations that I consider were likely to be memorable to the witnesses because they were “out of the ordinary”.

190 The following sections set out my overall findings with respect to the credibility and reliability of the witnesses called by the parties.

ACCC witnesses

191 The ACCC’s witnesses comprised a number of present and former employees of BlueScope, employees of steel distributors and an import trader, an ACCC employee and a solicitor employed by the Australian Government Solicitor. All except one of the ACCC witnesses gave evidence voluntarily. As discussed below, I generally found them all to be honest witnesses who did their best to recall events which occurred a considerable time ago. In a small number of instances, I found the witness evidence to be unreliable.

192 The one exception was Joseph Calleja who, at the time of giving evidence, was the Managing Director and part-owner of the Apex group of companies. Mr Calleja was an unwilling witness for the ACCC and was subpoenaed to give evidence. Mr Calleja’s evidence was the subject of consideration in *BlueScope (No 3)* (see [113]-[139]). As discussed below, Mr Calleja’s evidence was unsatisfactory and I found him to be an untruthful witness.

193 Two aspects of the ACCC’s witness evidence require initial comment.

194 First, in accordance with trial preparation orders made by the Court, the ACCC filed statements signed by its intended witnesses. For most witnesses, the ACCC filed multiple statements. The

statements had been prepared over time, with some statements dating back to 2017, before the proceeding had been commenced. It was apparent from their content that the subsequent witness statements had been prepared after the witness had been re-interviewed by the ACCC during which further questions were asked or further documents had been put to the witness. During cross-examination, the reliability of the recollection of a number of the witnesses was challenged on the basis that they had signed multiple witness statements. It was suggested to the witnesses that the subsequent witness statements involved later reconstructions and were therefore unreliable, or that the existence of multiple statements indicated that the witness's recollection was poor. In most instances, I considered the questions to be unfair and confusing for the witness. Lay witnesses, who were not familiar with legal procedures, had to explain why multiple statements had been prepared, when that was simply a consequence of the manner in which the ACCC prepared (and presented) its evidence in the proceeding. For the most part, the evidence given in subsequent witness statements was not inconsistent with earlier statements, but supplemented the earlier statements, usually by reference to documentary material. The subsequent witness statements frequently explained that a document referred to had not been available at the time the earlier statement was taken. It was also apparent that, in a number of instances, the ACCC had sought evidence on issues that had arisen as the case progressed and that were not adequately addressed in earlier witness statements. Overall, I was not persuaded that such challenges to the reliability of witnesses were of any real weight.

195 Second, at the request of the respondents, the ACCC agreed that certain passages from the witness statements would not be read into evidence and the ACCC would lead such evidence in oral testimony. During cross-examination, the reliability of the recollection of a number of the witnesses was challenged on the basis that their oral testimony diverged from their earlier written statement. My overall impression was that, in almost all cases, the divergence was of little moment. Inevitably, there was some divergence between the oral testimony and the original passage from the witness statement. For the most part, the divergence was merely a matter of the order in which facts or conversations were recounted or some differences in expression. On occasion, the oral testimony included a fact that was not part of the original passage. I was generally impressed with the clarity and coherence of the evidence that was given by the ACCC's witnesses in oral testimony. Nevertheless, in assessing the witnesses' testimony, I have made allowance for the fact that the events recounted occurred many years ago and it is likely that recollection of some matters of detail will be inaccurate.

Matthew Hennessy (formerly BlueScope)

196 Mr Hennessy was the Executive National Sales Manager for BlueScope CIPA from September 2009 to 1 July 2014.

197 Mr Hennessy commenced employment with BHP Steel limited (**BHP Steel**) in February 1993 as a Customer Service Representative. He worked at BHP Steel in various capacities until he left to become a Development Manager at Intermarket Technologies in September 1999. In or about 2003, BlueScope de-merged from BHP Steel. In August 2005, Mr Hennessy re-commenced his employment with BlueScope as a Strategic Support Manager. Mr Hennessy's career history at BlueScope from August 2005 is as follows:

- (a) from August 2005 to October 2006 – Strategic Support Manager;
- (b) from November 2006 to August 2009 – NSW/ACT Sales Manager;
- (c) from September 2009 to June 2014 – Executive National Sales Manager for CIPA;
- (d) July 2014 to April 2017 – NSW/ACT State Manager, BlueScope Building Components Division in which he managed the New South Wales component of the BlueScope Lysaght Australia and Fielders businesses.

198 After leaving BlueScope, Mr Hennessy was employed by Strategic Business Development Group.

199 In Mr Hennessy's role as National Sales Manager of CIPA, he reported to Bernie Landy from his commencement to 2 July 2011, Andrew Garey from 3 July 2011 to 31 August 2013 and then Mr Ellis from 1 September 2013 to 1 July 2014.

200 As National Sales Manager, Mr Hennessy was responsible for:

- (a) managing annual sales of greater than 700,000 tonnes of flat steel, with monthly market offers, and various business development and margin management activities;
- (b) managing and developing a team of approximately 23 employees;
- (c) strategic and business planning for distribution channel to market, including executing changes and growth to the BlueScope distribution channel;
- (d) managing customer relationships; and
- (e) contributing to the monthly sales and operations planning for CIPA.

201 Mr Sparks, Mr Gent, Mr Kelso and Todd Bryers reported to Mr Hennessy.

202 Mr Hennessy provided four witness statements dated 13 April 2017, 12 November 2018, 15 January 2019 and 1 July 2021. He gave evidence about the relevant meetings and conversations in which he took part during the relevant period, including with Mr Ellis, in the scope of his employment and authority as an employee of BlueScope.

203 Mr Hennessy gave evidence that by the time he began to report to Mr Ellis in September 2013, he had known him for at least 20 years. He had first met Mr Ellis back in 1993, when they were both working at BHP Steel. At some point over 2006 to 2009, Mr Ellis left BlueScope to become the General Manager for CMC's steel distribution business in Australia, CMC Steel. Whilst Mr Ellis was General Manager for CMC Steel, Mr Hennessy had some dealings with him in his capacity as a BlueScope customer. In around 2009, Mr Ellis came back to BlueScope as the country manager for Thailand and was based in Thailand. Mr Ellis moved back to Australia a week or so before he was due to start at BlueScope CIPA in September 2013.

204 Mr Hennessy was cross-examined. I found Mr Hennessy to be an honest and careful witness. As discussed in detail below, I accept Mr Hennessy's evidence on most matters. However, for reasons explained below, I have received his evidence concerning the characterisation of BlueScope's RRP strategy with some caution.

Dieter Schulz (formerly BlueScope)

205 Mr Schulz is a citizen of both the United States of America and Germany, and currently resides in the US. Mr Schulz has spent his entire career since 1980 working in the steel industry, and specifically international steel trading. From 1988, Mr Schulz was continuously employed by BHP, BHP Steel and later BlueScope, following its separation from BHP in 2002. In 2011, Mr Schulz was promoted to President of the International Markets Group (**IMG**) for BlueScope. In this role, Mr Schulz remained formally employed by BlueScope Steel North America, but reported up through the BANZ division of BlueScope. At the time of giving evidence, Mr Schulz was no longer employed.

206 In his role as President of IMG, Mr Schulz managed a team of approximately 36 people across approximately seven offices around the world. The role of IMG is both to sell and buy steel around the world, but largely to sell steel. Mr Schulz's team was responsible for all of BlueScope's export sales from Australia and New Zealand. Mr Schulz oversaw BlueScope's overseas offices in: Long Beach, California; Miami, Florida; Capetown, South Africa; Ho Chi Minh City, Vietnam; Seoul, Korea; Tokyo, Japan; and Port Kembla, Australia.

207 As part of Mr Schulz's role, he visited BlueScope's offices in Australia and overseas. He usually visited each office approximately two times per year. However, Mr Schulz was not involved in the sale of steel to distributors or customers in Australia and he agreed in evidence that the price and terms on which steel products were sold to distributors and customers in Australia was not within his remit.

208 Mr Schulz provided three statements dated 9 March 2018, 16 May 2018 and 27 March 2019. Mr Schulz was cross-examined. I found him to be an honest and careful witness and I accept his evidence in full.

Brian Kelso (BlueScope)

209 Mr Kelso commenced his career at BHP Steel (Los Angeles) in 1990 as a Sales Representative and since that time has been continuously employed by BHP Steel and, following its demerger from BHP in 2002, BlueScope. The roles that Mr Kelso has held and currently holds over that period include the following:

- (a) Between March 1994 and June 1995, Mr Kelso was an International Trader at BHP Steel and was responsible for managing export negotiations and the movement of steel products from Australia to Asia.
- (b) Between 1996 and 2002, Mr Kelso held various sales and management roles within BHP Steel in Australia.
- (c) Over the period 2002 to 2006, Mr Kelso remained a BlueScope employee, based in India, and was seconded to work for Tata BlueScope for some of that four year period.
- (d) Over the period January 2007 to June 2011, Mr Kelso held the role of Business Development Manager at BlueScope and was based in California, United States.
- (e) Over the period June 2011 to June 2014, Mr Kelso held the role of National Sales Manager at BlueScope, based in Brisbane, reporting to Mr Hennessy.
- (f) From July 2014 to the time of his giving evidence, Mr Kelso held the role of Manager, International Trade and Development, BlueScope Americas LLC, which is a wholly owned subsidiary of BlueScope. At the time of signing his first statement, Mr Kelso reported to Mr Schulz, Manager of IMG.

210 Mr Kelso's description of his role in the period June 2011 to June 2014 differed to some extent from the description of his role in the *dramatis personae* prepared by the parties (as set out earlier in these reasons). Nothing turns on the differences.

211 Mr Kelso provided three statements – one dated 15 March 2018 and two dated 14 July 2021. Mr Kelso was cross-examined. I found Mr Kelso to be an honest witness, but consider that not all of his evidence was reliable. At the time of trial, Mr Kelso remained a current employee of BlueScope and, as a result, was likely to be subject to an unconscious (if not conscious) incentive and desire to acquiesce with, or readily adopt, a characterisation of BlueScope’s conduct that was favourable to BlueScope’s interests in the proceeding. Unusually (in the context of cross-examination), Mr Kelso agreed with virtually every proposition put to him by BlueScope’s counsel in cross-examination, including a series of propositions that were expressed in a somewhat complex manner. These propositions were put to him immediately upon the commencement of cross-examination. The exchange was as follows:

Mr Kelso, can you see me and hear me clearly? --- Yes, I can.

Thank you very much. If at any time there is any difficulty please let me know. Mr Kelso, in your first statement, you refer to a strategy which you define as the RRP strategy; correct? --- Yes.

And is it correct that that strategy involved, firstly, modifying the existing BlueScope CIPA price list and existing distributor discounts by increasing slightly the gap between the list price and the net price? --- That’s correct.

And, secondly, providing the price list to distributors as a recommended resale price suggesting that they could use that price list as a benchmark for setting the prices they charge to their customers? --- That is correct.

Now, in applying that strategy, you were not intending to suggest to distributors, and you did not suggest, that they give up their freedom to set their own prices; correct? --- That is correct.

And you didn’t understand that was part of the strategy? --- That is correct.

Rather, you were hoping that the distributors that you dealt with would see the good sense of using the BlueScope price list as a benchmark when making their own decisions when setting their prices; correct? --- That is correct.

And that is what you understood was the strategy? --- Yes, that’s correct.

You were not intending to suggest, and you did not suggest, that distributors make any commitment to price in accordance with the recommended resale price or any commitment to increase their prices; correct? --- That’s correct.

And, again, you didn’t understand that was part of the strategy; correct? --- That’s correct.

And you understood, pursuant to the strategy, that distributors were to retain their pricing freedom, it was up to them whether or not they followed the price list; correct? --- That is correct.

And you were not intending that distributors be under any obligation to BlueScope to price in accordance with the price list or any obligation to increase their prices; correct? --- That is correct.

You also never suggested that and never sought such an obligation from any distributor; correct? --- That is correct.

And you didn't understand that was part of the strategy; correct? --- That is correct.

You never intended to enter into any understanding with distributors that they price in accordance with the price list or any understanding that they would increase their prices to their customers? --- That is correct.

Whether they did so or not was a matter entirely up to them; correct? --- Yes.

And you didn't think that entering into any understanding was part of the strategy? --- That is correct.

212 I formed the impression from the manner in which Mr Kelso answered those questions that he was familiar with the propositions that were put to him. As discussed below, however, the documentary record of Mr Kelso's contemporaneous communications are more consistent with the ACCC's allegations. That is not to say that Mr Kelso's evidence was dishonest; rather, I consider that Mr Kelso acquiesced with, or readily adopted, a characterisation of BlueScope's conduct that was favourable to BlueScope's interests in the proceeding which is explicable by his ongoing employment by BlueScope.

Noriaki Inomata (BlueScope)

213 Noriaki Inomata has worked in the steel industry for over 40 years. Since 1989, Mr Inomata has been continuously employed by BHP, BHP Billiton Limited, BHP Steel Limited and, following its demerger from BHP in 2002, BlueScope. Mr Inomata currently holds a management position within BlueScope Steel North Asia Ltd (a subsidiary of BlueScope). Mr Inomata has held the following positions within BHP or BlueScope:

- (a) From January 1989 to November 1993, Mr Inomata worked in Tokyo at BHP Trading Asia Ltd, a subsidiary of BHP, as the Manager of Steel Trading.
- (b) Between December 1993 and June 2000, Mr Inomata was employed at BHP Trading Asia Ltd as Vice President of Steel Products and the Manager of the BHP Trading Asia Ltd Japan Branch.
- (c) From July 2000 to November 2011, Mr Inomata worked as Regional Manager of North Asia at BHP Trading Asia Ltd (which, from 2002, became BlueScope Steel North Asia Ltd, a subsidiary of BlueScope).
- (d) Between December 2011 and June 2016, Mr Inomata was employed by BlueScope Steel North Asia Ltd as the Regional Manager of North Asia and the Manager of the

BlueScope Japan and BlueScope Vietnam offices. At this point, Mr Inomata commenced reporting to Mr Schulz.

- (e) Since July 2016, Mr Inomata no longer has responsibility for the Vietnam office but has retained his responsibilities as the Regional Manager of North Asia and the Manager for Japan.

214 Mr Inomata provided one statement dated 11 August 2017. Mr Inomata was not cross-examined.

Alison Minogue (BlueScope)

215 Ms Minogue has worked as an Executive Assistant at BlueScope since September 2010. Before August 2013, Ms Minogue worked as Executive Assistant to Mr Garey, General Manager, Sales and Marketing and Mark Crimmins, General Manager, Lysaght. Ms Minogue worked as Mr Ellis's Executive Assistant between 1 September 2013 and 2 August 2017 and also assisted Mr Ellis with some administrative matters in August 2013, prior to his commencement as General Manager.

216 Ms Minogue provided two witness statements dated 29 March 2019 and 31 July 2020. Ms Minogue was not cross-examined.

Sean O'Brien (formerly NZSA)

217 Mr O'Brien has spent over 21 years first working within the BHP Steel group, later BlueScope, and then NZSA. The key roles that Mr O'Brien had over the period 1992 to July 2014 were as follows (located in Victoria):

- (a) from 1992 to April 2000, various roles within BHP Building Products, Nunawading;
- (b) from April 2000 to May 2008, Area Manager, BSL Lysaght, Geelong; and
- (c) from May 2008 to July 2014, Manager, NZSA, Hawthorn East.

218 Mr O'Brien was also a Director of NZ Steel from 18 June 2008 until he stopped working for NZSA in July 2014.

219 At the time he gave evidence, Mr O'Brien was employed by the Dulux Group as State Sales Manager Vic/Tas, Fosroc.

220 Mr O'Brien provided two witness statements dated 2 May 2018 and 5 July 2020. Mr O'Brien was cross-examined. I found Mr O'Brien to be an honest and impressive witness. I accept his evidence in full.

Alec Highnam (BlueScope)

221 Mr Highnam's employment with BlueScope started in October 2005. Over time, Mr Highnam held various management roles at BlueScope and BlueScope North America, including in human resources and services. Relevantly, since 1 April 2016, Mr Highnam has been the Executive General Manager of People at BlueScope.

222 Mr Highnam provided one statement dated 1 April 2019. Mr Highnam was not cross-examined.

223 Ultimately, the parts of Mr Highnam's written statement that were tendered without objection concerned an interview conducted by Messrs Vassella and Highnam with Mr Ellis on 28 March 2017. The meaning of para 54 of Mr Highnam's statement was clarified by a statement of agreed facts tendered by the parties (exhibit A). The purpose of the interview was to obtain information concerning Mr Ellis's interactions with other BlueScope employees concerning the investigation then being conducted by the ACCC of the matters the subject of this proceeding. The background to the interview was that BlueScope had instructed Mr Ellis not to discuss the ACCC investigation with other BlueScope employees. Mr Highnam's evidence was that, in the interview, Mr Ellis admitted that he had not complied with that instruction and had contacted both Mr Hennessy and Mr Schulz about the investigation, although Mr Ellis stated that each of Mr Hennessy and Mr Schulz had refused to engage in the discussion. The discussions between Mr Ellis on the one hand, and Messrs Hennessy and Schulz on the other, are addressed below in the context of my assessment of Mr Ellis's credibility and reliability as a witness.

Luke Sparks (BlueScope)

224 At the time of trial, Mr Sparks remained an employee of BlueScope. Mr Sparks was not called as a witness by the ACCC. However, I allowed certain representations from two witness statements signed by Mr Sparks (dated 4 December 2017 and 7 July 2021) to be tendered as admissions in the case against BlueScope (but not against Mr Ellis): *BlueScope (No 3)* (see at [109]-[112]).

225 Mr Sparks commenced his career at BlueScope as Account Manager within the Building Markets Team in January 2011, and was based in Melbourne. In this role he was responsible

for managing customer relationships with BlueScope's key building market customers in Victoria. Between October 2011 and November 2012, Mr Sparks moved to the Distribution Markets Team and continued as an Account Manager. In this role, he was responsible for managing customer relationships with BlueScope's key distribution market customers in Victoria, including BlueScope Distribution, Apex Steel and CMC Steel. Mr Sparks reported to Andrew Walsh, who in turn reported to Mr Hennessy.

226 In November 2012, Mr Sparks was promoted within the Distribution Markets Team, to National Account Manager & Sales Manager for SA/NT and he also moved to Sydney. In this role, he was responsible for managing BlueScope's national distribution account with Southern Steel and had oversight of BlueScope's distribution sales in South Australia and the Northern Territory. Mr Sparks also assisted with managing the account of Apex Steel. During this period, Annette Arzoumanian, an Account Manager, had primary responsibility for the Apex Steel account, however Mr Sparks also had communications with Apex Steel as necessary, generally in relation to important issues or where customer queries needed to be escalated. His main contact at Apex Steel was Nello Compagnino, a senior manager at Apex Steel. Mr Sparks reported to Mr Hennessy.

227 In August 2014, there was an internal restructure within BlueScope and Mr Sparks became the NSW/ACT State Manager for Distribution and Manufacturing Markets. In October 2017, Mr Sparks moved back to Melbourne and became the Victorian State Manager for Distribution Markets.

228 My decision to permit the tender of Mr Sparks's written statements in the case against BlueScope but not in the case against Mr Ellis has had no material effect on my conclusions in each case. That is for two reasons. First, the evidence in Mr Sparks's written statements was largely duplicative of evidence given by others or was corroborated by the evidence of others. As such, while I refer to Mr Sparks's written statements in these reasons, that evidence has not affected my ultimate findings in any material respect. Second, Mr Sparks's written statements refer to a number of underlying documents which were business records of BlueScope. There was no objection to the tender of those documents and no dispute that they constituted business records of BlueScope and were admissible against both respondents on that basis.

Neil Lobb (CMC Steel)

229 Mr Lobb commenced his career in the steel industry in 1987 with BHP Steel in a range of sales and marketing roles based in Port Kembla, New South Wales. In March 2000, Mr Lobb joined

Smorgon Steel as a Sales Manager and in around 2003 became NSW State Manager of this business. In August 2007, Mr Lobb joined CMC (Australia) Pty Ltd (CMC) as the General Manager, Sheet and Coil within the steel distribution side of the business. In this role, Mr Lobb was responsible for sales of sheet and coil across Australia. CMC had two businesses: a steel trading business and a steel distribution business (which is referred to in these reasons as CMC Steel).

230 In around 2012, when CMC was re-structured into a state business, Mr Lobb was appointed as the State Manager for New South Wales within CMC Steel. In that role, Mr Lobb managed the sales and operations in New South Wales and reported to Mr Simpkin, the General Manager of CMC Steel (who managed CMC Steel on a national basis). Mr Simpkin reported to Mr Stedman who was the Managing Director of CMC Australia over the period of approximately 2011 to 2015. After a further re-structure in May 2014, where CMC Steel was reorganised into a national product distributor, Mr Lobb became General Manager, Sheet & Coil, CMC Steel.

231 Mr Lobb provided two witness statements, dated 9 July 2018 and 26 August 2020. Mr Lobb was cross-examined. Certain extracts from the transcript of a s 155 examination of Mr Lobb conducted on 23 May 2018 were tendered in cross-examination. I found Mr Lobb to be an honest and impressive witness and I accept his evidence in full.

232 The respondents submitted that Mr Lobb's evidence suffered from a number of inconsistencies, illogicalities and omissions and that his evidence must be approached with caution. I reject that submission. Ultimately, the respondents pointed to two matters that were said to undermine Mr Lobb's reliability as a witness. The first matter was that Mr Lobb's oral evidence concerning his discussion with Mr Ellis departed from an account he had given in the course of a s 155 examination many years earlier. The second matter was the fact that Mr Lobb did not speak to anyone within CMC about his conversation with Mr Ellis. Both matters are addressed later in these reasons. In respect of both, I accept the evidence given by Mr Lobb.

Joseph Calleja (Apex Steel)

233 Mr Calleja is the Managing Director and part-owner of the Apex group of companies. Apex Steel acquires a large proportion of its steel requirements from BlueScope.

234 In the course of its investigation of the conduct which is the subject of this proceeding, the ACCC took a written statement from Mr Calleja, which Mr Calleja signed as true and correct on 29 May 2018. The written statement described the business of Apex Steel and its

competitors and certain communications and dealings between BlueScope and Apex Steel which the ACCC alleges constituted an attempt by BlueScope and Mr Ellis to induce Apex Steel to make an arrangement or arrive at an understanding that contained a cartel provision. Relevantly, the statement recorded Mr Calleja's recollection of:

- (a) statements made at the Melbourne Airport meeting on 6 September 2013 between Messrs Ellis and Hennessy of BlueScope, Mr Calleja (representing Apex Steel) and a representative of each of Southern Steel, Vulcan Steel and Selection Steel;
- (b) the receipt by Apex Steel of a BlueScope pricing document on 17 September 2013 and associated communications; and
- (c) phone calls received by Mr Calleja from Mr Ellis from October 2013 and throughout 2014.

235 In respect of the Melbourne Airport meeting, Mr Calleja's written statement (at para 27) recorded that Mr Ellis said words to the following effect:

We are going to increase the prices that we charge to BlueScope's own distribution arms. We need to raise prices. There is an opportunity for all distributors to achieve better profit margins by increasing prices. BlueScope has an initiative, which I intend to implement, to set recommended retail prices for you.

We will be sending to you a price list around the middle of the month which will include our recommended retail price initiative. [sic] for December that you can benchmark your prices to for all your steel products. We encourage you to implement this initiative.

236 Mr Calleja's written statement (at paras 29 and 30) also recorded that, at the same meeting, Mr Ellis said words to the following effect:

We are going to limit tactical pricing.

and

We should keep this meeting quiet and amongst ourselves.

237 In relation to the BlueScope pricing document received by Apex Steel on 17 September 2013, Mr Calleja's statement recorded (at para 34) that, prior to receiving the document, Mr Hennessy had called him and said words to the following effect:

Hi Joe, I am going to send to you our December prices that includes our recommended retail pricing that Jason raised at our meeting on the 6th. We encourage you to implement it and raise your prices.

238 In respect of the phone calls received by Mr Calleja from Mr Ellis from October 2013 and throughout 2014, Mr Calleja's statement (at para 37) recorded that the message from these

conversations was that Mr Ellis was trying to put pressure on Mr Calleja to put pressure on his colleague Mr Compagnino (who was responsible for Apex Steel's pricing for flat steel products), to get him to increase prices in the market and buy more steel from BlueScope.

239 Mr Calleja was an unwilling witness for the ACCC. The ACCC issued a subpoena compelling Mr Calleja's attendance at the trial to give evidence. Mr Calleja attended the hearing to give evidence on 14 September 2021 in response to the subpoena.

240 During the course of Mr Calleja's testimony, I gave leave to the ACCC to ask leading questions of Mr Calleja concerning parts of his statement, a course which was objected to by the respondents. At the conclusion of Mr Calleja's testimony, the ACCC tendered Mr Calleja's written statement and the respondents objected to the tender. I allowed the tender of Mr Calleja's written statement and that part of his examination-in-chief which comprised the leading questions asked of Mr Calleja by the ACCC and Mr Calleja's answers: *BlueScope (No 3)* at [113]-[139].

241 While I admitted Mr Calleja's written statement and the relevant parts of his examination-in-chief, it remains to be determined how much weight should be afforded to each part of his evidence. The ACCC places reliance on Mr Calleja's written statement and those parts of his oral testimony that confirmed the accuracy of the written statement or were otherwise consistent with it. BlueScope submitted that the Court should place no weight on Mr Calleja's evidence. It submitted that Mr Calleja's vacillation as to the scope and content of his recollection, even after refreshing his memory by reference to his written statement, undermines any notion that his evidence could be relied upon safely. BlueScope argued that it also confirms that his oral evidence cannot be considered a reliable account of his interactions with Mr Ellis and erodes the reliability of Mr Calleja's written statement. Mr Ellis also submitted that the Court cannot place any weight on Mr Calleja's evidence, noting Mr Calleja's own evidence that he had reconstructed what had happened based on a pretty distant memory.

242 The course of Mr Calleja's testimony at trial is summarised in *BlueScope (No 3)* at [120]-[128]. It is an understatement to say that Mr Calleja was an unsatisfactory witness. Early in his cross-examination, Mr Calleja was taken to his written statement and he confirmed that he had signed it, said that he had read the statement several times recently and confirmed that the statement was true and correct to the best of his knowledge. It was never suggested to Mr Calleja that he was pressured in any way to agree to the statement or that the statement was otherwise than voluntary; nor was it put to Mr Calleja that the conversations recounted in the

statement were suggested to him by the ACCC. However, his subsequent oral testimony about the matters canvassed in the written statement was inconsistent with his evidence that the contents of the written statement were true and correct, with Mr Calleja stating that he could not recall important conversations recounted in the written statement. His oral testimony then became contradictory: in further examination-in-chief Mr Calleja stated (albeit being led) that he did recall the conversations; then in cross-examination he reverted to a lack of recollection. His evidence was implausible and inconsistent on some relatively insignificant matters.

243 Mr Calleja’s demeanour in answering questions indicated to me a wilful recklessness as to the truth of his testimony. I formed the impression that Mr Calleja sought to avoid giving clear evidence by saying that he could not remember matters and by agreeing to possibilities that were put to him, even if the possibilities were inconsistent with previous evidence given. I concluded from the whole of his evidence that Mr Calleja actively sought to avoid giving evidence that was unfavourable to BlueScope, to the point of being untruthful about his (lack of) recollection. I infer that the reason Mr Calleja adopted that course was his close commercial and personal ties with BlueScope. In that regard, I note that Apex Steel was an aligned distributor of BlueScope, purchasing a substantial quantity of its steel requirements from BlueScope. The evidence also established that Mr Calleja has known Mr Vassella (the Chief Executive Officer of BANZ) for a number of years and Mr Vassella was a close family friend. Mr Calleja had also known Mr Ellis since around early September 2013. In cross-examination, Mr Ellis confirmed that he and Mr Calleja sat on the “Colorbond Council” together and that Mr Ellis and Mr Calleja would see each other on a regular basis at the end of 2013 and the beginning of 2014 at Council meetings.

244 The following aspects of Mr Calleja’s evidence are illustrative:

- (a) Early in examination-in-chief, Mr Calleja said that he recalled having been served with a notice requiring him to attend a compulsory examination by the ACCC, but then gave evidence that he could not recall having further meetings with the ACCC, saying “I honestly can’t remember... I must have. I can’t remember.” I find that answer implausible in circumstances where Mr Calleja gave a signed written statement to the ACCC, which he recalled. His demeanour in providing the response (that he did not remember) indicated to me that he was seeking to avoid answering the question.
- (b) When asked in examination-in-chief what topics were discussed at the Melbourne Airport meeting on 6 September 2013, Mr Calleja responded as follows:

The markets, you know, how the market was. It was sort of just a conversation like, you know, four people would be having over a cup of tea or a beer. Nothing really much more than that. Now, this is where it's going to get a bit hard because I'm trying to remember a conversation from back then. But it was just general chit-chat, you know, and then it went on from there.

When asked what Mr Calleja meant by "and then it went on from there", Mr Calleja said:

...it was just general chit-chat of the market, how the market was going. What else – how – you know, probably how everyone was doing and that's where I found it a bit strange because, you know, probably Selection Steel had – you know, I couldn't work out why they were there. So I was very guarded of what I, you know, said. And I probably heard more than I said but trying to recall exactly what was said now is going to be – I can't completely [recall] everything but it was just general stuff about how the market was going. It was a very tough market at that stage. Jason did say something like, you know, he had been overseas and, you know, the market in Australia is much more aggressive and all over the place. You know, things like that. I'm only just plucking things that I can remember.

When asked whether Mr Ellis had said anything about why he had convened the meeting, Mr Calleja responded as follows:

No, not really. No. I – I – no, I don't. I don't remember word for word why we had the meeting. No, I don't. ... Probably to discuss the market, how everyone was doing and blah, blah, blah, things like that. But distinctly on one subject, no.

When asked whether he recalled anything being said about prices at the meeting, Mr Calleja replied:

No, I can't recall, sir. No.

In circumstances where Mr Calleja gave evidence that he had read his written statement several times recently, that it was true and correct to the best of his knowledge, and the statement recorded specific things said by Mr Ellis at the Melbourne Airport meeting about pricing, Mr Calleja's failure to refer to those matters in his oral testimony is striking. Mr Calleja proffered no explanation as to how he could attest to the accuracy of what was recorded in his written statement on the one hand, but then assert in testimony that he could not recall the critical matters, even in general terms. I formed the impression from Mr Calleja's demeanour and his response that the failure to refer to matters addressed in his written statement was a deliberate choice to obfuscate, not a lapse in memory. The impression was confirmed by three further matters. First, when pushed further in examination-in-chief, Mr Calleja said that he recalled that "they" (meaning BlueScope) were going to bring out a recommended retail price list, but he

recalled nothing else that was said about the price list. Second, when taken back to the contents of his written statement at para 27 (which referred to an explanation by Mr Ellis about BlueScope's plan to set recommended retail prices), Mr Calleja stated that he believed the paragraph to be correct and stated that he now remembered the event recorded. Third, in cross-examination, a subtly different version of Mr Ellis's statement was put to Mr Calleja and Mr Calleja said that that version was not inconsistent with what he recalled from the meeting, indicating that he had a recollection of the topic being discussed at the meeting.

- (c) When asked in examination-in-chief who spoke at the Melbourne Airport meeting, Mr Calleja said that he was sure that Mr Ellis did "a bit of the talking" and volunteered that he did not think that Mr Hennessy said anything because Mr Calleja could not "even remember him being there". A little later in examination-in-chief, Mr Calleja said that he did not know Mr Hennessy very well. During cross-examination, Mr Calleja was asked whether, at the meeting, it was possible that Mr Hennessy talked about BlueScope's price list rather than Mr Ellis, and he replied that he could not remember and that it was possible that it was Mr Hennessy. That answer was inconsistent with his earlier evidence, volunteered in examination-in-chief, that he could not remember Mr Hennessy being at the meeting.
- (d) When asked in examination-in-chief whether he remembered having any discussions with Mr Hennessy between the meeting on 6 September 2013 and receiving the CIPA price list, Mr Calleja replied:

As I've said, I really didn't know Matt Hennessy very well. So I honestly can – I just can't – you know he might have rang me to tell me it was coming. But I can't remember any specific conversations him and I had.

Again, in circumstances where Mr Calleja gave evidence that he had read his written statement several times recently, that it was true and correct to the best of his knowledge, and the statement recorded a specific conversation with Mr Hennessy about the CIPA price list, Mr Calleja's failure to refer to that conversation is striking. Again, Mr Calleja proffered no explanation as to how he could attest to the accuracy of what was recorded in his written statement on the one hand, but then assert in testimony that he could not recall critical matters. I again formed the impression from his demeanour and response that Mr Calleja was deliberately obfuscating. That impression was confirmed by two further matters. First, when taken back to the contents of his written statement at para 34, Mr Calleja stated that he believed the paragraph to be correct, that

he remembered a conversation with Mr Hennessy, that he could not remember every word that was said and that what was recorded in para 34 was “about as good as I can recall it”. Second, in cross-examination, a subtly different version of Mr Hennessy’s statement was put to Mr Calleja and Mr Calleja agreed that it was possible that that was what Mr Hennessy said, indicating that Mr Calleja had a recollection of a conversation with Mr Hennessy.

- (e) When asked in examination-in-chief whether he remembered having any subsequent discussions with Mr Ellis after receiving the CIPA price list, Mr Calleja replied that he would have had three or four phone calls but all that he could recall was that the calls related to Apex buying more steel from BlueScope. For the same reasons as given above, I consider that Mr Calleja’s answer to that question involved deliberate obfuscation.

245 As I have found that Mr Calleja was untruthful when giving oral testimony, I place no reliance on that testimony save in the following respects.

246 First, I place some weight on Mr Calleja’s testimony in which he confirmed the accuracy of his written statement. The confirmation ran counter to Mr Calleja’s overall approach which was to avoid giving evidence that was unfavourable to BlueScope and therefore lent some credibility to the evidence. It was open to Mr Calleja to explain, before giving that evidence, that he was unable to confirm the accuracy of the written statement, but he did not do so. On two occasions he verified the statements as an accurate record. Nevertheless, I also place some weight on Mr Calleja’s oral testimony concerning the statement that:

- (a) the statement was prepared some four and a half years after the events referred to in the statement;
- (b) it was hard to remember exact conversations that Mr Calleja had had with people four and a half years earlier;
- (c) at the time Mr Calleja prepared his statement, he did not have any notes of any conversations referred to in the statement and he had to reconstruct the conversations based on a pretty distant memory; and
- (d) that remained the case at the time of giving evidence.

247 I accept the truth of that evidence, which means that the evidence given in the written statement about conversations that occurred many years prior must be received with some caution.

Nevertheless, the evidence can be weighed with other evidence concerning the same events or similar contemporaneous events. I accept the truth of other evidence given in the written statement concerning the business of Apex Steel and its competitors.

248 Second, I also place some weight on Mr Calleja’s oral testimony about the relevant events without being led, specifically that:

- (a) Mr Ellis telephoned Mr Calleja to invite him to the Melbourne Airport meeting and told Mr Calleja who would be attending;
- (b) the meeting was attended by Messrs Ellis and Hennessy, Mr Wells from Vulcan Steel, Mr Peter Smaller from Southern Steel and Mr Gregory from Selection Steel;
- (c) Mr Calleja thought it was “strange” for that group of people to be having a meeting because Apex Steel and Southern Steel were aligned distributors of BlueScope whereas Selection Steel was perceived as a major competitor of BlueScope and Vulcan Steel was buying steel from NZ Steel but not BlueScope; and
- (d) he was “told to keep [the meeting] quiet” by either Mr Ellis or Mr Hennessy.

249 Third, I generally accept Mr Calleja’s oral testimony concerning the market for the supply of flat steel products and the competitors to Apex Steel.

Dale Wood (Selwood Steel)

250 Mr Wood has worked in the processing and distribution of flat steel products since 1979 in a number of companies including ARC Engineering, Blyth Greene Jourdain, George Ward Steel and Brice Metals. At Brice Metals, Mr Wood was the Victorian State Manager. In Victoria, Brice Metals began by selling surplus BHP metal. Subsequently, Brice Metals’ Victorian operation began acquiring flat steel products from NZ Steel and then from Australian import traders, such as CMC Trading, Wright Steel, Minmetals Australia (**Minmetals**), Insteel and Stemcor. Sometime after Mr Wood left Brice Metals, it was taken over by Surdex Steel.

251 In 1991, Mr Wood started his own company, Celhurst Pty Ltd, and commenced his own sheet metal distribution and processing business under the trading name “Selwood Steel Trading” (Selwood Steel). Mr Wood is the sole director and company secretary of Celhurst Pty Ltd. When Mr Wood started trading, he sourced Australian made surplus metal products from Met Steel (a South Australian company that no longer trades) and supplied it to domestic customers. Around 12 months later, Mr Wood began to source his first imported flat steel products through import traders such as Minmetals and Wright Steel. By approximately 1993, Mr Wood started

to be supplied by NZ Steel, an arrangement which continues. Mr Wood started sourcing flat steel product from NZ Steel because, for government contracts, it could be considered “Australian content” under the Trans-Tasman Agreement. In the relevant period, NZSA and Wright Steel were Selwood Steel’s two largest suppliers.

252 Mr Wood provided three witness statements dated 11 September 2017, 1 August 2018 and 31 August 2020. He also gave further oral evidence and was cross-examined. A central aspect of Mr Wood’s evidence concerned a meeting with Messrs Ellis and Whitfield of BlueScope which occurred on 30 October 2013 at Selwood Steel’s premises. I found Mr Wood to be an honest witness and I generally accept his evidence. However, as discussed later in these reasons, there are some matters of detail concerning the meeting on 30 October 2013 in respect of which I have less confidence in Mr Wood’s recollection.

253 The respondents sought to impugn Mr Wood’s credit on two bases, each related to the evidence given by Mr Lenton. First, Mr Ellis submitted that Mr Wood had a motive to give evidence adverse to BlueScope, relying on Mr Lenton’s evidence that he believed that Mr Wood was concerned about BlueScope’s anti-dumping actions. Second, Mr Ellis submitted that Mr Wood’s account of his conversations with Mr Lenton were contradicted by Mr Lenton’s evidence about those conversations. I reject those submissions. I do not consider that Mr Lenton’s evidence established that Mr Wood had a motive to give false evidence against BlueScope and I regard any inconsistency between the evidence of Mr Wood and Mr Lenton as insignificant. Those matters are discussed in more detail in the context of Mr Lenton’s evidence below.

254 The respondents also sought to impugn Mr Wood’s reliability, principally on the basis that Mr Wood’s evidence had likely been contaminated by conversations with other industry participants, including Mr Wright, over the years. In his written and oral evidence in chief, and in cross-examination, Mr Wood readily acknowledged that he had discussed the events at the meeting on 30 October 2013 with others: first, with other members of his staff; second, with Mr Wright; and third with Mr O’Brien and Darren Fogarty of NZSA. As discussed further below in the context of Mr Wood’s evidence concerning the 30 October 2013 meeting, I am not persuaded that the substance of Mr Wood’s evidence is unreliable by reason of contamination, although I have not given weight to certain matters of detail. None of the persons with whom Mr Wood discussed the events of 30 October 2013 attended the meeting.

Accordingly, none had their own version of the events such as to “contaminate” Mr Wood’s recollection.

Gary Collis (Selection Steel)

255 Mr Collis commenced employment with Selection Steel in 1984. For the past 33 years, he has worked in various managerial roles selling steel sheet and coil products. Since 2001, he has been General Manager for Sales and Trading. Mr Collis reports directly to the Managing Director and owner of Selection Steel, Mr Gregory, who bought the business in around 2000.

256 Mr Collis provided two witness statements dated 16 August 2017 and 13 July 2021. Mr Collis was cross-examined. I found Mr Collis to be an honest and careful witness and I accept his evidence save in one respect. Mr Collis gave evidence that he attended two meetings with Messrs Ellis and Hennessy of BlueScope in the company of Mr Gregory. He said that the first meeting was in late August or early September 2013 and the second meeting was on 13 September 2013. There is no documentary record of the first meeting and neither Mr Ellis nor Mr Hennessy recall it. Based on what Mr Collis said was discussed at the first meeting, I consider it probable that Mr Collis’s recollection of having attended two meetings in the period prior to 13 September 2013 was mistaken and that the discussions that Mr Collis refers to in his evidence occurred at the 13 September 2013 meeting.

Rhys Jones (Vulcan Steel)

257 Rhys Jones has been a director of Vulcan Steel for around 12 years. At the time of giving evidence, he also held the role of Chairman of the Executive Board of Vulcan Steel NZ which deals with the operational day-to-day running of the business. The founder of the Vulcan group of companies and the Chairman of the Board of Directors is Mr Wells.

258 Mr Jones provided two witness statements dated 19 October 2017 and 27 July 2020. Mr Jones was cross-examined. I found Mr Jones to be an honest and impressive witness and I accept his evidence in full.

Malcolm Griffith Wright (Wright Steel)

259 Mr Wright has worked in the steel industry since about 1977, first as a sales cadet at ANI Austral Steel, then in a sales role at Dawborn Steels Trading Pty Ltd and as a Senior Steel Trader with Heine Brothers. In August 1985, Mr Wright registered his own company, Wright Steel Trading Pty Ltd. Through this business, Mr Wright was involved in trading activities between overseas flat steel suppliers and Australian wholesale distributors or end use flat steel

product manufacturers. That business ceased trading in February 2001. At that time, Mr Wright formed a joint venture with a Chinese investing house, Citic, through a different company, Wright Steel (Sales) Pty Ltd (which is referred to in these reasons as Wright Steel). The joint venture imports sheet and flat steel products into Australia.

260 Mr Wright provided four witness statements dated 3 March 2017, 20 September 2017, 18 August 2020 and 25 May 2021. Mr Wright was cross-examined. I found Mr Wright to be an honest witness and I generally accept his evidence. However, he was not entirely reliable on all issues. In particular, there were areas of inconsistency in respect of:

- (a) whether Mr Wright mentioned the ACCC at the dinner on 12 September 2013 with Messrs Ellis and Hennessy; and
- (b) whether Mr Wright was concerned that BlueScope would propose to the overseas mills that supplied Wright Steel (Yieh Phui and China Steel Trading Corporation (**China Steel**)) that they should increase their prices.

261 As I will address in further detail below, I am not prepared to accept Mr Wright's evidence on those points.

262 The respondents sought to impugn Mr Wright's credit on the basis that he had initiated a complaint to the ACCC about BlueScope's conduct (and it may be that the ACCC's investigation of the matters the subject of this proceeding originated in Mr Wright's complaint). The respondents submitted that Mr Wright appreciated that the ACCC would not be interested in merely protecting Wright Steel's commercial interests, but might be interested in potential cartel conduct on the part of BlueScope. Mr Wright made a complaint about BlueScope to the ACCC in about August 2015 and his complaint included reference to the dinner with Mr Ellis and Mr Hennessy. The respondents submitted that it is likely that Mr Wright's desire to make an ACCC complaint subconsciously or consciously affected his perception of what he recalled, to the point where his account became nothing more than a reconstruction of what Mr Ellis said, attuned to the possibility of a cartel complaint.

263 In cross-examination, Mr Wright accepted that one of the reasons that he had made a complaint to the ACCC about BlueScope in 2015 was because BlueScope had recently approached a significant customer of Wright Steel in a manner that Mr Wright considered was unfair. That event caused Mr Wright to obtain legal advice about activities of BlueScope that might "have been seen to be against the anti-competitive law". Following the receipt of that advice, Mr

Wright made a complaint to the ACCC. There is nothing unusual in that sequence of events. It does not provide a foundation for a conclusion that “Mr Wright’s desire to make an ACCC complaint subconsciously or consciously affected his perception of what he recalled”. It merely explains why Mr Wright made the complaint to the ACCC at the time that he did. I reject the respondents’ submissions that Mr Wright’s evidence concerning what Mr Ellis said at the dinner on 12 September 2013 was “nothing more than a reconstruction ... attuned to the possibility of a cartel complaint”. I consider the respondents’ criticisms of Mr Wright’s evidence in more detail later in these reasons.

264 The respondents further submitted that the manner in which Mr Wright gave his evidence exposed that he wanted his evidence to assist the ACCC’s case, and was trying to ensure his evidence would not be adverse to that case. In support of that submission, the respondents referred to various aspects of Mr Wright’s oral testimony which, they contended, demonstrated that Mr Wright repeatedly resisted propositions put to him, only to eventually concede the proposition when it became clear to him that his denial was illogical, or contradicted by something else. I reject the respondents’ assessment of Mr Wright’s evidence. While Mr Wright’s evidence was not always fluently delivered, I did not perceive that he was seeking to advance the ACCC’s case regardless of truth. The inconsistencies that arose in his evidence were, in my view, explicable by confusion about the questions that were asked.

265 The respondents also submitted that “the fact that Mr Wright was acting in the interest of the ACCC’s case was even put in writing”, referring to an email between Mr Wright and the ACCC on 16 October 2018. The relevant email exchange between the ACCC and Mr Wright appears to have arisen from a phone call between the ACCC and Mr Wright that day, with an ACCC officer sending Mr Wright an email thanking him for his time. Mr Wright replied stating: “Thanks for the contact and I will endeavour to get as much info as possible to assist the cause??”. A subsequent email from the ACCC the same day showed that the information being sought by the ACCC was factual in nature, including: (i) market information relevant to the types of flat steel products, prices and volumes that Wright Steel sourced from its main suppliers over the period 2012 to 2017 (including who the suppliers were); (ii) anti-dumping applications that were lodged against Yieh Phui and China Steel before September 2013 and the outcome of those applications; (iii) anti-dumping applications that were lodged against Yieh Phui and China Steel after September 2013 and the outcome of those applications; and (iv) any correspondence between Wright Steel and its customers in relation to their purchasing decisions over the period 2013 to 2017, and which may have had an impact on the reduction in

Wright Steel's profitability. When Mr Wright's email to the ACCC is read in context, the respondents' submission that Mr Wright "was acting in the interest of the ACCC's case" can be seen to be overblown.

Grant Elliott (ACCC)

266 Mr Elliott is employed by the ACCC. At the time of giving evidence, Mr Elliott held the position of Director in the ACCC's Competition and Cartels branch, New South Wales. Subject to the direction of ACCC and more senior staff of the ACCC, Mr Elliott was the Director responsible for an investigation into alleged cartel conduct involving BlueScope and other possible parties between 21 September 2015 and 26 February 2018.

267 Mr Elliott provided a witness statement dated 11 December 2018 and an affidavit affirmed on 9 September 2021. Mr Elliott gave evidence about the ACCC's receipt of a s 155 response from Yieh Phui. Mr Elliott was cross-examined. I found Mr Elliott to be an honest and careful witness and I accept his evidence in full.

Christopher Steger (Australian Government Solicitor)

268 Mr Steger is a solicitor employed by the Australian Government Solicitor, the lawyers representing the ACCC. Mr Steger affirmed an affidavit dated 15 September 2021. The affidavit annexed a LinkedIn profile for "Luke S", which I accept is Luke Sparks, accessed on the date of the affidavit. The profile showed that, as at that date, Mr Sparks held the role of National Sales Manager at BlueScope. Mr Steger was not cross-examined.

Transcripts of examinations

269 In addition to calling the above witnesses, the ACCC also tendered extracts of transcripts of examinations of the following employees of BlueScope conducted pursuant to s 155 of the Act:

- (a) Mr Vassella conducted on 17 July 2018;
- (b) Mr Unicomb conducted on 5 March 2018; and
- (c) Anthony Palermo (who held the position of National Pricing Manager for CIPA during the relevant period) conducted on 6 April 2018.

270 The transcripts were tendered as admissions in the case against BlueScope, but were not admissible in the case against Mr Ellis.

271 I have adopted a cautious approach in placing reliance on the transcripts of the s 155
examinations. The documents that were tendered comprised extracts and, in many instances, I
was not satisfied that the extract provided a full account of the examinees' statements in respect
of a particular topic. Indeed, the manner in which the extracts had been compiled meant that
the full context in which many statements were made could not be determined. In preparing
this judgment, I have only placed reliance on the transcripts where I was satisfied that the
extract provided a full account of the examinees' statement on a topic. For that reason, there is
only limited reference to the transcripts in these reasons.

272 The tender of the transcripts in the case against BlueScope but not in the case against Mr Ellis
has had no material effect on my conclusions in each case.

BlueScope Witnesses

273 BlueScope adduced evidence from a single witness in the proceeding, reading an affidavit of
Paul Bickley, Head of Global Security Operations for BlueScope. Mr Bickley gave evidence
regarding the export of Mr Ellis's Microsoft Outlook calendar entries. Copies of these
Microsoft Outlook calendar entries dated between 29 July 2013 and 3 November 2013, and an
entry on 8 April 2014, were exhibited to Mr Bickley's affidavit. Mr Bickley was not cross-
examined.

Witnesses for Mr Ellis

274 Mr Ellis gave evidence and also adduced evidence from Simon Lenton.

Simon Lenton

275 Mr Lenton is currently Sales Manager at Scottsdale Construction Systems Ltd (**Scottsdale**), a
position he has held since August 2021. Before commencing his employment with Scottsdale,
Mr Lenton had a few different roles in the steel industry over the course of 35 years including
(relevantly):

- (a) from approximately June 2014 to March 2019, he worked as an import trader for Crofts
Mitsubishi; and
- (b) from 1987 to 2010, Mr Lenton worked for CMC Steel, where he was employed in
various roles (and in the period from 2008 to 2010, for approximately 18 months, he
reported to Mr Ellis when he was the State Manager for Queensland and the Northern
Territory).

276 An affidavit of Mr Lenton, sworn on 21 September 2021, was read by Mr Ellis and Mr Lenton was cross-examined.

277 The only purpose of Mr Lenton’s evidence was to impugn Mr Wood’s credit. Mr Ellis submitted that Mr Lenton’s evidence established that Mr Wood had a motive to give evidence adverse to BlueScope. Mr Ellis also submitted that Mr Wood’s account of his conversations with Mr Lenton were contradicted by Mr Lenton’s evidence about those conversations which should be accepted. I reject those submissions and consider that Mr Lenton’s evidence has no material bearing on the matters raised in the proceeding.

278 Mr Lenton’s affidavit was not sworn, filed and served until after the close of the ACCC’s case. Accordingly, Mr Wood was cross-examined in circumstances where neither Mr Wood nor the ACCC had any notice of the existence or content of Mr Lenton’s affidavit. It should also be noted that Mr Wood was cross-examined by BlueScope’s counsel (and not by Mr Ellis’s counsel), and I cannot assume that BlueScope had, at that time, received a copy of Mr Lenton’s affidavit (although BlueScope must have had some basis for the questions put to Mr Wood concerning conversations with Mr Lenton).

279 In the course of cross-examination, Mr Wood was asked about his dealings with Mr Lenton. Mr Wood confirmed that, on behalf of Selwood Steel, he purchased steel from Crofts Mitsubishi and dealt with Mr Lenton in that context. Mr Wood was asked whether he discussed with Mr Lenton that Mr Wood had been contacted by the ACCC for information regarding BlueScope’s behaviour in the market. Mr Wood answered that he did not specifically recall but he “probably would have”. Mr Wood was asked whether he discussed with Mr Lenton that he would do his “best to ensure that BlueScope and Mr Ellis got what’s coming to them”. Mr Wood answered “not at all”. Mr Wood was asked whether he suggested to Mr Lenton that he “had spent a lot of time conferring with others to try and get as much ammunition as possible against” BlueScope, to which Mr Wood again answered “not at all”. Mr Wood was asked whether he suggested to Mr Lenton that he was unhappy with BlueScope because of their actions in relation to anti-dumping, to which Mr Wood replied “yes”.

280 In his affidavit, Mr Lenton gave evidence concerning two conversations that he had with Mr Wood during the time that Mr Lenton was working for Crofts Mitsubishi.

281 In relation to the first conversation, Mr Lenton said in his affidavit that he did not recall when the conversation occurred, but thought it was in early 2018. Mr Lenton also said that he could

not recall the precise words that were used, but he said that during the conversation Mr Wood said words to the effect that “Griff and I have both lost significant dollars as a result of Bluescope and Ellis” and “We’re going to put a stop to this”. Mr Lenton understood that “Griff” was a reference to Griff Wright of Wright Steel and that the reference to losing “significant dollars” was a reference to successful anti-dumping applications that had been filed by BlueScope. Mr Lenton also said that he recalled Mr Wood saying, both before this meeting and after the meeting, words to the effect that BlueScope’s anti-dumping applications were hurting his business and were hurting Griff. It can be immediately observed that the affidavit evidence does not coincide with the propositions put to Mr Wood in cross-examination.

282 In cross-examination, Mr Lenton was circumspect about his recollection of the first conversation. He said that he only vaguely recalled the date of the conversation (in early 2018). Mr Lenton agreed that, as at 2018, all import traders had lost money as a result of BlueScope’s anti-dumping actions. He also agreed that, instead of Mr Wood saying that he had lost significant dollars as a result of BlueScope’s actions, Mr Lenton may have projected his assumption that everyone dealing in imports had lost a significant amount. He also agreed that, instead of Mr Wood saying that “We’re going to put a stop to this”, Mr Lenton may be projecting his recollection of the general attitude in the industry at that time. Mr Lenton also agreed that his first conversation with Mr Wood was about the effect of anti-dumping actions on the steel industry and had nothing to do with the ACCC investigation at that point in time.

283 Mr Lenton said that the second conversation occurred at a meeting at the premises of Selwood Steel. Mr Lenton could not recall precisely when that meeting occurred, but thought it may have been in mid to late 2018. Mr Lenton also could not recall the precise words that were used, but he said that during the conversation Mr Wood said words to the effect that he had had three or four people from the ACCC in the office, that “Griff and I have had a gutful, and we’re going to make sure that justice is done” and that “I’ve spoken to other people too. We’re trying to gather as much ammunition as possible”. The reference to gathering ammunition was put to Mr Wood in cross-examination but denied by him.

284 In cross-examination, Mr Lenton was again circumspect about his recollection of the conversation. He described the date of the meeting as “roughly” mid to late 2018. Mr Lenton said that he was not sure of the subject of the conversation that Mr Wood had with the ACCC.

285 Overall, I consider that the differences between Mr Lenton’s evidence and, having regard to what was put to him, Mr Wood’s evidence is inconsequential and does not impugn Mr Wood’s

credit. As to the first conversation, Mr Wood agreed in cross-examination that he suggested to Mr Lenton that he was unhappy with BlueScope because of their actions in relation to anti-dumping. As to the second conversation, Mr Wood agreed in cross-examination that, while he could not specifically recall, he probably would have discussed with Mr Lenton that Mr Wood had been contacted by the ACCC for information regarding BlueScope's behaviour in the market. As to Mr Wood's denial that he said to Mr Lenton that he would do his "best to ensure that BlueScope and Mr Ellis got what's coming to them" and that he "had spent a lot of time conferring with others to try and get as much ammunition as possible against" BlueScope, I do not have a high degree of confidence that Mr Lenton's evidence was an accurate recollection. Even if it was an accurate recollection, I consider that Mr Wood answered to the best of his recollection. The conversation with Mr Lenton occurred some three years earlier and Mr Wood had no prior notice of the questions and therefore no prior opportunity to reflect on the conversation. As to Mr Ellis's submission that Mr Wood's unhappiness about BlueScope's anti-dumping actions gave him a motive to give exaggerated or dishonest evidence about BlueScope, that circumstance does not undermine my confidence in Mr Wood's evidence.

Mr Ellis

286 Mr Ellis has a Bachelor of Arts (Political Science) from the University of Sydney (1989-1991) and a Masters in Commerce from the University of Wollongong (1993-1994). He is currently the Deputy Chairman of EmPower Steel Co. Ltd, a role that he has occupied since October 2017.

287 Mr Ellis has had a long career in the steel industry, working in Australia and in many Asian countries. From 1993 to 1999, Mr Ellis held various finance, marketing, sales & operational roles within BHP, including Sales Manager BHP Lysaght (Thailand) from January 1997 to March 1999. In April 1999, Mr Ellis became President for BHP Lysaght (Sri Lanka), in February 2001 he became President BHP Lysaght (Thailand), in July 2003 he became Vice President Business Development, BSL Lysaght (Australia) and in July 2004 he became President, Tata BlueScope Steel (India). Between October 2006 and January 2008, Mr Ellis was President of Butler (China).

288 Between February 2008 and March 2010, Mr Ellis was Group General Manager for CMC Steel. During this period, CMC Steel operated as a distributor of long steel products and flat steel products in New South Wales, Queensland, Victoria, South Australia and Western Australia. CMC also operated an import trading business (CMC Trading), but Mr Ellis was not involved

in that part of the business. Mr Ellis's primary responsibilities included managing its procurement, steel processing and sales functions.

289 In April 2010, Mr Ellis returned to BlueScope and became President BSL Thailand, which was a joint venture between BlueScope and Loxley Pty Limited. In this role, Mr Ellis was responsible for sales and manufacturing of steel products in Thailand by the joint venture.

290 In August 2013, Mr Ellis returned to Australia to take up the position of General Manager, Sales & Marketing for BlueScope CIPA which formally commenced on 1 September 2013. From April 2017 until August 2017, Mr Ellis was the VP Innovation and Product Development for CIPA. Up until June 2017, Mr Ellis was also a Director of the Australian Steel Institute and the Bureau of Steel Manufacturers of Australia.

291 In his role as General Manager, Sales & Marketing for CIPA, Mr Ellis reported directly to Mr Vassella, the Chief Executive Officer of BANZ. Mr Ellis's role included responsibility for:

- (a) sales of steel products in Australia;
- (b) oversight of BlueScope's supply chain;
- (c) marketing of steel products in Australia;
- (d) innovation which encompassed improvements in the quality and standards of BlueScope's steel products; and
- (e) trading which included the functions of CIPA's IMG sales area.

292 Mr Ellis read an affidavit sworn by him on 26 September 2021, following the close of the ACCC's case. Mr Ellis was called as a witness on 27 September 2021 and was cross-examined for nearly four days.

293 Certain of the ACCC's witnesses gave evidence of their perceptions of Mr Ellis's character. I do not place any weight on that evidence. While I do not doubt that the witnesses held the perceptions of Mr Ellis's character that they recounted, in my view those subjective perceptions do not provide a reliable basis on which to assess Mr Ellis's credibility as a witness and are not otherwise probative of any fact in issue. It is therefore unnecessary to refer to that evidence.

294 From the totality of the evidence given by Mr Ellis in the proceeding, I formed the impression that Mr Ellis was an unreliable, unsatisfactory and, in some respects, dishonest witness. While Mr Ellis's evidence is discussed throughout these reasons, a number of overarching matters are noted in this section.

295 An important matter which requires addressing at the outset concerns Mr Ellis’s conduct in the period between April 2016 and March 2017 after he became aware that the ACCC was conducting an investigation into BlueScope’s conduct, the subject of this proceeding. Mr Ellis became aware of the ACCC’s investigation in April 2016 when BlueScope received a notice from the ACCC under s 155(1)(b) of the Act requiring the production of documents to the ACCC. I consider that Mr Ellis’s conduct in that period materially undermines his credibility as a witness in this proceeding.

296 Both Messrs Hennessy and Schulz gave evidence concerning meetings and conversations held with Mr Ellis between April 2016 and March 2017. That evidence is described below. The evidence was unchallenged at trial. Aspects of that evidence were put to Mr Ellis in cross-examination. Mr Ellis generally testified that he did not recall saying the things attributed to him by Mr Hennessy and Mr Schulz. I accept the evidence of Messrs Hennessy and Schulz, who were not challenged on that evidence. In my view, the evidence shows that Mr Ellis urged each of Mr Hennessy and Mr Schulz to give information to the ACCC that was false or misleading, knowing that the information was false or misleading. Mr Ellis’s knowledge of the falsity of the information is apparent from the content of his conversations with Messrs Hennessy and Schulz (set out below).

297 In his affidavit, Mr Ellis acknowledged that, on 8 December 2019, he was charged with two counts of inciting the obstruction of a Commonwealth official pursuant to ss 11.4(1) and 149(1) of the Commonwealth Criminal Code arising out of the discussions he had had with Messrs Hennessy and Schulz in relation to the ACCC investigation. On 1 September 2020, Mr Ellis pleaded guilty to a single “rolled-up” charge of inciting the obstruction of a Commonwealth official. Mr Ellis gave evidence that he pleaded guilty because he “recognised that what [he] had done was wrong and ... that it was an offence”. On 15 December 2020, Mr Ellis was sentenced to a term of imprisonment of eight months, suspended on condition that he pay a recognizance of \$1,000 and be of good behaviour for that term of eight months and for a further period of two years. In respect of his conduct, Mr Ellis deposed that:

I deeply regret the conduct that is the subject of the criminal proceedings. If I had my time again, I would not have engaged in that conduct. I accept that it was a serious error of judgment on my part. I pleaded guilty because I recognised that what I had done was wrong and because I recognised that it was an offence.

298 However, in cross-examination, Mr Ellis attempted to put a different complexion on his conduct and guilty plea. Initially, Mr Ellis gave the following evidence:

...in relation to Mr Hennessy, what, as you understand it, is the conduct that you engaged in that was obstruction? --- What I was charged with was obstruction in trying to prevent a Commonwealth official in doing their job and that I guided Mr Hennessy in his evidence.

Yes. You understand that the relevant conduct was that you sought to have Mr Hennessy give false evidence to the ACCC? --- Yes. Correct.

And you also sought to have Mr Schulz give false evidence to the ACCC? --- That was the charge, yes.

I'm sorry. Just that language you used then: "That was the charge". Do you accept that you sought to have Mr Hennessy – I'm sorry, Mr Schulz, give false evidence to the ACCC? --- Yes, unreservedly. I was guilty and I pleaded guilty and I'm extremely remorseful for it.

299 Subsequently, Mr Ellis gave the following evidence:

... You don't believe that you sought to have Mr Hennessy give information to the ACCC that was false. You believe that you sought to have Mr Hennessy give information to the ACCC that reflected your recollection of events but not his recollection of events? --- Yes. That's my position. Which is one of the reasons why I did not agree to the statement of facts put forward by the ACCC in the criminal case.

...

... your position is that the things that you told Mr Hennessy about between April 2016 and March 2017 were things that, in fact, occurred, at least as you remember them? --- As far as I recalled them, yes.

It was just that Mr Hennessy didn't remember them in that way? --- Correct. Yes.

And does that also apply to Mr Schulz? --- Well, you would have to ask me specific questions on Mr Schulz but in general, yes, that's correct.

So the things that you wanted Mr Schulz to say to the ACCC weren't things that you thought were untrue. They were just things that Mr Schulz's recollection about didn't accord with your recollection? --- Yes, that is correct. And that's one of the primary reasons why I didn't agree with the statement of facts presented by the ACCC.

Yes. Your position is that, again, the information that you were providing to Mr Schulz was true as you remembered it? --- As best I could recall it.

300 As is apparent from the foregoing exchange, during cross-examination Mr Ellis altered his position and stated that he did not attempt to have Messrs Hennessy and Schulz give false evidence to the ACCC; rather he attempted to have them give the ACCC information that Mr Ellis believed was correct, but which Mr Hennessy and Mr Schulz may not have believed was correct. I do not accept Mr Ellis's evidence in that regard. In my view, the evidence set out below shows that Mr Ellis was aware that the information he asked Messrs Hennessy and Schulz to give to the ACCC was false or misleading.

301 Mr Hennessy's evidence refers to a number of conversations with Mr Ellis in the period between April 2016 and March 2017 in which they discussed the events that were likely to be

the subject of the ACCC investigation, and during which Mr Ellis proffered a version of events which Mr Hennessy considered inaccurate. Without seeking to be exhaustive, Mr Hennessy referred to the following conversations.

302 Mr Hennessy said that, on or around 11 April 2016, Mr Vassella informed Mr Hennessy that BlueScope was under investigation for price fixing, and that he, Mr Ellis and Mr Robertson were targets of the ACCC's investigation. Shortly thereafter, Mr Hennessy participated in a three-way call with Messrs Ellis and Robertson. Mr Hennessy recalls Mr Ellis saying words to the following effect:

The best way to respond to this is to not tell the ACCC anything however being involved in an ACCC investigation will mean an end to our careers at BlueScope.

303 Mr Hennessy said that, the following week, he and Mr Ellis met at a café in Gwynneville. During the course of that meeting, Mr Ellis identified "three areas of concern" as being his and Mr Hennessy's meeting at the Melbourne Airport with Southern Steel, Vulcan Steel, Selection Steel and Apex Steel, their meeting with Mr Wright and Mr Ellis's meeting with Yieh Phui. Mr Hennessy recalls Mr Ellis describing the Melbourne Airport meeting in words to the following effect:

This was a customer engagement forum number one of three which we used to collect feedback on what we needed to do to increase our sales to customers.

The themes that emerge from this engagement forum were that we [BlueScope] were slow and arrogant, difficult to deal with, could not offer the entire range of products that customers required and had a complex pricing offer.

Our response to this feedback was to simplify the price list to more closely align with import offers, implement an RRP as a suggested price for customers to use if they wished and to provide import completing parcels of surplus capacity.

304 Mr Hennessy said that Mr Ellis's account of that meeting was not his recollection of the meeting. The evidence in the proceeding also shows that that description of the Melbourne Airport meeting was inaccurate. Even on Mr Ellis's own evidence in this proceeding, the RRP strategy was a topic raised by Mr Ellis at the meeting, not a response to feedback from the meeting. Mr Hennessy understood that Mr Ellis was encouraging him to repeat Mr Ellis's version of events if Mr Hennessy was ever asked about the meeting as part of the ACCC's investigation. Mr Hennessy recalls stating or otherwise indicating that he was willing to repeat Mr Ellis's version of events.

305 Mr Hennessy recalls Mr Ellis describing the meeting with Mr Wright in words to the following effect:

At this meeting we discussed Griff selling products to us that were outside of our product range and also Griff selling our products to his customers.

306 Mr Hennessy said again that Mr Ellis's account of that meeting was not his recollection, and that he understood that Mr Ellis was encouraging him to repeat this version of events if he was ever asked about them as part of the ACCC's investigation.

307 Mr Hennessy also recalls Mr Ellis describing the Yieh Phui meeting in words to the following effect:

At the Yieh Phui meeting I discussed buying their material and trading internationally and into Australia.

There could have been a potential misunderstanding about the discussion on price.

308 In cross-examination, Mr Ellis said that he had identified the Yieh Phui meeting as an area of concern with Mr Hennessy because he knew that, at the meeting, he had raised the prospect of Yieh Phui increasing their prices in the Australian market by reference to CIPA's recommended resale prices. Mr Ellis's statement to Mr Hennessy at the meeting in Gwynneville was at best misleading.

309 At the meeting in Gwynneville, Mr Ellis also provided Mr Hennessy with a photocopied set of handwritten notes, saying words to the effect of "these are my thoughts on the investigation". Amongst other things, the notes recorded similar statements to those set out above. Overall, the notes conveyed the impression that the prices at which distributors, import traders and Yieh Phui supplied flat steel products in Australia was not the focus of discussions engaged in by BlueScope in the relevant period, which is contrary to the evidence set out in these reasons. Whether or not Mr Ellis appreciated that his conduct in the relevant period may have involved an attempt to induce a contravention of the law, I consider that Mr Ellis knew in April 2016 that the focus of BlueScope's discussions with distributors Wright Steel and Yieh Phui during the relevant period was the price at which they supplied flat steel products. In my view, the notes prepared by Mr Ellis and handed to Mr Hennessy were an intentional attempt to conceal that fact.

310 The third conversation referred to by Mr Hennessy occurred on or about 27 or 28 September 2016. Mr Hennessy said that Mr Ellis telephoned him and a conversation in words to the following effect occurred:

Ellis: When you are interviewed about the meeting with Griff [Wright], I need you to say that we asked to buy steel from him and he said 'No' and we asked to sell steel to him and he said 'No'.

Hennessy: I think I may have sent Griff a price list after that meeting. Why would I have done that if he said flatly 'no' and 'no'?

Ellis: You don't have a record of the price list being sent in the document search?

Hennessy: I don't have it but I may still have sent it.

Ellis: Well you mustn't have sent it then - so will you say that we asked to buy steel from him and he said 'no' and we asked to sell steel to him and he said 'no'?

Mr Hennessy: Okay, but I'm worried about the price list.

Mr Ellis: There were only three people in that meeting and if we have the same position on what was discussed then it is two against one.

Mr Hennessy: Okay, we're in this together.

311 Mr Hennessy said that, between October 2016 and January 2017, he and Mr Ellis had a number of conversations which included Mr Ellis asking if he could call on Mr Hennessy's home phone number to avoid talking on their mobiles. They also agreed to use the codename "Magnaflo" when discussing the investigation. This codename was then used in telephone discussions and text messages.

312 On 3 February 2017, Mr Ellis sent Mr Hennessy a text message that stated: "Hi Matt – got an update on Magnaflo in NSW – u available? Cheers Jason". In cross-examination, Mr Ellis accepted that it was "probably correct" that, by this point in time, he had formed the intention to have Mr Hennessy give false information to the ACCC.

313 On 6 February 2017, Mr Hennessy said that he met Mr Ellis (at Mr Ellis's request) at Sydney Domestic Airport. Mr Ellis told Mr Hennessy that he had spoken to Mr Schulz and that his interview had not gone well. Mr Hennessy recalls that a conversation to the following effect occurred:

Ellis: When you are interviewed about the meeting with Griff, I need you to say that we asked to buy steel from him and he said 'No' and we asked to sell steel to him and he said 'No'. Then I need you to say that we [Mr Ellis and Mr Hennessy] had a specific discussion after the meeting and we agreed that I needed to go to Yieh Phui and break the channel.

Hennessy: I'm not sure if I sent Griff a price list after the meeting and I wouldn't use the words 'break the channel'.

Ellis: If you sent the price list, it would have been found in the document search. Just use your own words for breaking the channel but I need you to say that we had this conversation after the meeting with Griff.

Hennessy: Okay. We are in this together. Are you aware that the ACCC has issued a 155 notice to obtain price lists from Bluescope?

314 Mr Hennessy said that he then showed Mr Ellis a copy of the s 155 notice issued to BlueScope and that his recollection is that Mr Ellis was not aware of the notice.

315 On 28 February 2017, Mr Hennessy organised a meeting with Mr Ellis to take place at Alexandria on 2 March 2017. On 1 March 2017, Mr Hennessy became aware that the ACCC had issued a s 155 notice requiring him to attend an examination on 28 March 2017. On 2 March 2017, Mr Ellis and Mr Hennessy met at a café. Mr Hennessy said that he told Mr Ellis about the examination. Mr Ellis asked to look at the s 155 notice and Mr Hennessy showed him the notice. Mr Hennessy said that a conversation in words to the following effect then occurred:

Hennessy: This is serious.

Ellis: About the meeting with Griff [Wright], we asked to buy steel from him and he said 'no' and we asked to sell steel to him and he said 'no'. Then we had a specific discussion afterwards and agreed that I needed to go to Yieh Phui and break the channel.

Hennessy: Mate I'm going to be in front of a barrister and under oath.

Ellis: We're smart guys too.

Hennessy: So buy 'no' and sell 'no' and then we decided we need to bypass Griff.

Ellis: Yes. This is going to be a bad year for both of us. I will be having one of these interviews too. I am sorry you are in this position.

Hennessy: Okay. We're in this together.

Ellis: I am preparing an affidavit with my lawyer. I will give you a copy early next week so you can review it and give me some feedback.

316 At the conclusion of the meeting, Mr Hennessy said that he agreed to meet with Mr Ellis on 6 March 2017.

317 Mr Hennessy said that, following receipt of legal advice, he decided to cancel his meeting with Mr Ellis. He said that on 6 March 2017, he telephoned Mr Ellis and a conversation in words to the following effect occurred:

Hennessy: We have to stop our discussions and meetings.

Ellis: Okay. Has anything changed?

Hennessy: This is very serious.

Ellis: Okay. We were aligned anyway.

Hennessy: Jason I have to go.

318 Mr Hennessy said that he had no further contact with Mr Ellis following that phone call.

319 Mr Schulz also gave evidence about a number of conversations with Mr Ellis in the period from early April 2016 until about March 2017 in which they discussed the overseas trip they took in 2014 during which they met with representatives of Yieh Phui (amongst other steel mills), and which they believed was likely to be the subject of the ACCC investigation. During some of those conversations, Mr Ellis proffered a version of events which Mr Schulz considered inaccurate. Without seeking to be exhaustive, Mr Schulz referred to the following conversations.

320 During one of those conversations in mid-2016, Mr Ellis asked Mr Schulz what he remembered about the purpose of the 2014 overseas trip. Mr Schulz responded by setting out what Mr Schulz described as the five main “legitimate” purposes of the trip:

The purposes of the trip included to introduce you to members of other IMG offices, to meet with our current suppliers, to meet with potential new suppliers, to explore trading opportunities outside of Australia, and to discuss trading opportunities into Australia.

321 In his evidence, Mr Schulz described those five purposes of the overseas trip as the sanitised version which was consistent with the formal trip report prepared by Mr Ellis at the conclusion of the trip in mid-March 2014 (which is discussed later in these reasons) and which omitted any reference to discussions concerning CIPA’s recommended resale price in Australia and the prices at which overseas mills were supplying steel into Australia. Mr Schulz said that, before he mentioned anything else, Mr Ellis stopped him and said: “That’s good, let’s stick to that”. Mr Schulz said that his impression at the time from the manner in which Mr Ellis abruptly cut off the discussion, which evidence I accept, was that Mr Ellis was indicating that he did not want Mr Schulz to refer to any other aspect of the meetings, specifically those relating to the prices at which overseas mills supplied steel into Australia.

322 In mid-October 2016, Mr Schulz attended the BANZ Sales Marketing, Innovation and Trading conference in Kiama, followed by a two-day group development session in Sydney. At that conference in Kiama, Mr Vassella told Mr Schulz that Mr Schulz had been “roped into the ACCC matter with Jason Ellis” and that Mr Ellis had made statements about recommended resale prices on the overseas trip with Mr Schulz. Mr Vassella commented that those statements were not the least bit helpful. Mr Schulz said that, at either the conference in Kiama or the session in Sydney, he had a conversation with Mr Ellis which included the following exchange:

Schulz: Hey Jason, I’m roped in here now as well.

Ellis: We stick to the story.

323 Mr Schulz's impression at the time, which evidence I accept, was that Mr Ellis's reference to "the story" was a reference to the five "legitimate" purposes of the overseas trip referred to above.

324 Mr Schulz subsequently received a notice from the ACCC under s 155 of the Act to attend an examination. Shortly before his examination, Mr Schulz had another conversation with Mr Ellis during which Mr Ellis again asked him about his recollection of the overseas trip. Mr Schulz repeated the five purposes of the trip referred to above and Mr Ellis responded with words to the effect of: "That's good, that's the focus of the trip. Stick with the plan". Again, Mr Schulz's impression at the time, which evidence I accept, was that Mr Ellis's response was a request that, in his s 155 examination, Mr Schulz should only refer to the five purposes of the overseas trip referred to above, and that Mr Schulz should avoid mentioning the discussions about pricing and restrictions of supply into Australia with Asian mills.

325 Mr Schulz admitted that he gave incomplete and false evidence to the ACCC during his examination on 20 December 2016. Immediately after the examination he had a conversation with Mr Ellis in which Mr Schulz told Mr Ellis that the examination had not gone very well but did not give any specifics.

326 Mr Schulz said that he spoke by telephone with Mr Ellis on 23 December 2016 and they had a conversation in words to the following effect:

Ellis: I want to talk about what is happening.

Schulz: I can't talk to you about the interview or the investigation.

Ellis: Give me the number of a landline in Germany so that we can speak about it on a secure line. I'm sure that our phones are being bugged.

327 Mr Schulz said that he did not provide Mr Ellis with a landline and they did not speak while Mr Schulz was in Germany.

328 Mr Schulz said that he had another conversation with Mr Ellis in either late January or in February 2017 in words to the following effect:

Ellis: I have heard that there is a recording or a written recording of one of the meetings that we attended.

Schulz: I cannot discuss that. I'm not allowed to discuss that.

Ellis: Is the investigation all about Taiwan?

Schulz: Maybe, maybe not. I cannot discuss it.

Ellis: You know that meeting in Taiwan. I never told you but Hennessy and I had a meeting with Griff Wright before our trip. I asked Griff if we could purchase YP [Yieh Phui] product from them, and Griff said no. I said fine, I'm going to visit YP and I'll ask them to sell steel to us directly.

329 In my view, the totality of the evidence showed that Mr Ellis urged each of Messrs Hennessy and Schulz to give information to the ACCC that was false or misleading, knowing that the information was false or misleading. Mr Ellis's conduct during the period from about April 2016 to about March 2017 showed an intentional willingness to re-create a version of the events that are the subject of this proceeding in a manner that distorts the truth.

330 Mr Ellis's testimony in the proceeding was shown on many occasions to be unreliable. In fairness, Mr Ellis conceded in response to many questions that he had no recollection of the events about which he was questioned. However, on many occasions when he proffered an answer, his recollection was shown to be wrong by contemporaneous documents. More significantly, Mr Ellis's testimony in the proceeding displayed a propensity to obfuscate, refusing to admit obvious facts. On occasions, I consider Mr Ellis's answers were dishonest. The difficulties with Mr Ellis's evidence are illustrated by the following examples.

331 First, aspects of Mr Ellis's evidence appeared rehearsed and contrived. One example was Mr Ellis's dogged adherence to the use of the word "hope" when describing his intentions with respect to the benchmarking strategy. Mr Ellis's evidence was that he hoped distributors would use the CIPA price list as a benchmark or price reference tool, and thereby earn better margins. When Mr Ellis was asked in cross-examination whether he wanted or desired this outcome from the benchmarking strategy, he refused to accept the proposition and insisted on using the term "hope". This evidence is discussed below. Overall, I formed the impression that Mr Ellis was aware that case law has established that a mere hope or expectation that a party will act in a particular way is insufficient to constitute an understanding within the meaning of the Act (as per *Apco* at [47]), and that Mr Ellis believed that describing his business intention in terms of a "hope" would take the conduct outside the reach of the Act.

332 Second, in many of his answers, Mr Ellis refused to accept obvious propositions that were put to him in cross-examination and instead gave obfuscatory or evasive answers. For example:

- (a) When asked "when you were speaking to distributors do you agree that you were encouraging them to consider raising their prices?", Mr Ellis replied "I was encouraging distributors to use the RRP as a reference tool". The question was asked a second time and the cross-examination continued:

Do you agree that when you were meeting with distributors you were encouraging them to raise their prices? --- No, I was encouraging them to consider the RRP in the consideration of how they established their prices.

And just so I understand this and we're all very clear on this, you weren't intending that distributors, by considering the RRP, would be raising their prices? --- Not necessarily. It was completely up to the distributors' discretion.

- (b) When asked "do you agree... that you were seeking, throughout the end of 2013 and early 2014, to have SMS price by reference to the recommended resale price that you were publishing?", Mr Ellis replied: "I was providing the opportunity... to SMS to use this price book as a price by reference tool for their own use". The cross-examination continued as follows:

And – I'm sorry, that means you're agreeing or disagreeing with the proposition that you were seeking throughout the end of 2013 and early 2014 to have SMS price by reference to the recommended resale price that you were publishing? --- What I'm saying is that I was providing an opportunity for SMS at their own volition to use an RRP price book with their own customers and their own market.

- (c) I reject the testimony referred to in (a) and (b). The evidence adduced in the proceeding, discussed below, makes plain the obvious commercial fact that, by the RRP strategy, BlueScope (through Mr Ellis) was encouraging distributors (including SMS) to increase their prices for flat steel products. That fact was conceded by Mr Ellis when he was not asked the question directly.
- (d) Mr Ellis refused to accept the proposition that a motivation for proposing the concept of the recommended resale price was to increase CIPA's sales revenue:

And do you agree with me that the idea of a recommended resale price – or that concept that you describe in paragraph 61 was ultimately directed at a purpose of trying to obtain more sales for BlueScope CIPA of its steel? --- No. I think the purpose was to assist the customers in increasing or improving their margins, number 1, and number 2, the secondary purpose was to assist those customers with an ease of pricing by reference particularly for their smaller customers.

...

And is it your evidence that no part of your motivation for suggesting or proposing the concept of an RRP was about increasing sales of CIPA flat steel products to distributors?---It wasn't a primary motivation...

- (e) I reject the testimony referred to in (d). The evidence showed, and it is a commercially obvious fact, that BlueScope CIPA proposed the use of recommended resale prices by distributors as benchmark prices to increase their sales revenue and margins and thereby increase CIPA's sales revenues.

- (f) When asked about “tactical pricing” used by BlueScope CIPA, Mr Ellis said that it had no impact on the pricing of distributors (including SMS) and, when challenged on that answer, refused to accept the proposition that the purpose of giving “tactical pricing” discounts to distributors (including SMS) was to enable them to reduce their selling prices and better compete. As discussed below, the evidence shows that, in addition to a range of other discounts, BlueScope CIPA provided “tactical pricing” to its distribution customers, which was also referred to as “end user targeted rebates” or “EUTs”. The offers were ad hoc and represented additional discounts provided to distributors in response to a specific request by them for even further discounts to the price that they would otherwise pay to BlueScope CIPA for steel. Tactical pricing was offered for the purpose of enabling distributors to compete with import offers for a particular parcel of steel to their end customer. The exchange with Mr Ellis was as follows:

Mr Ellis, you just gave evidence that tactical pricing has no effect on SMS’ pricing or I think I should say no impact on their pricing. That’s just not true, is it? --- It is absolutely true, Mr Hodge. How SMS set their prices in the margin they choose to earn is completely up to them.

...

... you understand, don’t you, that EUTs, or tactical pricing, reduces the net/net cost for a distributor? --- Their buying rates, if that’s what you mean, yes.

And the whole purpose of providing that tactical support is so that they can price lower to an end customer? --- No, they price to win the work.

- (g) Again, I reject the evidence referred to in (f). The evidence showed the contrary, which was an obvious fact.
- (h) When asked whether evidence he had given in his affidavit regarding conversations with Mr O’Brien was included to disagree with things that Mr O’Brien had said in his witness statement, Mr Ellis refused to agree:

What I’m suggesting to you is that the reason that you have put forward this recollection is because you are seeking to disagree with Mr O’Brien’s account of the discussions that he had with you; do you agree with that? --- No, I’m not. I’m saying quite clearly this is my best recollection of that meeting that occurred on 13 September 2013.

- (i) The evidence referred to in (h) is inexplicable apart from a desire or propensity to disagree with the questioner.

333 Third, in a number of respects, I find that Mr Ellis’s obfuscatory or evasive answers became dishonest. For example:

- (a) In his affidavit, Mr Ellis proffered an explanation of a comment that he had made in his meeting with Yieh Phui that his statements in the meeting had “been practised maybe 20 times before”. Mr Ellis deposed that he was referring to the fact that he had met with distributors on numerous separate occasions and had said something to similar effect to that which he said in the meeting with Yieh Phui (being an explanation of BlueScope’s recommended resale prices). In support of that evidence, Mr Ellis included a list of 26 meetings he had attended between 27 August 2013 and 26 February 2014 with distributors in Annexure A to his affidavit. In cross-examination, Mr Ellis agreed that the list in Annexure A had been prepared and included in the affidavit to support his evidence concerning statements made in meetings with distributors. However, when pressed, Mr Ellis accepted that that was not true, and that nine out of the 26 meetings listed in the annexure were not meetings in which the RRP strategy was discussed. Mr Ellis then attempted to explain the inconsistency by suggesting that he had made a mistake when preparing the annexure and had listed all meetings that he had held with distributors in the period. When pressed again, Mr Ellis conceded that the annexure did not contain a list of all such meetings. I find that the annexure represented a deliberate distortion of the truth for the purpose of bolstering Mr Ellis’s evidence concerning the comment that he had made in the meeting with Yieh Phui.
- (b) Aspects of Mr Ellis’s evidence concerning his criminal conviction in September 2020 on the charge of inciting the obstruction of a Commonwealth official (which was discussed above) defied belief. Mr Ellis gave evidence about the conviction and the conduct the subject of the conviction (which occurred in the period April 2016 to March 2017) in his affidavit that was sworn on 26 September 2022. Mr Ellis was asked about that evidence two days later on 28 September 2022. Mr Ellis acknowledged that he had pleaded guilty and had been sentenced on the basis of an agreed statement of facts, but said that he did not agree with the statement of facts. When asked which of the facts he disagreed with, Mr Ellis responded that he could not recall. When pressed about that answer, the following exchange occurred:

So even at a general level, without going through the statement of facts you couldn’t say what you don’t agree with? --- Mr Hodge, to be very frank, I’ve put that behind me. I don’t – I’ve never wanted to think about it again. So I pleaded guilty and, as I said yesterday, I – I am very remorseful for it, very sorry for it. I take it on my own shoulders that – that I was guilty – pleaded guilty. And I have not thought about it since the day I pleaded guilty.

But, Mr Ellis, you must have thought about it since the day you pleaded guilty?
--- No.

Because you have sworn an affidavit in which you say you're contrite and acknowledge your guilt? --- Yes, I do. I have intentionally not thought about it Mr Hodge. It was an awful period, not one that I wish to relive, and I have not thought about it for one second since then.

- (c) I do not accept the evidence referred to in (b) and find it dishonest. The conviction, the conduct that resulted in the conviction and Mr Ellis's explanation for that conduct were addressed in his affidavit which was sworn two days before giving that testimony. Mr Ellis necessarily had thought about the conviction and the conduct that resulted in the conviction in preparing his affidavit.
- (d) Immediately after giving the evidence referred to in (b), Mr Ellis then gave evidence that also defied belief on the simple question of whether he had read Mr Hennessy's first witness statement. Mr Ellis initially stated that he could not recall if he had read Mr Hennessy's witness statement. In itself that answer is not believable in circumstances where Mr Hennessy reported to Mr Ellis during the relevant period and Mr Hennessy's first witness statement provides detailed evidence about the conduct the subject of the allegations against Mr Ellis. When pressed, Mr Ellis quickly backtracked, although his answers, in my view, were not honest. The exchange was as follows:

And, as I understand it, you've read Mr Hennessy's first statement that addresses the discussions that you had with him between April 2016 and March of 2017? --- I can't actually recall if I have read Mr Hennessy's statement. I certainly listened to Mr Hennessy when he was a witness.

You think you might not have read Mr Hennessy's first statement? --- Listen, I just can't remember. I've read so many documents Mr Hodge, I just – I just can't remember. I'm sorry.

Mr Ellis, do you know what Mr Hennessy's account is of the discussions he had with you between April 2016 and March 2017? --- My – Mr Hodge, my best recollection is that I – I may well have read – I concede I may well have read it but I've read so many documents over the course of the last five years. I just can't recall. They all blur into one.

...

And for the purposes of preparing your affidavit you didn't go back and review Mr Hennessy's statement? --- For the purposes of my affidavit, I listened very closely and consulted obviously with Dr Higgins on his witness statement and – when he was a witness.

I'm sorry. Just – I will need to press you on that? --- Sure.

I understand you listened to his evidence-in-chief and cross-examination when it was oral but do you say you didn't go back and read his first statement? --- In the last 11 days, no, I didn't.

At any time this year? --- I could quite possibly have done it this year, Mr Hodge. I just can't recall.

Following a short adjournment, Mr Ellis was asked whether he had read some parts of Mr Hennessy's statement for the purpose of preparing his affidavit, and he said that he was very sure that he had. Mr Ellis was then reminded that he had given evidence the previous day that he had read the witness statements that had been filed on behalf of the ACCC (which included Mr Hennessy's statement). Mr Ellis replied in the following manner:

I – listen, Mr Hodge, again, I'm sorry I just have to say this, but I've read so many documents, I'm sure it is highly likely that I would have read both Mr Schulz's and Mr Hennessy's statements. I don't know when I read them. Can I recall reading them? No, I can't. This process is – is a long and exhaustive one and there's just so many things to read. So I can't be emphatic.

- (e) Again, I do not accept the evidence referred to in (d) and find it dishonest in circumstances where Mr Ellis's affidavit addressed matters raised in the statements of Messrs Hennessy and Schulz.
- (f) Mr Ellis also gave contradictory answers when asked about his meeting with Yieh Phui.

The initial exchange was as follows:

... Do you agree with me that when you spoke to Yieh Phui you were encouraging them to consider raising their prices in Australia? --- No.

You don't think that you did that? --- Well, not by reference to the RRP if that's what you meant.

Mr Ellis was pressed on the question and contradicted his first answer:

Mr Ellis, do you agree with me that when you spoke to Yieh Phui you encouraged them to consider raising their prices in Australia? --- Yes.

And you encouraged them to obtain the price list that at that time you were distributing to distributors in Australia? --- Yes.

...

You encouraged them to consider raising their prices by taking into account or looking at the recommended resale prices that you were distributing to distributors? --- Yes.

334 In my view, during his testimony Mr Ellis exhibited a propensity to answer questions in an evasive or obfuscatory manner which, on occasion, became dishonest. Overall, I place no weight on Mr Ellis's evidence in the proceeding unless it is unchallenged and uncontroversial or is corroborated by other evidence. I address other specific aspects of Mr Ellis's evidence in the course of these reasons.

335 I emphasise that the findings I have made in this section of the reasons are only directed to the question of the reliability and credibility of Mr Ellis's testimony in the proceeding. Although I

consider that Mr Ellis’s conduct during the period from about April 2016 to about March 2017, and aspects of his testimony, were dishonest, it is unnecessary to make a finding that Mr Ellis’s dishonesty was an implied admission of guilt. It is well established in the criminal law that the telling of a lie by an accused can amount to an implied admission of guilt, but “[i]t is only if the accused is telling a lie because he perceives that the truth is inconsistent with his innocence that the telling of the lie may constitute evidence against him”: *Edwards v The Queen* (1993) 178 CLR 193 at 209 per Deane, Dawson and Gaudron JJ. Their Honours further explained that (at 209, citation omitted):

... in telling the lie the accused must be acting as if he were guilty. It must be a lie which an innocent person would not tell. That is why the lie must be deliberate. Telling an untruth inadvertently cannot be indicative of guilt. And the lie must relate to a material issue because the telling of it must be explicable only on the basis that the truth would implicate the accused in the offence with which he is charged. It must be for that reason that he tells the lie. To say that the lie must spring from a realisation or consciousness of guilt is really another way of saying the same thing. It is to say that the accused must be lying because he is conscious that ‘if he tells the truth, the truth will convict him’.

336 In the present case, I find that Mr Ellis was aware that his conduct may have risked contravening the Act and his fear and apprehension in that regard caused him to be evasive in his answers and, on occasions, dishonest. However, I have assessed the question of whether Mr Ellis attempted to induce suppliers to contravene the Act on the totality of the reliable evidence adduced in the proceeding. It has been unnecessary to make a finding that any dishonesty on the part of Mr Ellis was an implied admission of guilt.

Witnesses not called

337 Before trial, the ACCC filed witness statements or outlines of evidence in respect of a number of anticipated witnesses, and in some instances had issued subpoenas to the anticipated witnesses, but ultimately chose not to call those witnesses. Those witnesses were:

- (a) Mr Wells, a director of Vulcan Steel, and an attendee at the Melbourne Airport meeting;
- (b) Mr Casey, also a director of Vulcan Steel and a party to several of the communications and dealings with BlueScope relevant to the alleged Vulcan Steel understanding;
- (c) Mr Lander, the General Manager of Brice Metals (part of the Southern Steel group);
- (d) Bradley Hoenger, the State Manager of Surdex Steel (part of the Southern Steel group);
- (e) Mr Bolzan, the former National Procurement Manager of OneSteel Metalcentre;
- (f) Paul Bagshaw, the General Manager of East Coast Steel; and

- (g) Ms Arzoumanian, a former Account Manager within the Distribution Markets Team at BlueScope CIPA.

338 As noted earlier, the ACCC elected to tender parts of the written statements of Mr Sparks as an admission of BlueScope, rather than call Mr Sparks as a witness, an election I upheld over objection: *BlueScope (No 3)* at [109]-[112]. In rejecting BlueScope's submission that the Court should refuse to admit the written statements of Mr Sparks under s 135 of the Evidence Act, I observed that (at [112]):

Mr Sparks remains an employee of BlueScope and it is open to BlueScope to call Mr Sparks as a witness. If Mr Sparks believes that his statements are incorrect, he is able to give evidence and explain how that came about, whether through some unfairness or confusion at the time the statements were taken or because his recollection of relevant events has changed. In circumstances where BlueScope is able to confer with Mr Sparks before he gives evidence, there is no unfair prejudice arising from the fact that BlueScope would be subject to the rules relating to examination-in-chief, including the rule that prevents leading questions.

339 The evidence also established that, in the course of its investigation prior to the commencement of the proceeding, the ACCC had examined the following additional persons pursuant to s 155 of the Act:

- (a) Peter Smaller, the owner of the Southern Steel group;
- (b) Kevin Smaller, the General Manager of the Southern Steel group;
- (c) Mr Larkin, General Manager, Southern Sheet & Coil for NSW, Queensland, Victoria;
- (d) Mr Stedman, Managing Director of CMC Australia;
- (e) Mr Simpkin, General Manager for CMC Steel; and
- (f) Mr Compagnino, the Managing Director of Apex Steel.

340 Similarly, before trial, BlueScope filed affidavits in respect of a number of anticipated witnesses but ultimately chose not to call those witnesses. Those witnesses included:

- (a) Mr Gent, the CIPA Sales Manager for New South Wales (with responsibility for CMC Steel) and Acting Sales Manager for Victoria and Tasmania (with responsibility for BlueScope Distribution); and
- (b) Mr Whitfield, a CIPA Account Manager with account responsibility for CMC Steel, OneSteel and Surdex Steel in Victoria.

341 For completeness, it can also be noted that a number of other persons referred to in the proceeding, and who were employees of BlueScope at the relevant time, were not called as witnesses, including:

- (a) Mr Vassella, the Chief Executive Officer of BANZ (although parts of his s 155 examination were tendered by the ACCC);
- (b) Mr Unicomb, the CIPA Pricing Manager Distribution (although extracts of his s 155 examination were tendered by the ACCC);
- (c) Satina Wang, General Manager, Taiwan Branch, BSL North Asia;
- (d) Andrew Bray, the General Manager of BlueScope Distribution;
- (e) Gerald Cornelius, the National Manager of SMS;
- (f) Mr Garey, the General Manager of NZS;
- (g) Mr Fogarty, the Manager of NZSA; and
- (h) Scott Fuller, the Sales and Marketing Manager, NZSA.

342 BlueScope submitted that the ACCC's failure to call the witnesses in respect of whom it had filed and served witnesses statements was unexplained, but BlueScope did not formally advance any submission based on the rule in *Jones v Dunkel* (1959) 101 CLR 298 (*Jones v Dunkel*) at 320-321.

343 Mr Ellis submitted that a *Jones v Dunkel* inference should be drawn in respect of the ACCC's failure to call Mr Wells in respect of an issue that arises in the case: whether the Melbourne Airport meeting was proposed and organised by Mr Ellis or by Peter Smaller. Mr Ellis submitted that it may be inferred that the evidence of Mr Wells would not have assisted the ACCC. I reject the submission. There is no basis for knowing whether Mr Wells had any relevant knowledge concerning the organisation of the meeting. If Mr Ellis considered that Mr Wells had such knowledge and that his evidence was favourable to Mr Ellis, it was equally open to Mr Ellis to call Mr Wells as a witness. Mr Ellis advanced the further generalised submissions that a *Jones v Dunkel* inference should also be drawn in relation to at least Mr Lander of Southern Steel, Mr Bolzan of OneSteel, Mr Casey of Vulcan Steel, Mr Bagshaw of East Coast Steel, Mr Hoenger of Southern Steel, Ms Arzoumanian of BlueScope CIPA and Mr Sparks, but without identifying any specific fact in dispute in respect of which the inference should be applied.

344 The ACCC submitted that a *Jones v Dunkel* inference should be drawn in respect of BlueScope’s failure to call Messrs Vassella and Whitfield in respect of particular identified issues. The applicability of *Jones v Dunkel* inferences in the context of those particular issues is considered later in these reasons.

345 It is convenient, though, to make some preliminary observations about the application of the rule in *Jones v Dunkel* in this case. The rule in *Jones v Dunkel* permits, but does not require, a tribunal of fact to infer that the evidence of an absent witness, if called, would not have assisted the party who failed to call that witness: *Jones v Dunkel* at 308 per Kitto J and 320-321 per Windeyer J; *RPS v The Queen* (2000) 199 CLR 620 at [26] per Gaudron ACJ, Gummow, Kirby and Hayne JJ. However, the rule does not entitle a court to speculate about “what other evidence might possibly have been led”: *Australian Securities and Investments Commission v Hellicar* (2012) 247 CLR 345 (*Hellicar*) at [165] per French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ. The rule does not enable the absence of a witness to make up any deficiency in the evidence and it will not support an adverse inference unless the evidence otherwise provides a basis upon which that unfavourable inference can be drawn: *Chong v CC Containers Pty Ltd* (2015) 49 VR 402 at [208] per Redlich, Santamaria and Kyrou JJA.

346 As Beach J observed in *Olex*, *Jones v Dunkel* inferences are particularly appropriately drawn where the facts are peculiarly within the knowledge of the silent party, and the significance of the inference depends on the closeness of the relationship of the absent witness with the party who did not call the witness (see at [403] and [483]). That point has particular significance in a case such as the present brought by a statutory body seeking to enforce statutory prohibitions. The statutory body typically has no relationship with potential witnesses and is reliant on a degree of cooperation from potential witnesses. While a witness can be subpoenaed to give evidence, the difficulties associated with leading evidence from an uncooperative witness under subpoena affects equally the statutory body bringing the proceeding and the respondents. The degree of cooperation between a witness and the statutory body may vary in the time before trial. In many cases, including the present, the respondents may have a closer relationship with the potential witnesses. Many of the potential witnesses who were not called to give evidence at trial were past or present employees of BlueScope. Many others were past or present distribution customers of BlueScope. It was certainly open to BlueScope to call any of the potential witnesses referred to above in its defence of the proceeding.

347 In the circumstances of the present case, I am not persuaded that a *Jones v Dunkel* inference should be drawn against the ACCC in respect of its failure to call any of the potential witnesses referred to above. None of the witnesses can properly be described as being in the ACCC’s “camp” (notwithstanding the signing of witness statements); and the question whether the evidence of the potential witnesses would have added to the probative evidence at trial is an exercise in speculation. Conversely, and as discussed later in these reasons, I infer from BlueScope’s failure to call Messrs Vassella and Whitfield, who were employees of BlueScope at the time of trial, that their evidence on particular issues would not have assisted BlueScope.

348 The respondents advanced a broader submission, based on the principle in *Briginshaw*, that by reason of the ACCC’s failure to call the above witnesses, the Court should be much slower in drawing the inferences urged by the ACCC, particularly that Mr Ellis had an intention to induce a cartel arrangement. BlueScope submitted that the ACCC’s failure to call the above witnesses “confirms that the proof which the ACCC puts forward lacks cogency”. The basis for these submissions was the following statement of the New South Wales Court of Appeal in *Whitlam v Australian Securities and Investments Commission* (2003) 57 NSWLR 559 (*Whitlam*) at [119]:

In our opinion, the principle in *Briginshaw* calls attention to the requirement that a party seeking a finding of serious misconduct produce adequate material to enable a court to reach a comfortable satisfaction on such a serious matter. Although this is not the same as the obligation of the Crown to call available evidence in a criminal prosecution, we think it is fair to say that a person seeking such a finding does need to be diligent in calling available evidence, so that the court is not left to rely on uncertain inferences: cf the article Hodgson “The Scales of Justice: Probability and Proof in Legal Fact Finding” (1995) 69 ALJ 731, particularly at 739-740. In the circumstances of this case, if the respondent were seeking to make out a case that the appellant was given good reason to believe that the fourth point had not been accepted, we would have expected that at least Mr Hamilton would have been called, if his evidence in any way supported its case.

349 I do not accept that the considerations discussed in *Whitlam* are applicable to the question whether Mr Ellis had an intention to induce a cartel arrangement. Mr Ellis denied that he had such an intention. For reasons explained earlier, I place no weight on Mr Ellis’s denial. The Court must assess whether the objective facts and circumstances proved on the evidence are sufficient to satisfy the Court, by way of inference, that Mr Ellis had such an intention. The respondents did not submit, and could not submit, that the persons listed above who were not called as witnesses would have been able (or permitted) to give evidence as to Mr Ellis’s state of mind (in contrast to evidence of the communications and dealings they had with Mr Ellis, if any).

350 More generally, a submission similar to that advanced by Mr Ellis was considered by the High Court in *Hellicar*. The issue in dispute was whether the board of James Hardie Industries Ltd, at a meeting in February 2001, had approved a draft ASX announcement that was found to be misleading and deceptive and had thereby breached their duties as directors. At the trial, ASIC tendered the minutes of the board meeting which recorded the tabling and approval of the draft ASX announcement. The minutes had been adopted and signed as a correct record at the next board meeting. Two witnesses called by ASIC to give evidence about the board meeting were unable reliably to recall events. The defendant directors claimed that the minute recording the tabling and approval of the draft announcement was false and that the minutes contained significant inaccuracies in other respects. Those directors who gave evidence at the trial did not accept that they had approved the draft ASX announcement. The company’s solicitor, Mr Robb, who had supervised the preparation of the draft minutes and had attended the February board meeting, was not called by ASIC to give evidence. At trial, the New South Wales Supreme Court found that the directors had approved the draft ASX announcement and had breached their duties in doing so. That decision was overturned on appeal, with the New South Wales Court of Appeal concluding that ASIC owed a “duty of fairness” which it had breached by not calling the company’s solicitor. The Court of Appeal found that, as a consequence of the breach, the cogency of ASIC’s case was so diminished as not to have been proved. The High Court overturned the reasoning of the Court of Appeal as unsound. The plurality (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ) commenced with the observation (at [147]):

It may readily be accepted that courts and litigants rightly expect that ASIC will conduct any litigation in which it is engaged fairly. Nothing that is said in these reasons should be taken as denying that ASIC should do so. But the Court of Appeal concluded that ASIC was under a duty in this litigation to call particular evidence and that breach of the duty by not calling the evidence required the discounting of whatever evidence ASIC did call in proof of its case. Neither the source of a duty of that kind, nor the source of the rule which was said to apply if that duty were breached, was sufficiently identified by the Court of Appeal or in argument in this Court.

351 The plurality then explained the principles concerning prosecutorial duties applicable in criminal proceedings (at [152]-[153], citations omitted, emphasis added):

152 For the purposes of deciding these matters, it is convenient to assume, without deciding, that ASIC is subject to some form of duty, even if a duty of imperfect obligation, that can be described as a duty to conduct litigation fairly. What consequences might be thought to follow if failure to call a witness could, and in a particular case did, amount to a breach of a duty of that kind can then be elucidated by reference first to prosecutorial duties in criminal proceedings.

153 What was held by this Court in *Apostilides* to be the duty of a Crown prosecutor in relation to the calling of evidence must be understood in the light

of a number of relevant considerations. First, it is to be remembered that a criminal trial is an accusatorial process in which the prosecution bears the burden of proving its case beyond reasonable doubt. The prosecutor's duty stems from the very nature of the proceedings. Secondly, as this Court pointed out in *Apostilides*, the conclusion that a prosecutor has failed to call a witness who should have been called does not, of itself, require the further conclusion that the conviction recorded at that trial must be set aside. Rather, in the words of the common form criminal appeal statute, the question would be whether, having regard to the conduct of the trial as a whole, there was "on any other ground whatsoever a miscarriage of justice". If a prosecutor's failure to call a witness who should have been called occasioned a miscarriage of justice, the conviction entered at trial would be set aside and a new trial would be ordered. *The failure to call the witness could not, and would not, found any reassessment of the evidence that was called at trial, let alone any suggestion that the cogency of that evidence should be discounted.*

352 Applying such principles on the hypothesis that ASIC was under a duty to call Mr Robb as a witness, the plurality said (at [155], emphasis in italics added, emphasis in bold in original):

... it is then important to recognise what conclusions could follow if, as the Court of Appeal held, ASIC was under a duty to call Mr Robb. If there was such a duty (and these reasons will explain that ASIC not calling Mr Robb was **not** unfair to the respondents or any other defendant) it would be expected that the remedy for breach of the duty would lie either in concluding that the primary judge could prevent the unfairness by directing ASIC to call the witness or staying proceedings until ASIC agreed to do so or, if the trial went to verdict, in concluding that the appellate court should consider whether there was a miscarriage of justice that necessitated a retrial. *But no solution to the hypothesised unfairness could be found by requiring that the primary judge or an appellate court apply some indeterminate discount to the cogency of whatever evidence was called in proof of ASIC's case.* This would seem to be no more than an attempt to "punish" a regulatory authority by denying it the relief it seeks. But that approach would fail to recognise that the regulatory authority seeks the remedy it does for public and not its own private purposes. *It is an approach that would seek to supplement, needlessly, the long-established and generally applicable principles that are engaged when a party to litigation does not call evidence that it could be expected to call (Jones v Dunkel (1959) 101 CLR 298 183).* *The asserted principle would evidently have no satisfactory roots. And because the notion of "discounting" the evidence is necessarily indeterminate, the asserted principle would have no certain content.*

353 After concluding that it had not been shown that it was unfair for ASIC not to have called Mr Robb as a witness, the plurality then addressed the question of the cogency of proof in the proceeding, stating (at [165], emphasis in original):

Disputed questions of fact must be decided by a court according to the evidence that the parties adduce, not according to some speculation about what other evidence might possibly have been led. Principles governing the onus and standard of proof must faithfully be applied. And there are cases where demonstration that other evidence could have been, but was not, called may properly be taken to account in determining whether a party has proved its case to the requisite standard. But both the circumstances in which that may be done and the way in which the **absence** of evidence may be taken to account are confined by known and accepted principles which do not permit the course taken by the Court of Appeal of discounting the cogency of the evidence

tendered by ASIC.

354 Having regard to the principles stated in *Hellicar*, the submission advanced by the respondents (that the Court should be slower in drawing the inferences urged by the ACCC because of the ACCC's failure to call certain witnesses) cannot be accepted. The ACCC's failure to call particular witnesses is to be considered on the basis of the well-established principles stated in *Jones v Dunkel*. Accordingly, I have not applied some indeterminate discount to the evidence that was adduced in the proceeding.

Admissibility of evidence against Mr Ellis

355 In closing submissions, Mr Ellis submitted that the ACCC was seeking to rely on evidence that could not be used in the case against Mr Ellis. It is convenient to address Mr Ellis's submissions by reference to three categories of evidence.

356 The first category concerns evidence which, during the trial, I expressly ruled admissible in the case against BlueScope but inadmissible in the case against Mr Ellis. This category contains two subcategories. The first subcategory is hearsay evidence that was admitted in evidence as an admission of BlueScope under s 81 of the Evidence Act. That comprises certain representations from two witness statements signed by Mr Sparks (see *BlueScope (No 3)* at [109]) and the extracts of s 155 examinations of Messrs Vassella, Unicomb and Palermo. The second subcategory comprises evidence that was excluded in the case against Mr Ellis pursuant to s 135 of the Evidence Act. That comprises the handwritten notes of Mr Lander (see *BlueScope (No 3)* at [80], [106]). In closing submissions, Mr Ellis sought to extend the first subcategory to documents referred to in Mr Sparks's written statements. The documents were business records of BlueScope and were admitted into evidence on that basis. The documents were not admitted as admissions. Accordingly, the documents were admitted in the case against Mr Ellis.

357 The second category concerns evidence given by certain witnesses about communications received from Mr Ellis. This category of evidence was the subject of an evidentiary ruling in *BlueScope (No 3)* at [46]-[71]. The respondents accepted that evidence of Mr Ellis's communications is admissible against Mr Ellis, but argued that that evidence is inadmissible in so far as it goes beyond evidence of the communication and extends to evidence of the witness's understanding of the meaning and effect of the communication. Relevantly, in *BlueScope (No 3)*, I ruled that evidence of that kind was not admissible as direct evidence of

Mr Ellis's intention in making the communications (at [53]). However, I also ruled that (at [55]):

- (a) in so far as the witness's state of mind is relevant (such as Mr Hennessy), evidence of what the witness understood a communication from Mr Ellis to mean is admissible in so far as it is relevant to the witness's state of mind; and
- (b) evidence from a representative of a counterparty as to what they understood from a communication in the context in which it was made is admissible in so far as the evidence bears upon an objective assessment of the substance and content of the communication and the meaning that would reasonably be expected to be understood by a person in the position of the recipient of the communication.

358 In that respect, I observed (at [56]):

... in so far as the evidence concerns communications of Mr Ellis, the evidence is not admissible as direct evidence of Mr Ellis's intention in making the communications. However, in so far as the evidence enables the Court to make findings on the balance of probabilities about the substance and meaning of the communications, such findings may then provide a foundation for drawing inferences as to Mr Ellis's intention in making the communications.

359 In the course of the trial, I made rulings under s 136 of the Evidence Act to the effect that particular passages of evidence of this kind be limited to the witness's state of mind. A number of such rulings were made in respect of Mr Hennessy's evidence. The effect of such rulings is that the evidence is relevant to the case against BlueScope but not to the case against Mr Ellis. In the end, in preparing these reasons, I have placed little weight on evidence of that kind.

360 The third category concerns evidence of communications between BlueScope CIPA employees (in the Distribution Markets sales area) and employees of distributors concerning the benchmarking strategy and market prices generally. In closing submissions, Mr Ellis submitted that the ACCC had not identified any basis on which such evidence was said to be relevant to the case against Mr Ellis. The contention appeared to be that evidence was not relevant to the case against Mr Ellis unless it directly involved conduct of Mr Ellis. I reject the contention. The ACCC's case against BlueScope and Mr Ellis involves a combination of direct and circumstantial evidence. As discussed earlier in these reasons, the Court must consider "the united force of all the circumstances put together" in determining whether each of BlueScope and Mr Ellis attempted to induce price fixing understandings. In doing so, it is permissible for the Court to consider the inferences that arise from the combined effect of the evidence concerning Mr Ellis's position and authority within BlueScope, Mr Ellis's written and oral

communications to employees who reported to him and to distributors, import traders and overseas steel mills and the conduct of employees who worked under Mr Ellis's ultimate authority. The combined circumstances may compel the inference that the employees who worked under Mr Ellis's ultimate authority were acting in accordance with the instructions of Mr Ellis, which instructions may have been conveyed directly or indirectly to the employees.

E. OVERVIEW OF THE PRODUCTION AND DISTRIBUTION OF FLAT STEEL PRODUCTS IN AUSTRALIA

361 The proceeding principally concerns conduct undertaken by and on behalf of CIPA (Coated Industrial Products Australia), which is a business division of BANZ (BlueScope Australia and New Zealand), which is a reporting division of BlueScope, in respect of the supply of flat steel products in Australia.

362 It is necessary to commence with a description of flat steel products and their production and distribution. As noted earlier, the respondents took issue with numerous aspects of the ACCC's pleaded allegations concerning the relevant markets for the supply and distribution of flat steel products. The evidence established that the ACCC's allegations were largely correct. In addition to witness testimony, the evidence included a document submitted by BlueScope to the ACCC on 25 August 2013 titled "Background briefing on the Australian steel industry". The document was submitted in support of BlueScope's applications to the ACCC for informal clearance of certain proposed acquisitions in the steel industry under s 50 of the Act. There is no reason to doubt that the information contained in the document was a fair and accurate overview of the Australian steel industry, as it was prepared by the dominant domestic producer, BlueScope, and was prepared for submission to a statutory authority, the ACCC. The document was prepared contemporaneously with the events the subject of this proceeding. The information contained in the document was also consistent with the written and oral testimony of numerous witnesses. The following description of flat steel products and their production and distribution in Australia has been extracted from that document. The description is written in the present tense but, unless stated to the contrary below, the description is intended to describe the position during the relevant period for the purposes of this proceeding.

Steel production

363 Steel producers use inputs such as iron ore, coal and steel scrap to form raw steel, using one of two methods: basic oxygen steelmaking and electric arc furnace steelmaking. Raw steel is

passed through a continuous casting machine, which moulds and solidifies the steel into “slab”, “billets” or “blooms” (each of which are referred to as semi-finished products):

- (a) Steel slab has a rectangular cross-section and is used in the production of “flat” steel products. Slab can also be used in the production of some structural sections, which are “long” steel products.
- (b) Billets have a square cross-section and are used to produce “long” steel products.
- (c) Blooms have a rectangular cross-section and are also used to produce “long” steel products including rail and rail products, and structural sections.

364 Steel slab, billets and blooms undergo further processing to produce a range of “flat” or “long” steel products.

Flat steel products

365 The phrase “flat steel products” or “flat products” refers to certain steel products produced from steel slab. Specifically, steel slab is reheated and passed through a rolling mill to produce hot rolled coil (sometimes abbreviated to “HRC”) or a form of “steel plate”. Hot rolled coil may be subject to further processing to manufacture cold rolled coil (“CRC”) or another form of steel plate. Hot rolled coil can also be sold and used “as is” in other applications. Cold rolled coil may be sold “as is”, or may undergo further processing to produce “metallic coated steel” or “painted steel”. Cold rolled coil can also be used “as is” in other applications. A more detailed description of those product categories follows.

366 Hot rolled coil is produced by feeding reheated steel slabs through rolling mills to make the steel thinner and longer. The steel is then rolled into a large coil for transport and storage. Hot rolled coil is used in steel manufacturing (ie, to produce cold rolled coil, plate and structural tubing); it is also used in the manufacturing of mining equipment, racking, guard rails, building and construction products, water pipelines, oil/gas pipelines and automotive components.

367 Cold rolled coil is produced by passing hot rolled coil through rolling mills at low temperatures to reduce thickness. Cold rolling increases the strength and improves the finish of hot rolled coil. The steel is then rolled into a large coil for transport and storage. Cold rolled coil is used to manufacture automotive components, packaging (eg, drums) and storage systems.

368 Plate products are rectangular steel sheets produced either by rolling slab to the desired thickness and cutting it to the desired length (to produce “pattern plate”), or uncoiling hot rolled

coil at a processing line and cutting it to the desired length (to produce “coil plate”). Plate is used to manufacture mining equipment, and is also used for structural applications and in infrastructure.

369 Metallic coated steel is produced by uncoiling cold rolled coil and applying a metal coating, which prevents the steel from oxidizing and improves its durability. The most common coatings are zinc and a mixture of aluminium and zinc. Once coated, the steel is cooled and fed through equipment for shape correction and surface treatment. Galvanised (ie, zinc coated) steel is used in general and automotive manufacturing and to produce structural sections and decking for commercial and industrial buildings. Aluminium zinc alloy-coated steel is used to produce roofing, walling, rain water goods, and framing for residential construction.

370 Painted steel is produced by painting cold rolled coil and metallic coated steel. Painted steel can be used to produce products including roofing, walling, fencing, rain water goods, cladding support systems, sheds and garages, and architectural panels.

Acquirers of flat steel products

371 A significant volume of flat steel products is supplied directly to customers who use the product in their own manufacturing applications. In particular, flat steel products are supplied by flat steel producers to:

- (a) building component manufacturers, including:
 - (i) roll formers – steel coil, including metallic coated and painted steel, is fed through contoured roller dies to form the steel into a profile which can be cut to a particular length, producing products such as steel roofing and wall cladding, guttering, fencing, and structural formwork;
 - (ii) other building component manufacturers such as manufacturers of electrical meter boxes and hot water systems;
- (b) pipe and tube manufacturers – steel coil is a key input into “welded pipe and tube” products (thereby converting the input coil which is a flat product into a long product); and
- (c) other manufacturers – flat steel products are also acquired by other manufacturers such as larger automotive original equipment manufacturers, general manufacturers, including larger producers of racking and shelving, metal strapping and drums, white

goods and gas cylinders, and manufacturers of products used in mining and civil infrastructure (eg, guardrails, gratings and walkways).

372 Manufacturers who acquire flat steel products from a flat steel producer are typically customers with large purchase volumes, who are able to accept large minimum order quantities for each product specification, place their order for products (processed or not) on longer lead times and do not require consolidation of their order with other non-flat steel products.

373 Flat steel products are also acquired by steel distributors who on-sell those products to customers, and may also undertake further processing of those products. Hot rolled coil, cold rolled coil, light gauge plate, metallic coated coil, and painted steel are typically sold through “sheet and coil” distributors, while “plate” products are typically sold through “steel and tube” distributors.

Production and supply of flat steel products in Australia

374 BlueScope is the only Australian based manufacturer of hot rolled coil, cold rolled coil, plate and metallic coated steel. BlueScope is also Australia’s largest producer of painted steel products.

375 During the relevant period, approximately one third of flat steel supplied in Australia was imported. Excess global capacity and inventory meant there was a ready supply of overseas steel products able to be exported to Australia. BlueScope data showed that CIPA and importers supplied the following volumes (million tonnes) of flat steel products in Australia in the financial years 2010 to 2013 (with the financial year based on trade data to March 2013 that is annualised but not seasonally adjusted):

	FY10	FY11	FY12	FY13
CIPA	2.3	2.0	2.0	1.8
Importers	0.8	0.7	0.8	0.9

376 There was no real dispute between the parties that imported flat steel products were substitutable for the products supplied by CIPA and NZSA. BlueScope’s anti-dumping applications confirm that fact. Throughout 2012, BlueScope made applications for anti-dumping and countervailing duties in respect of various types of flat steel products (hot

rolled coil, galvanised steel, aluminium zinc coated steel and plate steel) exported from a number of countries in Asia. In 2014, BlueScope made an application for anti-dumping duties in respect of galvanised steel exported from India and Vietnam. In each of those applications, BlueScope stated that the goods manufactured in Australia by BlueScope are like products to the equivalent imported products, possessing similar physical properties and functional end-uses.

377 Import prices posed a significant constraint on BlueScope’s pricing of hot rolled coil, cold rolled coil, plate and metallic coated steel, each of which was priced at a slight premium to import parity prices (which accounted for the benefits from local purchasing, such as service standards, customer responsiveness and product traceability). Movements in BlueScope’s prices for these products typically reflected movements in import prices.

378 Australian customers imported significant volumes of flat steel products each year. From FY2006 to FY2012, independent imports (ie, excluding imports from BlueScope’s subsidiary in New Zealand) comprised an average of between 19% (HRC) and 36% (galvanised steel) of total Australian consumption of these product types. Historically, BlueScope’s range of painted products faced relatively lower levels of import constraint. However, as at 2013, those products also faced significant import competition, with independent import penetration increasing from approximately 5% of Australian consumption in FY2008 to over 10% in each month from October 2012 to March 2013.

Flat steel distribution and processing

379 As noted above, flat steel products are also acquired by steel distributors who on-sell those products to customers and may also undertake further processing of those products.

380 There are significant differences between the nature and terms of supplies made directly to users by a steel producer and supplies made to users by a steel distributor. Distributors typically offer customers a wider product range, shorter order to delivery lead times, lower minimum volumes and/or less onerous credit requirements than if the customer acquires direct from the steel producer. Distributors also provide “processing” services, either in-house or through third party tolling arrangements.

381 By way of elaboration, sales by steel producers are typically subject to minimum volume requirements (which can be as large as 20 to 30 tonnes per SKU (individual product item) for CIPA customers), and customers are expected to establish a consistent purchasing relationship.

Consequently, customers who obtain products directly from steel producers are typically large customers, and customers with smaller requirements are more likely to purchase from a distributor. Commensurate with the scale of their purchases, customers acquiring directly from a steel producer are typically subject to more stringent credit checks and shorter credit terms than customers purchasing through distributors. The bulk nature of these purchases, and the shorter credit terms offered and risk accepted by steel producers, is reflected in the fact that these direct supplies typically occur at lower prices than supplies through distributors. In contrast, distributors allow customers to purchase relatively small volumes, and offer more flexible credit terms, less stringent credit checks and shorter lead times on supply than are available on direct supplies. These customer benefits are reflected in the prices charged by distributors which are typically higher than the price of steel supplied directly by the producer.

382 Distributors frequently supply a range of processing services which involve breaking or dividing bulk steel into smaller quantities. The services typically include one or more of the following services:

- (a) the cutting of a flat steel coil product to length, referred to as “shearing”;
- (b) the cutting of flat steel coil product length-wise to make narrower strips or strands, referred to as “slitting”;
- (c) the recoiling of a flat steel coil product which has been sheared into a shorter coil (for example, by taking a 10 tonne coil and creating two five tonne coils of the same width); and
- (d) drilling or routing of plate.

383 It should be noted that processing services were not only provided by distributors. While a large proportion of the volume of sheet and coil sold by distributors to their customers was processed by the distributors, CIPA also carried out processing of sheet and coil and sold the processed sheet & coil to either its distributors or end customers directly.

384 Distributors incurred costs in supplying the above processing services and the prices charged by distributors would ordinarily reflect those additional costs. A number of witnesses (including Messrs Hennessy and Lobb) confirmed, however, that the supply cost of the flat steel products (whether purchased from BlueScope CIPA or from an import trader) comprised a large proportion of distributors’ overall costs. Indeed, Mr Lobb estimated that the cost of the steel (the raw material) constituted approximately 90% of the end price charged by CMC.

385 Distributors typically focus on distributing either “sheet and coil” products (ie, flat steel products) or “steel and tube” products (ie, long products and steel plate). While some distributors (including BlueScope) distribute both sheet and coil and steel and tube products, distributors typically establish distinct channels for the distribution of these product groups. In the case of BlueScope, its subsidiary, BlueScope Distribution, had the following trading divisions:

- (a) SMS (Sheet Metal Supplies) and Impact Steel which conducted BlueScope’s sheet and coil distribution businesses and which processed and sold mainly flat steel products; and
- (b) BSD (a business division of BlueScope Distribution trading under that name) which conducted BlueScope’s steel and tube distribution business, and which processed and sold mainly long steel products and steel plate.

386 There are a number of factors that cause distributors to focus on distributing either sheet and coil products or steel and tube products, including:

- (a) there is little overlap between customers who purchase steel and tube products and those who purchase sheet and coil products;
- (b) distributors require different warehousing arrangements, handling and processing equipment for “sheet and coil” compared to “steel and tube” products; and
- (c) distinct product and market knowledge is required to sell and distribute “sheet and coil” products compared to “steel and tube” products, since the applicable Australian standards and the end market uses of the product ranges are different.

387 There are a number of factors that make sheet and coil distribution in Australia highly competitive, including:

- (a) sheet and coil distributors can readily acquire comparable flat steel products at competitive prices from BlueScope CIPA or imports;
- (b) products and services offered by sheet and coil distributors are essentially homogenous;
- (c) the customer base for sheet and coil distribution is highly fragmented, with limited customer loyalty and almost no cost to customers of switching between competing distributors and most customers are supplied by multiple distributors;
- (d) there are a number of major competing distributors, and many smaller competitors, that distribute sheet and coil products; and

(e) as at 2013, there was significant industry wide overcapacity in sheet and coil distribution, and a history of expansion and entry into the market.

388 Although the particular sheet and coil products (or bundle of products) supplied in each transaction for each customer are essentially “bespoke” (ie, tailored to meet a customer’s needs), the component products and associated services are effectively homogenous for the following reasons: the steel supplied has extensively similar characteristics, whether originating from BlueScope or importers; significant sheet and coil distributors typically offer equivalent processing capability across an equivalent range of steel products; the level of service (in terms of speed of delivery, packaging, etc) is largely the same across all significant competitors; and all significant competitors are located in the major metropolitan areas in Australia.

389 The customer base of sheet and coil distributors is fragmented (as at 2013, BlueScope estimated that there were between 3,000 and 5,000 customers nationwide). There is limited customer loyalty and a key determinant for customers is price. Most customer transactions are preceded by the customer undertaking a process for discovering the best available price through seeking a formal quote (for larger transactions) or contacting a number of different distributors in order to obtain and compare distributors’ different prices (for smaller transactions). There is almost no cost to customers for switching between competing sheet and coil distributors. Many customers maintain multiple accounts with a range of distributors, which allows them to seek multiple quotes for any given purchase order. Customers do not typically enter into long term contracts for the supply of steel from sheet and coil distributors.

390 Within each state, there are a number of major competing distributors and many smaller competitors that distribute sheet and coil products. Most major competitors supply a comprehensive range of sheet and coil products. As at 2013, key sheet and coil distributors operating in Australia included the following:

- (a) BlueScope (SMS, Impact Steel): BlueScope owns sheet and coil distribution businesses, SMS and Impact Steel, which operate from a total of six sites located in Brisbane, Sydney, Melbourne, Adelaide and Perth. Each site has warehousing and sheet and coil processing capability.
- (b) Arrium (OneSteel): Prior to its acquisition by BlueScope on or around 1 April 2014, Arrium owned the OneSteel Sheet & Coil distribution business, which operates from four sites located in Sydney, Brisbane, Adelaide and Perth, with each location having

warehousing capacity and steel processing technology. In April 2013, Arrium sold the inventory, plant and equipment from its previous sheet and steel facility in Melbourne to Selection Steel. OneSteel acquired a significant proportion of its sheet and coil requirements from BlueScope, but also imported sheet and coil products.

- (c) Coil Steels is a subsidiary of CMC, a major importer and marketer of flat and long steel products. CMC comprises three divisions: sheet and coil, processing and long products. The sheet and coil division has large distribution centres in all capital cities and also has facilities in major regional centres, which are often co-located with the processing division. Coil Steels stocks a wide range of BlueScope and imported sheet and coil products. CMC also has a trading arm which supplies imported sheet and coil product into Australia.
- (d) Southern Steel distributes and processes flat and long steel products from sites across Australia and operates under several brands. Southern Sheet & Coil distributes flat products from Sydney, Brisbane, Newcastle and Townsville. It also processes and distributes sheet and coil products through Brice Metals in South Australia, Surdex Steel in Victoria and Southern Steel Cash & Carry in New South Wales. Southern Steel acquires sheet and coil from BlueScope and also imports sheet and coil products.
- (e) Selection Steel is a sheet and coil distributor with centres in Adelaide, Brisbane, Hobart, Melbourne, Perth, Sydney and Townsville. It supplies a wide range of sheet and coil products, and offers various processing services including slitting, shearing and guillotining. Selection Steel sources the majority of its products from New Zealand, Korea, Japan, China and Taiwan. Selection Steel's key suppliers include Pacific Coilcoaters, New Zealand Steel, Union Steel, Baosteel, Angang Steel, Wuhan Iron and Steel (Group) Corp, NSSMC and ChinaSteel. In April 2013, Selection Steel acquired the inventory, plant and equipment from OneSteel's distribution facility in Melbourne.
- (f) SK Steel Australia Pty Ltd (**SK Steel**) supplies sheet and coil products in Australia and the Asia Pacific region. It is an international steel trader and distributor, and also offers sheet and coil processing including slitting, shearing, recoiling and guillotining. SK Steel's distribution and processing facility is located in Eastern Creek in New South Wales. SK Steel imports into Australia all of its sheet and coil requirements.
- (g) Apex Steel is part of the Apex group of companies (described in more detail later in these reasons). Apex Steel provides sheet and coil processing services in Victoria

including shearing, guillotining, and slitting. Apex Steel imports the significant majority of its sheet and coil requirements.

- (h) Minmetals is a wholly owned branch of China Minmetals Corporation (a major state owned entity in China) and has a core business in steel trading. Minmetals supplies China-made steel products into Australia and also trades in metallurgical raw material. Minmetals is based in Melbourne but services customers nationally. Minmetals' product range includes both flat steel products and long steel products.
- (i) East Coast Steel is based in Sydney and was originally established to provide a slit coil service to the local manufacturing industry. East Coast Steel's product lines include sheet, bulk coil and stainless steel, and it has slitting, shearing and guillotining capacity. East Coast Steel imports the significant majority of its sheet and coil requirements.
- (j) Queensland Steel & Sheet is a privately owned Brisbane-based company that distributes sheet and coil products. Queensland Sheet and Steel imports the significant majority of its sheet and coil requirements.
- (k) Vulcan Steel is a privately owned steel distribution and processing company operating on the Australian east coast and in New Zealand. It specialises in steel distribution and processing steel coil, plate and long products. Vulcan Steel imports the significant majority of its sheet and coil requirements.
- (l) Stratco is a large roll forming company that has backwards integrated into importing flat steel products, some of which it processes and distributes as flat steel (ie, as opposed to roll-formed steel) in competition with other sheet and coil distributors in Western Australia and South Australia.

391 The evidence adduced in the proceeding established that, within each state, there are a number of distributors that distribute steel plate products. In the relevant period, steel plate distributors operating in Australia included the following (each of which supplied long products and steel plate): BSD, OneSteel Metalcentre, Southern Steel, CMC Steel and Vulcan Steel.

F. BLUESCOPE'S BUSINESS AND MANAGEMENT

392 The following section provides a description of the relevant aspects of BANZ's business and management.

393 At the relevant time, BANZ operated the following business divisions:

- (a) CIPA (Coated Industrial Products Australia) which manufactured flat steel products in Australia;
- (b) BlueScope Distribution, a wholly owned subsidiary of BlueScope, which was comprised of two principal business divisions: SMS, a sheet and coil distributor that purchased sheet and coil products from CIPA; and BSD, a distributor of long products that purchased plate products from CIPA; and
- (c) NZ Steel (New Zealand Steel Limited), a wholly owned subsidiary of BlueScope based in New Zealand, which manufactured flat steel products in New Zealand for supply in the New Zealand market and in other countries including Australia. NZ Steel supplied flat steel products into Australia through NZSA (New Zealand Steel (Australia) Pty Ltd).

394 During the relevant period, Mr Vassella was the Chief Executive Officer of BANZ. In this role, Mr Vassella was responsible for all of BlueScope’s steel operations in Australia and New Zealand. He reported to Paul O’Malley, the Managing Director and Chief Executive Officer of BlueScope until 2017.

CIPA

395 During the relevant period, CIPA manufactured a broad range of flat steel products in Australia including hot rolled coil, cold rolled coil, metallic coated coil, painted coil and steel plate. Within each of those categories, CIPA offered products in different grades, specifications, dimensions and surface finishes. CIPA also supplied many products under trademarks including: for metallic coated coil products, Galvabond, Galvaspan, Zinalume, Truecore and Zincanneal; for painted coil, Colorbond; and for steel plate, Xlerplate and Xlerplate Lite. BlueScope published a “Sheet and Coil Product Guide” which contained detailed information on the different flat steel products offered by CIPA.

396 CIPA supplied its products directly to large end-customers (typically manufacturing companies) and to its distribution channel, which included BlueScope’s subsidiary, BlueScope Distribution, and a number of “aligned” and “unaligned” independent distributors. Independent distributors who were long-term customers of CIPA and purchased all or most of their flat steel products from CIPA were commonly referred to as “aligned distributors”. A number of witnesses also used the expression “franchised distributors” and I infer that the two expressions were used interchangeably (although there was no franchise agreement between CIPA and distributors). During the relevant period, the aligned distributors included OneSteel, Southern

Steel, CMC Steel and Apex Steel and the unaligned distributors included Selection Steel and Vulcan Steel.

397 CIPA's management structure comprised two sections: Manufacturing, and Sales and Marketing. This proceeding is principally concerned with the conduct of the Sales and Marketing section. Between late 2011 and August 2013, the Vice President of Sales and Marketing was Mr Garey. On 1 September 2013, Mr Ellis formally commenced in the role of General Manager Sales & Marketing. In that role, Mr Ellis reported directly to Mr Vassella.

398 The Sales and Marketing section of CIPA was divided into four sales areas:

- (a) Distribution Markets, which was the responsibility of Mr Hennessy during the relevant period;
- (b) Building Markets, which was the responsibility of Simon Croft during the relevant period;
- (c) Manufacturing Markets, which was the responsibility of Steve Gregson during the relevant period; and
- (d) IMG (International Markets Group), which was the responsibility of Mr Schulz during the relevant period.

399 This proceeding is principally concerned with the conduct of the Distribution Markets and IMG sales areas.

CIPA's Distribution Markets sales area

400 Mr Hennessy was responsible for the Distribution Markets sales area and held the title Executive National Sales Manager. The Distribution Markets sales area consisted of a number of National Sales Managers who reported to Mr Hennessy and had responsibility for specific customers of CIPA. During the relevant period:

- (a) Mr Kelso was the Sales Manager QLD and, at a national level, had responsibility for CIPA's relationships with OneSteel and Vulcan Steel (although he also dealt with other distributors, such as CMC Steel and Southern Steel in respect of their Queensland business);
- (b) Mr Gent was the Sales Manager NSW and Acting Sales Manager VIC/TAS and, at a national level, had responsibility for CIPA's relationships with CMC Steel and BlueScope Distribution (both SMS and BSD); and

(c) Mr Sparks was the Sales Manager SA/NT and, at a national level, had responsibility for CIPA's relationship with Southern Steel.

401 Messrs Gent, Sparks and Kelso would regularly have discussions to ensure that they were all communicating with the market on a consistent basis in respect of CIPA's products and pricing.

402 Mr Whitfield and Ms Arzoumanian were members of CIPA's Distribution Markets sales team who reported to Messrs Kelso, Gent and Sparks.

403 Other staff who reported to Mr Hennessy at the National Sales Manager level included Elly Pilkadaris, who was based in Western Australia, and Mr Bryers. Ms Pilkadaris had responsibility at the state level for Western Australia. Her focus was on business development, however she would join Mr Gent, Mr Sparks and Mr Kelso on telephone conferences to discuss pricing. Mr Bryers was the Sales Operations Manager and was responsible for sales analysis reporting and data collection. He was the main person that compiled forecasts, sales analysis and margin analysis and planning.

404 During the relevant period, Mr Unicomb held the position of Pricing Manager for Distribution, having responsibility for the Distribution Markets sales area. Mr Unicomb reported to Mr Palermo. From 2011 until mid-2014, Mr Palermo held the role of National Pricing Manager for CIPA. In that role, Mr Palermo was responsible for the pricing of the whole range of products produced by CIPA, including flat steel products sold by the Distribution Markets sales area. During the relevant period, Mr Palermo reported to Lisa Dent who held the role of National Marketing Manager. Mr Unicomb's primary responsibility was the collation of prices of competing products (primarily imports) to determine an import parity price (often abbreviated to **IPP**). The import parity price underpinned CIPA's pricing for a large part of its product range.

CIPA's IMG sales area

405 Mr Schulz was responsible for the IMG sales area and held the title of President of IMG. Between late 2011 and August 2013, Mr Schulz reported to Mr Garey and, between September 2013 and August 2017, Mr Schulz reported to Mr Ellis. As stated earlier, Mr Schulz managed a team of approximately 36 people across approximately seven offices around the world. BlueScope's export department team of around 10 staff members, who were based at BlueScope's Port Kembla mill, reported to Mr Schulz.

406 The largest component of Mr Schulz’s responsibilities was selling excess BlueScope material produced in Australia in international markets. On an annual basis, IMG was involved in the sale of approximately 1.5 million tonnes of steel, of which approximately half was manufactured in Australia by BlueScope. However, IMG also:

- (a) sold excess NZ Steel material produced in New Zealand in international markets;
- (b) sold steel from BlueScope’s Asian joint venture with Nippon Steel & Sumitomo Metal Corporation (NSSMC), a steel mill in Japan, in overseas markets;
- (c) sourced steel for BlueScope’s factories overseas (particularly for the United States but also, on occasion, for Australia); and
- (d) engaged in a limited amount of “pure trading” where BlueScope purchased steel from an unrelated party (typically a steel mill) and then sold the steel to an unrelated party.

407 BlueScope staff who reported directly to Mr Schulz or belonged to IMG during the relevant period included:

- (a) Mr Inomata, the Manager of BlueScope’s Japan Office, who also had broader oversight of some of BlueScope’s Asia offices;
- (b) Dorgival Alencar, who was based in Miami;
- (c) Ms Wang, the General Manager of the BlueScope Taiwan office;
- (d) Charles Lee, the General Manager of the BlueScope Korea Office;
- (e) Noriaki Matsunaga, the Manager of BlueScope’s London office; and
- (f) Jack Marshall who was based in Los Angeles.

BlueScope Distribution

408 BlueScope Distribution is a wholly owned subsidiary of BlueScope. During the relevant period, BlueScope Distribution had the following divisions:

- (a) BSD, which distributed long products and purchased steel plate from CIPA;
- (b) SMS, which distributed sheet and coil products and purchased sheet and coil from CIPA; and
- (c) Impact Steel, which distributed sheet and coil products in Victoria.

409 During the relevant period, Mr Bray was the General Manager of BlueScope Distribution and reported to Mr Vassella. Mr Cornelius had management responsibility at SMS and reported to Mr Bray.

410 BlueScope Distribution competed with other distributors for the supply of flat steel products to end-users. During the period August 2013 to June 2014, Mr Kelso gave evidence that he recalls from conversations with existing BlueScope Distribution customers, external project owners and internal discussions with colleagues within BlueScope that along with each of BSD, SMS and Impact Steel, potential customers were considering purchasing flat steel products from companies such as OneSteel, Southern Steel, CMC Steel, Vulcan Steel, Selection Steel and Apex Steel.

NZSA

411 NZ Steel and NZSA are both wholly owned subsidiaries of BlueScope. During the relevant period, NZ Steel manufactured flat steel products in New Zealand. Steel produced by NZ Steel that exceeded demand in New Zealand was supplied to NZSA for sale into Australia. This included a broad range of sheet and coil products. NZ Steel also exported excess steel to the United States and other countries.

412 NZSA supplied flat steel products in Australia to a wide range of customers, including customers that were aligned distributors for CIPA. The customers supplied by NZSA included Impact Steel, OneSteel, Southern Steel, CMC Steel, Apex Steel, Selection Steel, Queensland Sheet and Steel, SK Steel, Vulcan Steel and Selwood Steel.

413 The Manager of NZSA from May 2008 to July 2014 was Mr O'Brien. Throughout the time that Mr O'Brien was employed at NZSA, he reported to Mr Fuller, the Vice President, Sales and Marketing. Mr Fuller reported to the President of NZ Steel who, in September 2013, became Mr Garey. Mr Fogarty worked in NZSA's Melbourne office with Mr O'Brien.

414 Mr O'Brien gave evidence that NZSA competed with other steel importers in the Australian domestic market, including Wright Steel, CMC Trading (which was the import business of CMC), Toyota Tsusho and Minmetals.

G. IMPORTED FLAT STEEL PRODUCTS

415 The following section provides a description of the overseas producers and importers of flat steel products. An issue that arises in this proceeding is whether BlueScope was in competition

with overseas steel mills (and specifically Yieh Phui) in respect of the supply of flat steel products in Australia, or whether the relevant competitors were import traders who imported the steel into Australia for supply. The evidence relevant to that issue is considered in this section.

Overseas Steel Mills

416 During the relevant period, approximately two-thirds of the flat steel products supplied in Australia was manufactured by CIPA and the remaining one-third was imported. The imported flat steel supplied in Australia was manufactured by steel mills in a number of countries including Japan, China, South Korea, Taiwan and New Zealand. Imported steel from New Zealand was manufactured by NZ Steel and supplied by NZSA. As discussed below, a number of companies in Australia conducted business involving the importation of flat steel products produced by overseas steel mills and the distribution of those products in Australia. In the proceeding, those companies were referred to as import traders.

417 Mr Schulz gave evidence that, in the Australian market, BlueScope faced competition from overseas steel mills, particularly from mills in Asian countries which export their flat steel products into Australia. Mr Schulz said that the steel mills that exported flat steel products into Australia in competition with BlueScope included:

- (a) Yieh Phui which manufactures steel in Taiwan;
- (b) China Steel which manufactures steel in Taiwan;
- (c) Shang Shing which manufactures steel in Taiwan;
- (d) Dongbu Steel Co. Ltd which manufactures steel in South Korea;
- (e) POSCO which manufactures steel in South Korea;
- (f) NSSMC which manufactures steel in Japan;
- (g) Hyundai Steel Company (**Hyundai**) which is based in South Korea and in particular manufactures hot rolled coil;
- (h) SeAH Steel Co which manufactures pipe in South Korea;
- (i) Dongkuk (also known as Union Steel) which manufactures steel in South Korea;
- (j) JSW which manufactures and exports steel from India;
- (k) Essar Steel which manufactures and exports steel from India; and
- (l) Uttam Galva which manufactures and exports steel from India.

418 In cross-examination, Mr Schulz acknowledged that, in his role within BlueScope, he was not involved in the sale of steel to distributors or customers in Australia, and the price and terms on which steel products were sold to distributors and customers in Australia was not within his remit. Mr Schulz also acknowledged that he was not involved in considering the competition that CIPA faced in selling into the Australian market. Given those acknowledgments, I place no weight on Mr Schulz's evidence in so far as it expresses the opinion that overseas steel mills were in competition with BlueScope. However, I accept his evidence in so far as it identifies the overseas steel mills which exported flat steel products to Australia.

419 Mr Kelso gave evidence that overseas mills would largely sell steel products into the Australian market through import traders. There were, however, some specific instances in which overseas mills would supply products directly to distributors or end customers in Australia. In respect of supply to end customers, Mr Kelso said that Chinese mills would occasionally provide sheet piling, which is made from flat steel, to end customers in Australia. Mr Kelso recalled that, during a visit to a port expansion project in Townsville, he was told by the project owner that the piling being used had been purchased directly from an overseas mill. Mr Kelso said that he saw the piling himself and it was marked with Chinese language characters. Mr Kelso also said that he was aware from conversations that he had with OneSteel representatives that OneSteel had a direct supply relationship with a steel mill in Korea called Hyundai for the supply of plate products. Apart from those specific instances, though, Mr Kelso said that import traders generally arranged for the importation of steel products and their sale in Australia. The import traders could offer their customers a range of steel products, including steel products from different mills, with different qualities. Mr Kelso gave evidence that the import traders set the price at which they would then supply steel products to distributors and to manufacturers in Australia, in competition with CIPA.

420 Yieh Phui is the overseas steel mill which was the subject of an alleged attempt by BlueScope and Mr Ellis to induce a price fixing arrangement or understanding. Mr Wright gave evidence about Yieh Phui's business. Yieh Phui's headquarters are located in Kaohsiung in southern Taiwan and it has several manufacturing mills in Taiwan and China. Yieh Phui has a reputation as a manufacturer of high quality steel. Mr Wright gave evidence that, from his experience in the industry, Yieh Phui manufactured about 70% of all coated flat steel products (either pre-painted or zinc coated) imported into Australia annually. As discussed further below, flat steel products manufactured by Yieh Phui and imported into Australia were supplied

exclusively to an entity associated with Wright Steel, not to Australian distributors or “end-user” customers directly.

421 In his s 155 examination, Mr Vassella agreed with the propositions that:

- (a) the prices at which importers of steel products sold the products in Australia impacted on BlueScope’s ability to compete with the imported product on price;
- (b) in the relevant period, both BlueScope and Yieh Phui were key suppliers of coated flat steel products in Australia; and
- (c) as an exporter of steel products to Australia, Yieh Phui was a competitor of BlueScope in the Australian market.

422 In cross-examination, Mr Ellis gave inconsistent evidence on the question whether Yieh Phui was a competitor of BlueScope. The first exchange on that question was as follows:

You regarded Yieh Phui as a competitor of BlueScope in Australia?---No, I saw that the traders that represented the overseas mills as competitors.

You didn’t think of Yieh Phui itself as a competitor?---Not directly, no.

423 However, Mr Ellis was subsequently reminded that, in his meeting with representatives of Yieh Phui (which is considered in more detail below), he stated that the discussion he wished to have about the price of flat steel products in Australia was sensitive and the meeting participants needed to be careful. The following exchange occurred:

... your view was that everyone in the meeting needed to be careful about what they said about this topic?---Well, when competitors discuss pricing, Mr Hodge, you need to be careful with where you tread, hence the sensitivity.

424 A little later, the following similar exchange occurred:

And the reason that you said in the meeting with Yieh Phui that the next topic was a little bit sensitive was because you understood that there was significant legal risk for competitors in discussing prices?---Yes. I think that is true...

425 It is clear from the subsequent two exchanges that Mr Ellis considered that Yieh Phui was a competitor of BlueScope. In my view, the first answer given by Mr Ellis was an answer that had been rehearsed for the proceeding to support his defence, but did not reflect his true opinion. When less guarded, and confronted by his own statements made in the meeting with Yieh Phui, Mr Ellis gave a truthful answer that his discussion with Yieh Phui was sensitive because BlueScope considered that Yieh Phui was a competitor in the Australian market for

flat steel products and Mr Ellis was proposing to discuss BlueScope's prices for flat steel products in the Australian market with Yieh Phui.

Import Traders

426 As stated above, a number of import traders purchase and import into Australia flat steel products manufactured by overseas steel mills and sell these products to distributors or manufacturers. During the relevant period, BlueScope monitored the price of imported flat steel products and its internal documents listed a significant number of import traders including CMC Trading, Wright Steel, Apex, GS Global and Marubeni.

427 Wright Steel and Citic are the import traders which were the subject of an alleged attempt by BlueScope and Mr Ellis to induce a price fixing understanding. In the relevant period, Wright Steel and Citic conducted an unincorporated joint venture for importing flat steel products into Australia. BlueScope denied that it was in competition with Wright Steel, contending that Citic, not Wright Steel, was the supplier of flat steel products in Australia under the joint venture arrangements. Ultimately, the issue raised by BlueScope has little significance because the ACCC's allegation concerning the Wright Steel understanding was made in the alternative: that Wright Steel, or Citic, or each were suppliers of flat steel products in Australia and the alleged attempt to induce a price fixing understanding was directed at whichever of the companies was the supplier.

428 Mr Wright gave evidence that the Wright Steel-Citic JV is an unincorporated joint venture (in respect of which there is no separate joint venture entity). The joint venture originally operated on the basis of a verbal agreement which was negotiated between Mr Wright and Mr Yuheng Wu of Citic. Two agreements were subsequently entered into that remained current during the relevant period.

429 The first agreement was entered into on 14 September 2005 and is titled "Commissions Agreement". It recites that the purpose of the agreement is to modify the payment structure for the payment of commissions to Wright Steel. The agreement records that the "commission" payable to Wright Steel is calculated as 50% of the profit for each contract after certain identified expenses are deducted (including materials (cost of goods sold), freight, customs duties, insurances port charges, demurrage, storage).

430 The second agreement was entered into on 16 December 2008. It recites that the parties desire to cooperate together to import steel products from Asia to Australia and includes the following contractual stipulations:

- (a) Clause 2 is titled “Main roles for each party” and records that:
 - (i) Wright Steel is responsible for sourcing of products from Asian countries and selling in Australia, and also handling order processing, marketing and organising ocean and domestic transportation of cargo.
 - (ii) Citic is responsible for payment of purchases and expenses, trade finance, foreign currency hedging, credit insurance and credit control.
- (b) Clause 3 is titled “Obligations of [Citic] and [Wright Steel]” and stipulates that Wright Steel will use its best efforts for sourcing and selling of products; Citic is the principal for importing and selling of products; and Wright Steel will confirm orders and sign contracts with third parties on behalf of Citic.
- (c) Clause 4 is titled “Issuance of Letter of Credits” [sic] and stipulates that:
 - (i) Wright Steel will prepare a cost and profit estimation for each order and will forward to Citic together with the signed contracts with suppliers.
 - (ii) Upon receipt of the cost and profit estimation, Citic will issue a letter of credits to suppliers according to the signed contracts within a reasonable time.
- (d) Clause 8 is titled “Profit and Loss calculation and sharing” and stipulates that Wright Steel will share 50% of profit or loss as commission for each contract after specified expense items have been deducted, including materials (ie, cost of goods sold), freight, customs duties, third party commissions, marine and credit insurance, port charges, demurrage and storage.

431 Mr Wright gave evidence about the practical operation of the joint venture. He said that, since 2001, Wright Steel had been responsible for the following aspects of the joint venture:

- (a) sourcing flat steel products from Asian mills by negotiating prices and placing orders with Asian mills;
- (b) negotiating with customers the prices that the joint venture will charge for steel products;
- (c) arranging credit insurance and ensuring customers stay within their credit limits;

- (d) arranging international shipping, loading and customs clearance, local transport, storage and delivery to customer premises;
- (e) checking and approving supplier invoices prior to payment by Citic;
- (f) preparing invoices for Citic to issue to customers; and
- (g) following up late payments.

432 Mr Wright said that Citic's primary role was to provide finance for the joint venture's operations. Since 2001, Citic had been responsible for:

- (a) providing trade finance by paying suppliers under a letter of credit once the invoices have been approved by Wright Steel;
- (b) hedging the joint venture's foreign currency risk;
- (c) maintaining credit and product liability insurance which are taken out in Citic's name;
- (d) credit control and forecasting for each customer; and
- (e) invoicing customers and receiving payment of invoices (while Wright Steel prepares the draft invoices that are issued to customers, Citic issues the invoices and receives payment from customers).

433 Mr Wright said that, during the relevant period, the Wright Steel-Citic JV did not carry inventory of steel products in Australia and Wright Steel did not order steel products from a mill until it had a confirmed order from the customer. Wright Steel received approaches from customers seeking prices for particular products. The customer specified the specific products they wanted including grade, width, thickness, surface condition, coil weight and month of shipment. Some customers addressed orders to Wright Steel while others sent orders to Wright Steel but addressed the orders to Citic. After receiving these enquiries, Wright Steel would approach the overseas mill for a price based on the specifications provided by the customer. Once Wright Steel had received pricing from the mill, it sent offers to customers. The offers were sent on Wright Steel letterhead and were at a price determined by Wright Steel. Wright Steel then ordered the required steel products from the mill, based on the offers accepted by its customers. The orders took the form of a document known as an "assortment" which specified the products being ordered and the customer who was ordering each product. The mill then manufactured the products that Wright Steel had ordered and sent an invoice to Wright Steel shortly before the products were shipped. The invoices were addressed to Citic. Wright Steel approved the invoice and forwarded it to Citic. Citic would then pay the mill under a letter of

credit or by electronic funds transfer. Wright Steel arranged shipping, customs clearance and warehousing in Australia which was also paid for by Citic under a letter of credit. Wright Steel arranged for delivery of the steel product to the customer and prepared an invoice, which Citic issued to the customer. The process from initial enquiry to delivery and invoicing typically took three to four months.

434 As discussed earlier, an understanding will not contain a cartel provision unless the competition condition is satisfied. The competition condition requires that at least two of the parties to the understanding are, or are likely to be, in competition with each other in relation to, relevantly, the supply of goods the subject of the cartel provision. BlueScope contends that the ACCC's allegation concerning the Wright Steel understanding must fail because Wright Steel was not a supplier of flat steel products within the meaning of the Act and therefore was not in competition with BlueScope in respect of the supply of those products. I reject that contention for the following reasons.

435 The joint venture between Wright Steel and Citic can be characterised in one of two ways. Regardless of the way in which it is characterised, the competition condition can be satisfied for the purposes of the ACCC's allegation.

436 The first way in which to characterise the joint venture is that Wright Steel's role in the joint venture was as a procurement, marketing and selling agent on behalf of Citic, for which it was paid a commission being 50% of the profits earned from the sale of flat steel products in Australia. In the capacity of an agent, Wright Steel marketed and sold flat steel products to Australian customers including negotiating the price and procuring the steel from overseas mills. If the joint venture is characterised in that manner, Citic was the supplier of the flat steel products for the purposes of the Act and, relevantly, was a competitor in the Australian market. That characterisation satisfies the ACCC's alternative allegation that Citic was in competition with BlueScope in relation to the supply of flat steel products in Australia. As Wright Steel was Citic's agent in the marketing and sale of the flat steel products in Australia, it is open to find that BlueScope and Mr Ellis attempted, through the agency of Wright Steel, to induce Citic to make a price fixing understanding in respect of the supply of flat steel products by Citic, as alleged by the ACCC.

437 The second way in which to characterise the joint venture arrangements is that each of the joint venture parties undertook their designated joint venture activities on behalf of the joint venture; that is, on their own behalf and on behalf of their joint venture partner. Citic entered into

contracts for the purchase and sale of flat steel products on behalf of itself and on behalf of Wright Steel as parties to the unincorporated joint venture, such that the supply of products was made by both entities in equal shares (reflecting the profit share arrangement) and profits were jointly earned (or losses jointly incurred) from the relevant trading activity. Similarly, Wright Steel engaged in procurement, marketing and selling activities on behalf of itself and Citic as joint suppliers of the imported products. That alternative characterisation also satisfies the ACCC's allegation that both Wright Steel and Citic were in competition with BlueScope in relation to the supply of flat steel products in Australia. It is open to find that BlueScope and Mr Ellis attempted to induce Wright Steel, on its own account and as agent for Citic, to make a price fixing understanding in respect of the supply of flat steel products by Citic and Wright Steel, as alleged by the ACCC.

438 The ACCC's allegation concerning the Wright Steel understanding is not dependent on establishing that BlueScope and Mr Ellis were aware of the details of the Wright Steel-Citic JV. It is only necessary for the ACCC to establish that BlueScope and Mr Ellis were aware of the facts that supported the conclusion that Mr Wright was a representative of a competitor to BlueScope in respect of the import supply of flat steel products in Australia, whether that competitor was Wright Steel, or Citic, or both entities as joint venturers. That knowledge is established. By each of their defences, BlueScope and Mr Ellis admitted that BlueScope was, in the relevant period, in competition with whichever was the relevant entity amongst Wright Steel and/or Citic that supplied flat steel products in Australia. Mr Ellis gave evidence that, at the time of meeting with Mr Wright in September 2013, he was aware that Wright Steel was the exclusive import trader in Australia for Yieh Phui steel products and also supplied hot rolled coil obtained from China Steel. He also gave evidence that, at that time, "Wright Steel" was one of the largest import traders in Australia and that "Wright Steel" was selling steel in competition with CIPA and with other import traders.

439 Mr Wright gave evidence that Wright Steel imports a range of sheet and coil flat steel products including hot rolled coil, cold rolled coil, painted coil, sheet steel, galvanised steel (being hot rolled coil or cold rolled coil that is coated with zinc) and aluzinc (being cold rolled coil that is coated with aluminium and zinc). Mr Wright said that since the 1990s, Wright Steel has imported all of the products that BlueScope manufactures and/or imports for supply in Australia and that, during the relevant period, BlueScope had an equivalent competing product to each of the products imported by Wright Steel. Mr Wright said that Wright Steel is constantly asked by customers to try and beat BlueScope's pricing against these products and that Wright

Steel has succeeded in gaining customers who were previously supplied by BlueScope. However, the most fruitful source of new customers for Wright Steel is to seek to win them from other importers. The other importers that Wright Steel competed with included NZSA, Stencor, Toyota Tsusho, CMC Trading, Croft Steel and Miso Marubeni.

440 Mr Wright said that, during the relevant period, Wright Steel focused on sourcing import product for long-term trade customers. While 90% of Wright Steel's customers were distributors, it supplied three Australian manufacturers: Gram Engineering in Sydney, Stratco in Adelaide and Stramit in Melbourne.

441 Mr Wright said that Wright Steel sources its steel products predominantly from Yieh Phui and China Steel of Taiwan. Mr Wright said that both of these companies operate steel mills in Taiwan and are regarded in industry terms as "Tier 1" producers. That is, their administration and delivery performance are first class and they have a reputation for manufacturing products that are reliably supplied within high technical manufacturing specifications. Mr Wright said that Tier 1 quality steel is considered the best quality mass consumption steel in the market and is used to produce a range of products requiring high quality finish such as rainwater products, hot water tanks, automotive products, white goods and building products. In the relevant period, Yieh Phui supplied approximately 80% of Wright Steel's annual import volume of sheet and flat steel products with the remaining 20% being sourced predominantly from China Steel.

442 Mr Wright gave evidence that both Yieh Phui and China Steel export steel to Australia exclusively through Wright Steel. Wright Steel has been the exclusive supplier of steel into Australia from Yieh Phui since around 1992, and from China Steel since around 2001-2002. Wright Steel has not used another overseas mill for around 25 years. Wright Steel does not have a written exclusivity agreement with either company. Mr Wright said that the exclusivity is based on the strong relationships between Wright Steel and each company.

443 Mr Wright said that Yieh Phui and China Steel do not tell Wright Steel/Citic what price to charge to the customer. Wright Steel/Citic sets the prices charged to its Australian customers. When negotiating and setting the prices to be charged, Mr Wright takes account of the costs incurred (including the cost of the steel procured from the overseas mill, the costs in arranging shipping and domestic freight, and the costs of customs duties) and the margin that Wright Steel/Citic seeks to earn from the sale of steel. In cross-examination, Mr Wright agreed that the margin earned on sales of flat steel differed between different categories of product

(reflecting the forces of supply and demand for different products) and that the prices charged to individual customers were based on individual negotiations with each customer.

444 Immediately prior to the relevant period, Wright Steel was a substantial supplier of flat steel products in Australia, supplying about 10% of the national market.

H. DISTRIBUTORS OF FLAT STEEL PRODUCTS

445 As stated earlier, within each state there are a number of major competing distributors and many smaller competitors that distribute sheet and coil products. Most major competitors supply a comprehensive range of sheet and coil products. BlueScope's wholly owned distributors of sheet and coil products, SMS and Impact Steel, have been described earlier. This section describes the other major distributors of flat steel products that are relevant to this proceeding. BlueScope categorised those distributors as aligned (being those that purchased all or most of their flat steel products from CIPA) or non-aligned. It is convenient to adopt that categorisation, and the categorisation has some relevance to the conduct considered in these reasons.

446 In the following description, Apex Steel has been categorised as aligned, although different witnesses had different perspectives on its position. As discussed below, Apex had a number of business divisions including relevantly Apex Steel (which was a distributor of sheet and coil products) and Apex Building Products (which acquired pre-painted steel, coil and metallic steel coil from CIPA for use in the manufacture of roll formed products such as gutters, roofing, downpipes, louvers, sheds, carports, fencing and steel house frames). Mr Hennessy gave evidence that Apex Building Products purchased the majority of its steel from CIPA whereas Apex Steel only purchased about 25% of its steel from CIPA. Mr Hennessy nevertheless categorised Apex Steel as an aligned distributor of CIPA. Conversely, Mr Kelso did not refer to Apex as an aligned distributor.

Aligned distributors

447 At the relevant time, BlueScope's "aligned" distributors were OneSteel, Southern Steel, CMC Steel and Apex Steel. In 2014, BlueScope purchased OneSteel's sheet and coil business.

OneSteel

448 At the relevant time, OneSteel operated a sheet and coil business known as OneSteel Sheet & Coil and the business OneSteel Metalcentre which focused on general distribution of steel.

449 Mr Kelso was responsible for CIPA's national relationship with OneSteel (among other distributors). In managing BlueScope's relationship with OneSteel in the relevant period, Mr Kelso's contacts at OneSteel were:

- (a) Mr Birchall, responsible for the overall general management of OneSteel Sheet & Coil;
- (b) Mr Szecsodi, responsible for purchasing, OneSteel Sheet & Coil;
- (c) Mr Bolzan, National Procurement Manager, OneSteel Metalcentre; and
- (d) Mr Lewin, General Manager, OneSteel Metalcentre.

Southern Steel

450 Southern Steel is a national steel distributor owned by Peter Smaller and his family, and is based out of Milperra in New South Wales. During the relevant period Southern Steel had various divisions and/or subsidiaries including:

- (a) Southern Sheet & Coil, which distributed sheet and coil products in New South Wales and Queensland;
- (b) Surdex Steel, which distributed sheet and coil products in Victoria;
- (c) Brice Metals, which distributed steel, including sheet and coil, in Western Australia and South Australia; and
- (d) Southern Steel Supplies, which distributed plate products in New South Wales.

451 Mr Sparks said that his most frequent contacts in respect of Southern Steel were Mr Larkin (who was General Manager of Southern Sheet & Coil) and Mr Lander (who was General Manager of Brice Metals). Mr Sparks also had discussions with:

- (a) Peter Smaller, the Managing Director of Southern Steel, on an infrequent basis;
- (b) Kevin Smaller, the General Manager of the various Southern Steel divisions; and
- (c) Kerrie-Anne Gatt who was the Business Operations Manager at Southern Steel.

CMC Steel

452 In the relevant period, CMC Steel operated two processing sites in New South Wales: one to process sheet and coil and the other to process long products. The Managing Director of CMC Steel was Mr Stedman. The General Manager of CMC Steel (who managed CMC Steel on a national basis) was Mr Simpkin. The State Manager for New South Wales within CMC Steel was Mr Lobb. Both Ashley Smith and Mr Klingos were responsible for steel procurement and

dealt directly with CIPA regarding CIPA's prices to CMC Steel. This included providing feedback on import sources and import prices.

453 Although CMC Steel was an aligned distributor of BlueScope, Mr Lobb said that prior to and in the period from 2013, CMC Steel also sourced imported flat steel products through steel trading houses, in particular Stemcor, Marubeni and GS Global and via its related company, CMC Trading. These trading houses acquired flat steel for CMC Steel from various steel mills in Korea and Taiwan, and Angang out of China. To the best of Mr Lobb's recollection, these were mills that were not subject to anti-dumping duties at the time (but may have been subject to anti-dumping applications). The imported flat steel sourced through these steel trading houses was comparable to BlueScope flat steel in that it met Australian standards and was similar in quality. The imported flat steel was generally cheaper in price when compared to BlueScope products.

454 CMC Steel had facilities to process the steel products that were supplied to CMC Steel by the steel mills. For sheet and coil, this included facilities for shearing and slitting. Mr Lobb stated that processing is a significant undertaking in terms of investment and ongoing management and maintenance costs. Processing requires the use of large and expensive machinery and staff to operate the machinery and other associated costs. Those processing costs were included in the price that was charged by CMC Steel to its customers for processed products. Mr Lobb stated that 60% to 70% of steel sold to customers by CMC Steel was processed. In terms of the remaining unprocessed steel sold by CMC Steel, Mr Lobb said that CMC Steel might buy and sell some items directly, in the same size, shape and condition that it had bought from the mill. In these cases, processing was not required as CMC Steel bought the processed product from the mill directly. Mr Lobb said that in these cases, CMC Steel was buying the product on behalf of a customer who either would have difficulty buying direct from the mills, or chose not to because they wanted CMC Steel's service.

455 The price that CMC Steel charged to the customer included the cost of the raw material plus processing costs, freight, pallets and other services supplied by CMC Steel. Those costs would be incorporated into a single end price to the customer. Mr Lobb estimated that the cost of the steel (the raw material) constituted approximately 90% of the end price charged by CMC Steel. Mr Lobb said that the end price charged to a particular customer also depended on various matters, such as the size of the customer and its relationship with CMC Steel, the amount of business it would do and competition in the market and the need to meet competitive price

offers. Nevertheless, if there was an increase in an input cost, such as the cost of steel, Mr Lobb said that CMC Steel would endeavour to pass that increase on to its customers.

456 Mr Lobb said that, in 2013, CMC Steel's major competitors in the distribution and sale of flat steel products to end users were SMS, other CIPA aligned distributors (Southern Steel and OneSteel) and other distributors in New South Wales and Victoria that Mr Lobb described as "import-style competitors" (including Selection Steel, Vulcan Steel, Apex Steel and East Coast Steel). It can be noted that Mr Lobb perceived that Apex Steel was an "import-style competitor" rather than an aligned distributor of CIPA.

457 Mr Lobb said that, by 2013, CMC Steel was in a poor financial position. It had high overheads and profit margins, in terms of percentages, were in the single figures. Mr Lobb recalls thinking at that time that it was imperative for CMC Steel to increase its profitability otherwise it would face being closed down or sold.

Apex Steel

458 In 2013, the Apex group comprised a number of companies which conducted three different businesses:

- (a) Apex Building Products Pty Ltd, Apex Building Products (QLD) Pty Ltd and Apex Steel Supplies Pty Ltd (collectively, **Apex Building**) acquired pre-painted steel, coil and metallic steel coil from CIPA for the manufacture of roll formed products such as gutters, roofing, downpipes, louvers, sheds, carports, fencing and steel house frames. The Apex Building businesses operated in Victoria, South Australia, Queensland and New South Wales.
- (b) Apex Steel was located in Melbourne and was a distributor of flat steel products which were acquired from CIPA and from importers. Mr Calleja's colleague, Mr Compagnino, was the Managing Director of Apex Steel.
- (c) Horan Steel Holdings Pty Ltd (**Horan Steel**) was located in Sydney and Newcastle and was jointly owned by Apex Building and Vulcan Steel. Horan Steel acquired various long steel products and processed them to the customer's requirement.

459 Mr Calleja said that the Apex Steel business was a traditional distribution business. It acquired flat steel products from suppliers in bulk and supplied the products in smaller parcels by slitting and shearing the steel. Apex Steel's services included inventory management, just-in-time delivery, shorter lead times than steel mills and more attractive credit terms than customers

could get from either CIPA or import traders. Mr Calleja agreed that the prices that were charged to the customer by Apex Steel included the cost of raw materials, processing costs and the cost of provision of other supply services. Mr Calleja agreed that, in setting Apex Steel's prices, Apex Steel had regard to its costs as well as competition in the market. Mr Calleja said that distribution is a "very negotiable" business, with individual price setting for individual customers. The price paid by a customer depended on matters such as the size of the customer, its relationship to Apex Steel, and the amount of business that it did with Apex Steel.

460 Mr Calleja said that the main suppliers to the Apex group were BlueScope CIPA and various importers, including Kenna International and Wright Steel. Kenna International and Wright Steel were trading houses that acquired sheet and coil steel from Asian mills for import to Australia.

461 Mr Calleja said that BlueScope is both a supplier to Apex Steel (through CIPA) and a direct competitor to Apex Steel (through SMS). The following businesses were major competitors to Apex Steel as at 2013: SMS (Australia wide); Southern Steel (Australia wide); Vulcan Steel (in Melbourne and Brisbane); Selection Steel (in Melbourne, Sydney and Brisbane); and CMC Steel (Australia-wide).

Non-aligned distributors

462 Mr Hennessy gave evidence that, at the relevant time, CIPA's non-aligned distributors included Selection Steel, Vulcan Steel's sheet and coil division, Queensland Sheet and Steel, SK Steel and East Coast Steel, being distributors of flat steel products which purchased some products from CIPA but purchased a large percentage of their steel from importers. Evidence was given about Vulcan Steel, Selection Steel and Selwood Steel.

Vulcan Steel

463 Vulcan Steel is the Australian subsidiary of a New Zealand company, Vulcan Steel Ltd, which conducts a steel distribution and steel processing business based in New Zealand. All references in these reasons to "Vulcan Steel" are to the Australian subsidiary. Vulcan Steel is headquartered in Dandenong, Victoria and operates predominantly across Victoria and Queensland.

464 At the relevant time, Vulcan Steel also owned 50% of Horan Steel, which was a steel distribution business based in New South Wales that primarily processed and distributed long

steel and plate products. Horan also distributed a small amount of sheet products but did not deal with coil products.

465 Mr Wells is the founder of the Vulcan group of companies and the Chairman of the Board of Directors. Mr Jones is a director and gave evidence about the business operations of Vulcan Steel. However, Mr Jones was not directly involved in day-to-day decisions involving the procurement of steel products (including flat steel products) in either New Zealand or Australia, and nor was he directly involved in day-to-day decisions involving pricing of Vulcan's products to end customers. Mr Casey, who reported to Mr Jones, was responsible for procurement, while responsibility for sales and pricing sat with the managers of each of the business units. Mr Millard and Mr Moss were responsible for sheet and coil distribution and processing in Brisbane.

466 At the relevant time, Vulcan Steel processed and distributed long steel products, flat steel products, plate products and stainless steel products to customers in Australia. However, while both the Victorian and Queensland parts of the business processed and distributed long steel and plate products, only the Queensland part of the business processed and distributed sheet and coil products. The sheet and coil products supplied by Vulcan Steel included pre-painted steel coil, galvanised steel coil, aluminium-zinc coated steel coil, hot rolled coil and cold rolled coil.

467 Mr Jones described the two forms of processing of sheet and coil products, being splitting and shearing. Mr Jones said that large pieces of equipment are needed to do the processing and a distribution business requires a workforce and an available stock of material. Mr Jones said that a reasonable sized operation would need a minimum of two to three thousand tonnes of material and stock of all variable sizes and grades. The equipment needed for processing is expensive and involves a significant investment. Mr Jones said that a slitter must be secured in the ground with concrete and a 6000 square metre building is needed to house the slitting line. This entails millions of dollars of investment. Shearing is a different process to slitting and requires a different machine. Mr Jones said that the vast majority of product sold to Vulcan Steel's customers would be processed (by splitting or shearing).

468 Mr Jones stated that Vulcan Steel also provided additional "value add" services to its customers, such as:

- (a) warehousing and inventory management;

- (b) freight services – Vulcan Steel owned their own trucking fleet to deliver products to customers;
- (c) just-in-time delivery – Vulcan Steel was able to supply in accordance with a customer’s forecast, ensuring continuous supply;
- (d) more attractive credit terms than a steel mill would provide (typically Vulcan Steel would offer 60 day credit); and
- (e) facilitating of direct purchase from a steel mill where requested by a customer (which was called “indenting”).

469 For processed products, Vulcan Steel generally charged customers a single price that included all relevant costs such as the raw material, processing, freight and pallets. Mr Jones said that customers negotiated prices and the price charged was affected by the customer’s size, the amount of business that they were doing with Vulcan and their negotiating ability, as well as competition in the marketplace.

470 In 2013, Vulcan Steel sourced most of its flat steel products from imports and only a minority of its products from BlueScope. The Vulcan group’s stated policy was to purchase from local manufacturers where possible at a 3% to 5% premium to import parity prices. However, in 2013, BlueScope was not offering price or service terms that were sufficiently attractive to Vulcan Steel, and Vulcan Steel could get better offers from steel mills in Asia.

471 Mr Jones said that, over time, Vulcan Steel has increased its purchases of flat steel products from BlueScope. As anti-dumping activity increased in around 2012/2013, including actions initiated by BlueScope, Vulcan Steel considered it prudent to develop an alternative local supply channel. In this period, Mr Casey negotiated a supply arrangement with BlueScope in relation to sheet and coil products. This enabled Vulcan Steel to obtain better prices and supply terms than BlueScope was previously offering. Vulcan Steel now purchases most of its flat steel products from BlueScope, with the exception of some products, such as Colorbond. Mr Jones said that the main advantages of purchasing from BlueScope compared to imports are that lead times are shorter and they don’t need to carry as much stock as BlueScope delivers as needed.

472 In the relevant period, Vulcan Steel purchased steel from overseas steel mills through import traders with a presence in Australia. The overseas mills that Vulcan Steel sourced flat steel products from were primarily located in Taiwan, Korea and China. Mr Jones said that Vulcan

Steel had long-standing relationships with both import traders and the overseas mills with whom those importers dealt. He was aware that some overseas mills appointed particular import traders as the exclusive channel through which they supplied steel products into Australia.

473 Mr Jones said that, when Vulcan Steel purchased steel from an overseas mill through an import trader, Vulcan Steel was always aware of the mill from which the steel was being sourced. The identity of the mill was specified in the offer from the import trader. Mr Jones said he considered that it was critical that Vulcan Steel knew which mill was supplying the product to ensure the reliability of supply and the quality of the product. If an import trader suggested that Vulcan Steel purchase steel from a mill that it had not previously purchased from, Vulcan Steel visited the mill and trialled the product before committing to the purchase.

474 Mr Jones said that Vulcan Steel only purchased products directly from overseas mills without going through an import trader in limited situations. An example of an overseas mill from which Vulcan Steel has purchased flat steel products directly is JFE, which is a large Japanese steel mill. Vulcan Steel made such purchases regularly through the 2013 to 2015 period. Mr Jones said that in general, Vulcan Steel dealt at a commercial level with the import trader rather than the overseas steel mill, although it maintained a direct relationship with the mill to make sure that it understood the mill's production process and to ensure the quality of the product. This enabled Vulcan Steel to reassure its customers that any imported product it supplied was of equivalent quality to the BlueScope product that they would be familiar with.

475 Mr Jones considered that, in the relevant period, Vulcan Steel competed directly with BSD and SMS for sales of sheet and coil products to customers in Queensland. However, Mr Jones did not consider that Vulcan Steel competed with BlueScope CIPA in respect of its direct supply to large customers such as large roll formers and manufacturers. In respect of BSD and SMS, Mr Jones believed that both businesses supplied the same or similar products as Vulcan Steel, being galvanised, coil, sheet and plate. BSD and SMS supplied those products to customers in Queensland that included customers of Vulcan Steel. Customers informed Vulcan Steel about quotes they received from BSD and SMS.

476 Mr Jones said that Vulcan Steel's other competitors for the supply of sheet and coil products in Queensland in the relevant period included Southern Steel, OneSteel (prior to its sale to BlueScope), CMC Steel, Apex Steel, Queensland Steel Supplies and Selection Steel.

Selection Steel

477 Selection Steel is a steel distribution and processing business headquartered in Dandenong South, Victoria and which currently operates across Australia. At the relevant time, its owner and Managing Director was Mr Gregory and its General Manager for Sales and Trading was Mr Collis.

478 Mr Collis said that, in 2013, Selection Steel did not have branches in Western Australia or Queensland. Selection Steel has expanded its operations since 2013 through several acquisitions, including purchasing SK Steel (which was an independent distributor of flat steel products in New South Wales) and the Perth processing assets of the OneSteel Sheet & Coil business from BlueScope in 2014.

479 In 2013, Selection Steel was purchasing virtually no steel from BlueScope. Prior to 2013, Selection Steel purchased flat steel products from China, however it ceased doing so as a result of anti-dumping actions that were taken against a number of Chinese mills. The mills from which Selection Steel purchased steel were primarily located in New Zealand, Korea, Taiwan and Vietnam. The steel was procured through international trading houses which have branches in Australia (including Stemcor, CMC Trading, Sanwa, Minmetals, Citic, Mitsubishi and GS Global). Selection Steel also purchased steel from NZSA.

480 At the relevant time, Selection Steel distributed flat steel products in a range of sizes comprising: pre-painted steel coil (cold rolled steel or metallic-coated steel coated with paint, typically used for roofing, rainwater and fencing applications); aluzinc (cold rolled steel coated with an aluminium-zinc alloy to protect against corrosion); galvanised steel (cold rolled steel coated with zinc or a zinc-iron alloy to protect against corrosion); galvaneal (cold rolled steel coated with zinc mainly used for external applications); electro-galv (cold rolled steel with a flash coating of zinc mainly used for internal applications); hot rolled coil (steel which has been rolled at high temperatures, which makes it more malleable); hot rolled pickled and oiled (hot rolled steel which has been run through acid, rinsed, then oiled); cold rolled coil (hot rolled coil which has then been rolled further at lower temperatures, which increases its strength and flatness); and laser plate (hot rolled steel sheet).

481 Selection Steel also provided a range of processing services, including slitting and shearing. Mr Collis said that Selection Steel incurred costs in providing these processing services, which are generally included in the price charged to Selection Steel's customers for the processed products. Mr Collis said that Selection Steel also supplied other services to customers

including: breaking bulk supply into smaller quantities; inventory management and just-in-time delivery for customers; shorter lead times than a customer could obtain from a mill or an import trader; and delivery and freight to the customer.

482 Mr Collis said that in setting Selection Steel's prices to customers, Selection Steel would take a number of matters into account, including steel import costs, processing costs, warehousing costs, costs of packing and handling the customer orders, transport and delivery costs (which could vary between customers, and might incur a lower average cost for a larger order) and Selection Steel's profit margin.

483 Mr Collis was responsible for preparing an internal price list which was provided to Selection Steel's team of sales staff to use as a guide when quoting and negotiating prices to end customers. Mr Collis based the price list on the prices charged by the trading houses to which was added Selection Steel's budgeted margin, taking into account all costs in running the business. Selection Steel did not publish a price list and Selection Steel's sales staff negotiated prices on a day-to-day transactional basis with individual customers. The price therefore varied from customer to customer. Selection Steel's customers shopped around with competitors to get a better price. Mr Collis said that the price charged to a customer depended on factors such as the size of the customer and its relationship with Selection Steel, including the amount of business that it did with Selection Steel. The price was also influenced by competitive offers from other distributors, as well as the customer's ability to negotiate an attractive price.

484 At the relevant time, Mr Collis considered that Selection Steel's main competitors were BSD and SMS as well as Southern Steel and OneSteel. Other competitors included Vulcan Steel, Apex Steel, East Coast Steel, Queensland Sheet & Steel, Selwood Steel, Dawborn Steels Trading and Impact Steel (a subsidiary of BlueScope).

Selwood Steel

485 Selwood Steel was founded in 1991 by Mr Wood. It is a distributor of flat steel products and conducts business from premises located in Carrum Downs, Victoria. As set out below, Selwood Steel sources flat steel products for distribution from import traders. Mr Wood has the general management and oversight of the business and has about 25 full time staff.

486 In the relevant period, Selwood Steel imported the following range of flat steel products for distribution: pre-painted coil; plate steel; cold rolled coil; and a full range of hot rolled coil in various gauges and grades, including dry coil (which has an equivalent in the BlueScope range

under the brand name “Black Form”), floor or checker plate coil and pickled and oiled. Mr Wood said that Selwood Steel supplied a very similar range of flat steel products to those manufactured and supplied by BlueScope in Australia.

487 Selwood Steel also provided a range of processing services include slitting, shearing and laser cutting (through a third party).

488 Selwood Steel’s customers were primarily based in Victoria, Tasmania, and the Riverina in New South Wales. Of Selwood Steel’s total supply, about 80% was supplied within Victoria and the remaining 20% was split between supplies to Tasmania and the New South Wales Riverina. As Selwood Steel was not a national distributor, it did not have a high share of the Australian steel market. Mr Wood said that Selwood Steel had a more significant presence in Victoria.

489 As Managing Director, Mr Wood generally determined Selwood Steel’s base price for its steel products. The base price was listed in internal price lists available to Mr Wood’s sales staff. Mr Wood would instruct his sales staff about the margin level Selwood Steel sought to maintain on sales and direct them to price accordingly on quotes. Selwood Steel did not have set resale or retail list prices that it charged its customers and prices were determined by negotiation.

490 Selwood Steel sourced flat steel products from NZ Steel through NZSA and from various overseas mills, primarily located in the Asia Pacific region, through import traders. About 25% of Selwood Steel’s total imports were from NZ Steel, and the remaining 75% were from mills in Asia. Selwood Steel was supplied imported steel, through import traders, from Taiwan, Vietnam, India, Korea and Japan.

491 When ordering NZ Steel product, Selwood Steel placed its orders with representatives of NZSA which operated an office in Victoria. Selwood Steel’s other imports of flat steel products were through import traders based in Australia or that had branches in Australia, which included: Wright Steel (which Mr Wood understood was funded through Citic Australia); Croft Steel Pty Ltd (which Mr Wood understood was funded through Mitsubishi Australia); Stemcor; Marubeni-Itochu Steel; Minmetals; and CMC Trading.

492 Mr Wood said that import traders can be perceived as both independent entities and agents for the overseas mills, meaning that while import traders are independent entities, in his experience dealing with import traders in Australia, they are channelled, or aligned with, particular steel mills. This means that you can only buy from particular mills via certain import traders, and

when buying from a particular import trader you are buying from a specific mill. Mr Wood said that he would often use a specific import trader because he wanted to purchase products from a particular overseas mill.

493 Mr Wood said that he has been approached from time to time by overseas mills to purchase products directly from them, rather than using an import trader. Selwood Steel has not taken up any of these offers because it is able to obtain better trading terms when it uses the import traders. For example, when Selwood Steel purchases China Steel products through Wright Steel, it buys on FIS (free in store) terms. Wright Steel takes care of freight forwarding, insurance and transporting the steel from the Melbourne wharf to Selwood Steel's location in Carrum Downs. If there is any need for a claim or there is a problem with the steel purchased, they can go through Wright Steel to resolve it. As Wright Steel is dealing with the overseas mills continuously, the claim or problem is more likely to be resolved.

494 Mr Wood considered BlueScope Distribution to be a competitor to Selwood Steel. However, in the relevant period, Mr Wood considered that distributors such as Surdex Steel, Selection Steel, Coil Steels and Apex Steel were Selwood Steel's main competitors. In Mr Wood's experience, there were a number of tiers of distributors in the market for flat steel products in Australia. The larger ones, such as BlueScope Distribution, Surdex Steel, Selection Steel, Coil Steels and Apex Steel, had similar customers to Selwood Steel. The smaller, or suburban, resellers did not buy products from the import traders; they purchased from other larger distributors, such as Selwood Steel.

Access to competitor pricing information

495 A number of witnesses gave evidence about their access to competitor pricing information.

496 Mr Lobb of CMC Steel was asked about an email he sent on 8 August 2013 to CMC Steel's internal and external sales representatives which enclosed a pro forma notification by CMC Steel to its customers of an increase in prices for various flat and long steel products. In the email, Mr Lobb stated (emphasis in original):

By now you would have seen the increase letters from OST Market Mills & BSL, plus letters from –

- Southern Steel
- Southern Sheet & Coil
- Horans

- SMS/BSD

This should give you some comfort that we're not alone in this. There seems to be sufficient talk to indicate prices will 'stick' better than previously. Already there is some evidence of this in S&C. As an industry we need to get prices up, and certainly for our business we need to improve results for our sustainability. The timing of this is fortunate for us due to the start of our financial year.

497 In cross-examination, Mr Lobb confirmed that his email was referring to price increase letters sent by steel mills, including CIPA, and by competing distributors as identified in the email. Mr Lobb said that CMC Steel obtained such letters from competing distributors in one of two ways: CMC Steel was sometimes a customer of a competing distributor and might receive a price increase notification in that capacity; or CMC Steel may be given such a letter from one of its own customers (which had received the notification from the competing distributor). Mr Lobb also agreed that CMC Steel would actively seek information of this kind from customers (ie, prices being charged by competing distributors). Mr Lobb said that the statement "as an industry we need to get prices up" was a reference to his belief at that time that, collectively, all distributors needed to increase their profitability by getting their prices up. Mr Lobb believed that other distributors were in a similar financial position to CMC Steel, as the industry was struggling at that point in time.

I. FINDINGS ABOUT MARKETS AND COMPETITION

498 In respect of each of the understandings that were the subject of the alleged attempts, the ACCC must establish that the competition condition in s 44ZZRD(4) was capable of being satisfied if the attempt had been successful and the understanding was reached. The competition condition would be satisfied if at least two of the parties to the understanding were or were likely to be in competition with each other in relation to the supply of goods or services the subject of the alleged price fixing provision. By s 44ZZRC, if a body corporate is a party to an understanding, each related body corporate is taken to be a party to that understanding. Thus, in so far as BlueScope attempted to induce other companies to reach an understanding containing a price fixing provision, the competition condition would be satisfied if BlueScope or one or more of its related body corporates (relevantly, NZSA or BlueScope Distribution) was or was likely to be in competition with one or more of the counterparties that were the subject of the alleged attempt in relation to the goods the subject of the alleged price fixing provision.

499 As set out earlier, the ACCC alleged that, at all material times:

- (a) BlueScope CIPA and NZSA were in competition with overseas steel manufacturers for the supply of flat steel products to distributors and steel users in Australia; and
- (b) BlueScope CIPA, BlueScope Distribution and NZSA were in competition with distributors for the supply of flat steel products in Australia to steel users.

500 In its pleading, the ACCC did not draw a distinction between import traders and distributors of flat steel products and classified them both as “distributors”.

501 The respondents admitted that BlueScope Distribution was in competition with other distributors of flat steel products for the supply of some flat steel products to some distribution customers in Australia, but otherwise contested the ACCC’s allegations concerning competition. The principal issues in dispute were whether:

- (a) BlueScope CIPA and NZSA were in competition with the overseas steel manufacturer Yieh Phui (as opposed to the import trader – Wright Steel/Citic – which imported Yieh Phui’s flat steel products into Australia); and
- (b) BlueScope CIPA was in competition with distributors for the supply of flat steel products to steel users.

502 As discussed earlier, two firms will be “in competition with each other” for the purposes of s 44ZZRD(4) if they are rivals or constrain each other in respect of the supply or acquisition of goods or services to which the cartel provision relates. The phrase “in competition” connotes a minimum degree of competitive constraint between two firms which is satisfied if the firms compete in the same market. That does not mean that it is necessary to delineate the market in which the firms compete as an element of the statutory proscription. It does mean, though, that the statutory requirement of competition must be considered within that conceptual framework, in order to determine whether the necessary degree of competitive constraint is present. For example, in a given case it may be possible to conclude that two firms compete throughout Australia and the conclusion of competition is not affected whether the market is defined as a national market or separate state-based markets. Similarly, in a given case it may be possible to conclude that two firms compete across a wide range of goods of a particular description, and the conclusion of competition is not affected whether the market is defined as goods of that description or separate markets comprising subsets of those goods.

503 It is well established that the behaviour and perceptions of industry participants are often most instructive in determining the existence and boundaries of markets and, thereby, whether two

firms are in competition with each other: *Rural Press (HC)* at [45] per Gummow, Hayne and Heydon JJ, adopting the observation of McHugh J in *Boral Besser Masonry Ltd v Australian Competition and Consumer Commission* (2003) 215 CLR 374 at [257].

504 In the present case, it is necessary to consider the product, geographic and functional dimensions of the markets in which flat steel products were supplied in Australia during the relevant period in light of the evidence referred to in sections E to H of these reasons.

Product dimension of the market

505 The product dimension of the market describes the goods or services that are supplied or acquired within the market, and includes all goods or services that are economic substitutes on the demand or supply side of the market. The evidence establishes that BlueScope CIPA, NZSA, import traders and distributors all supplied a broad range of flat steel products which can be classified as hot rolled coil, cold rolled coil, metallic coated sheet and coil, painted sheet and coil and steel plate. The different types of flat steel products had different physical characteristics and, for that reason, industrial applications. It can be inferred from the evidence that demand side substitution between different categories of flat steel products was likely to be limited. However, the evidence establishes that steel manufacturers, import traders and distributors all conducted businesses which produced, imported and/or supplied a broad range of flat steel products. It can be readily inferred from that evidence that, from the supply side, there were business efficiencies in offering a range of flat steel products, as opposed to concentrating on a single type of flat steel product. For producers, it can be inferred that the efficiencies arose from the fact that flat steel products were all produced from steel slab (manufactured by the steel mill) which then underwent different forms of processing to create different flat steel products. For distributors, it can be inferred that the efficiencies arose from the fact that similar facilities were required to stock, warehouse, process and deliver different types of flat steel products. The evidence shows that the suppliers competed by offering a broad range of flat steel products, and that suppliers were able to supply different types of flat steel products demanded by customers.

506 The respondents submitted that competition occurred in respect of different types, grades and dimensions of flat steel products and that it was necessary for the ACCC to prove competition between BlueScope and the alleged counterparties at that granular product level. I reject that submission. It does not accord with the evidence concerning the nature of the businesses conducted by steel manufacturers, import traders and distributors, supplying a broad range of

flat steel products across the principal product categories. Further, the evidence shows that the industry participants, including BlueScope, assessed their competitors by reference to the supply of flat steel products across the principal product categories and not at some more granular level. By way of illustration, a BlueScope document titled “Distribution S&C Channel Strategy” dated 27 August 2013 (version 9 circulated by email on 15 October 2013) recorded the volumes (tonnes per annum) of flat steel products being supplied by distributors who imported flat steel products under the following categories: HRC, CRC, Metallic, AluZinc, pre-painted, coil plate and plate. The distributors included Selection Steel (with total import volumes of 65,500 tpa), SK Steel (with total import volumes of 31,500 tpa), Apex Steel (with total import volumes of 22,200 tpa), Vulcan Steel (with total import volumes of 21,300 tpa) and Selwood Steel (with total import volumes of 9,000 tpa). The same document estimated BlueScope CIPA’s market shares across four main product segments: HRC, CRC, galvanised and zinc/aluminium alloy. The document also discussed the sheet and coil distribution market environment, including the strengths and weaknesses of distributors, without distinguishing between different flat steel products. Similarly, the BANZ market share report for August 2013 analysed BlueScope CIPA’s market share across the main product segments: HRC, CRC, galvanised, zinc/aluminium alloy, painted and plate. BlueScope’s internal documents also showed that BlueScope determined its pricing for its entire flat steel product range by selecting certain “key” flat steel products in each of the main categories and determining its price for that product by reference to equivalent import offers for equivalent products. BlueScope would then derive a price for specific grades and dimensions of that product category which was published in its monthly price schedules. That approach to pricing products at a more granular level was also confirmed in evidence by Mr Ellis.

507 Significantly, in BlueScope’s “Background Briefing” to the ACCC dated 25 August 2013, BlueScope stated that import prices posed a significant constraint on BlueScope’s pricing of hot rolled coil, cold rolled coil, plate and metallic coated steel, indicating significant import competition across the range of flat steel products. In the same document, BlueScope stated that sheet and coil distribution was “highly competitive”, sheet and coil distributors could readily acquire comparable flat steel products at competitive prices from CIPA or imports and that products and services offered by sheet and coil distributors were essentially homogenous.

508 In my view, the evidence supports the conclusion that the product dimension of the market encompassed the supply of flat steel products generally, as each of the suppliers that were party to the alleged attempts offered a broad range of flat steel products and had the capability and

capacity to competitively constrain other suppliers across the broad range of products. Each of the suppliers were in competition with each other in respect of flat steel products. The same conclusion about competitive constraint would be reached even if the product dimension of the market were described by reference to the principal categories of flat steel products: hot rolled coil, cold rolled coil, metallic coated, painted or steel plate. I am satisfied on the evidence that each of the suppliers that were party to the alleged attempts presented significant competitive constraint within each of those product categories and therefore were in competition in respect of each product category.

Functional dimension of the market

509 The functional dimension of the market describes the particular level of the supply chain at which a supplier conducts business. The different levels of a supply chain typically include manufacture, distribution (or wholesaling) and retailing, although different industries can have idiosyncratic structures and the structure will typically differ depending on whether the products being supplied are goods or services. Different levels of a supply chain reflect different economic activities that are undertaken at each level. Taking the supply of goods as an example, the manufacturing level involves the production of the goods. The distribution level involves the logistical activities that are required to move the goods or services from the manufacturing plant for supply in suitable quantities to retailers or end users. Typically, the distributor acquires the goods from the manufacturer, transports them to a warehouse, sells the goods to retailers or end users and packages and transports the goods to the retailer or end user. The retail level involves the activities associated with displaying the goods in a retail environment for sale. In any given industry, the different economic activities associated with the production, transportation, warehousing, distribution, packaging and retailing of goods may be undertaken by different firms, or a number of the activities may be undertaken by a single firm. In industries that are workably competitive, the functional structure of the industry will usually be driven by efficiency considerations: firms will emerge to perform a range of economic activities at a particular functional level of the industry where they are able to do so at lower cost and/or with greater proficiency than another firm that might be operating at another functional level of the industry.

510 It is usual for markets to be defined by reference to particular functional levels of the supply chain, and it is commonly the case that one functional level of the supply chain is not in competition with another functional level. That conclusion usually follows from the different

economic activities that are undertaken at the different functional levels of the supply chain, the different supply price at the different functional levels which reflect the costs of the economic activities undertaken, and the different customers served at the different functional levels of the supply chain. In many industries, a conclusion is readily reached that manufacturers are not in competition with distributors in the same supply chain for those reasons.

511 The question whether two firms operate at different functional levels of the supply chain and, for that reason, are not in competition with each other requires close consideration of the industry structure and the behaviour and perceptions of the industry participants. By way of illustration, *Singapore Airlines* concerned holiday tour packages (comprising bundled air services and accommodation). The Full Federal Court concluded that the relevant market identified by the primary judge, namely, the market for the supply of airline services to persons engaged in providing wholesale tours to the Maldives, was too narrow. Justice French (with whom Spender and O’Loughlin JJ agreed) concluded (at 182, emphasis added):

At the functional level it would be possible to limit the market to the supply of services by airlines to wholesalers. Such a limitation, however, seems unduly restrictive. The integration of wholesale and retail activities within Singapore Airlines and other agencies suggests that the appropriate functional level comprehends the supply of airline services to wholesalers, packaged tours by wholesalers to retailers and packaged tours by retailers to consumers. *The exercise of market power at either of the two upstream functional levels is closely connected with and capable of affecting competition downstream in the chain identified.*

512 *Metcash* concerned a merger between two grocery wholesalers that supplied independent grocery retailers, and the question whether the vertically integrated supermarket chains were in competition with the grocery wholesalers. The Full Federal Court upheld the primary judge’s affirmative conclusion. Justice Yates (with whom Finn and Buchanan JJ agreed) concluded at [266]:

These authorities show that, as a matter of principle, there is no reason why, for competition law purposes, a market cannot be defined by reference to multiple functional levels. They illustrate that it might be appropriate to do so where downstream activities function to constrain upstream behaviour. Whether that is so depends on the facts presented for consideration and the evaluation of those facts by the relevant decision-maker.

513 In *Air New Zealand (HC)*, the plurality (Kiefel CJ, Bell and Keane JJ) reiterated that (at [14]):

... given that the TPA regulates the conduct of commerce, it is tolerably clear that the task of attributing to the abstract concept of a market a geographical location in Australia is to be approached as a practical matter of business. It is important that any analysis of the competitive processes involved ... is not divorced from the commercial

context of the conduct in question.

514 While that statement was made in the context of discussing the geographic dimension of the market, it is applicable to all market dimensions.

515 In my view, the evidence establishes that there were at least two functional levels of the market:

- (a) the manufacture and importation of flat steel products for supply to large end users and distributors; and
- (b) the distribution of flat steel products.

516 It is apparent from the evidence that, during the relevant period, in Australia, there was a distinct distribution function in the market for the supply of flat steel products that was performed by BlueScope Distribution (through its various divisions), BlueScope aligned distributors (that purchased predominantly from CIPA) and non-aligned distributors that purchased predominantly from import traders. Each of the industry witnesses gave consistent evidence concerning the distribution function and the economic activities undertaken. Those activities included processing services (slitting, shearing and recoiling) and supply terms that differed from those offered by steel mills, particularly shorter order to delivery lead times, lower minimum volumes and less onerous credit requirements.

517 Ultimately, there was no real dispute between the parties that BlueScope Distribution was in competition with the aligned and non-aligned distributors of flat steel products. This conclusion was amply supported by the evidence of many of the witnesses:

- (a) Mr Kelso said that, through BlueScope Distribution, BlueScope competed with the aligned and unaligned distributors for the supply of flat steel products to downstream customers. In the relevant period, Mr Kelso knew from conversations he had with industry participants that potential customers of BlueScope Distribution were considering purchasing flat steel products from six of the seven independent distributors concerned in these proceedings (OneSteel, Southern Steel, CMC Steel, Vulcan Steel, Selection Steel and Apex Steel).
- (b) Mr Collis said that Selection Steel's main competitors were BlueScope Distribution, Southern Steel and Coil Steels (CMC) and that Selection Steel also competed with OneSteel, SK Steel and other smaller distributors including Vulcan Steel, Apex Steel, Selwood Steel and Impact Steel.

- (c) Mr Jones said that he considered that BlueScope’s distribution and processing business competed directly with Vulcan Steel for sales of sheet and coil products to customers in Queensland.
- (d) Mr Lobb said that CMC Steel’s major competitors in the distribution and sale of flat steel products included SMS, Southern Steel, OneSteel, Selection Steel (in NSW) and Apex Steel (in Victoria).

518 In its August 2013 briefing to the ACCC, BlueScope identified OneSteel, CMC Steel, Southern Steel, Selection Steel, Apex Steel and Vulcan Steel as its “key” competitors in sheet and coil distribution.

519 The evidence establishes that there was a functionally separate manufacturing/import level of the flat steel market. BlueScope CIPA and import traders (including NZSA) supplied flat steel products to distributors and to large manufacturing customers which had the demand and capability to purchase flat steel products in large volumes. Ultimately, the ACCC did not dispute that the large manufacturing customers supplied directly by CIPA, NZSA and import traders on the one hand, and the smaller manufacturing customers supplied by BlueScope Distribution and by other independent distributors on the other hand, were distinct customer segments.

520 The ACCC referred to evidence that indicated that customers could purchase flat steel products from CIPA (or overseas mills) in either a processed (slit or sheared) or unprocessed form. In my view, that evidence does not contradict a conclusion that the manufacturing/import level of the flat steel market was functionally separate from the distribution level. None of the witnesses suggested that the distributors sought to compete with CIPA in respect of supply to large customers. It might be inferred that there was likely to be an area of potential sales overlap between manufacturers/importers and distributors, where a customer was of a size that it may have been efficiently supplied by either a manufacturer/importer or by a distributor. It is well recognised that the boundaries of markets cannot be defined with precision, as “[t]he economy is not divided into an identifiable number of discrete markets into one or other of which all trading activities can be neatly fitted”: *Queensland Wire* at 196 per Deane J. What emerges from the evidence, however, is a relatively clear picture that the market was functionally separated between the manufacturing/import level and the distribution level, with relevant and significant competitive constraint occurring within each level but not between the levels. At the manufacturing/import functional level, there was no real dispute between the parties that

CIPA, NZSA and import traders were in competition with each for the supply of flat steel products. Each of Mr Ellis and Mr O'Brien gave evidence to that effect.

521 The principal area of dispute between the parties with respect to the functional dimension of the market was whether overseas steel manufacturers, whose products were exported to Australia via import traders, should be included within the manufacturing/import functional level of the market, or whether the overseas steel manufacturers competed at a separate functional level. Relevantly, BlueScope denied, and Mr Ellis did not admit, that BlueScope CIPA was in competition with Yieh Phui in respect of the supply of flat steel products in Australia.

522 In support of their position, the respondents relied on two commercial facts. First, Yieh Phui did not generally supply products directly to distributors or end customers, but supplied the import trader Wright Steel. Second, in setting its own prices by reference to import prices, BlueScope monitored the prices offered by import traders in Australia and not the prices offered by the overseas mills to import traders. The evidence establishes those facts. However, those facts are not determinative of the question whether BlueScope CIPA and Yieh Phui were in competition with each other during the relevant period in respect of the supply of flat steel products. Consideration must be given to all facts that bear upon the question whether and to what extent BlueScope CIPA faced significant competitive constraint from Yieh Phui (and other overseas steel mills). In my view, the following matters are relevant to the determination of that question.

523 First, the evidence establishes that the economic activities undertaken by import traders comprised a marketing and selling function in Australia and a logistical importing function (arranging freight, insurance and customs clearance for the importation of the flat steel products). The evidence indicates that import traders did not otherwise undertake any significant processing services or otherwise transform the flat steel products that were imported.

524 Second, BlueScope's internal documents show that it closely monitored the volumes of flat steel products being imported into Australia, with the documents identifying not only the categories and volumes of products being imported and the import traders undertaking the importation, but also the overseas steel mill that produced the products. Some of the documents of this kind in evidence were:

- (a) a document titled “Distribution S&C Channel Strategy” dated 27 August 2013 and an accompanying spreadsheet prepared for Mr Hennessy and provided to Messrs Ellis and Palermo;
- (b) a document entitled “Overview of recent imports into Australia” which was sent to Mr Ellis by Alan Gibbs (Development Manager International Trade Affairs – BANC) on 22 November 2013; and
- (c) a presentation entitled “BlueScope Global Trading Plan” dated March 2014.

525 An internal BlueScope document titled “Commercial and Industrial Roofing – Segment Plan, 2010-2012” contained a section titled “Key Competitors” which identified imported Aluzinc from Yieh Phui as a competitor of BlueScope’s Zinalume branded product.

526 Third, BlueScope closely monitored the prices of imported flat steel products in order to determine an import parity price for each product category and set its own prices. In the relevant period, BlueScope prepared monthly “market intelligence reports” which contained detailed information, obtained from the Australian market, concerning prices offered by import traders for particular products and which also identified the overseas mill producing the steel. It is clear that the prices being monitored by BlueScope were the prices being offered by the import trader in Australia (which included the trader’s margin). Nevertheless, the reports support a conclusion that BlueScope was concerned to identify and monitor the overseas manufacturers of all flat steel products being imported into Australia. BlueScope’s internal documents indicate that, in determining the applicable import parity price, BlueScope took into account the reputation of the source mill. One BlueScope document dated 19 August 2013 explained that the import parity price benchmark was the lowest available price from a “reputable tier 1 mill”. Mr Kelso said that, in determining the import parity price for a particular product, BlueScope would usually only take into account the price being offered for an imported product if BlueScope knew which mill the product was being imported from. This was because the identity of the mill was relevant to the lead time and reliability of the product, which BlueScope would take into account in determining the import parity price. Mr Kelso said that, in this way, the identity of the mill supplying into Australia at a particular price assisted BlueScope to make decisions about the pricing of its own products.

527 Fourth, BlueScope’s senior managers acknowledged that BlueScope competed against overseas steel mills in respect of the supply of flat steel products in Australia. As noted earlier, in his s 155 examination Mr Vassella agreed that Yieh Phui was a competitor of BlueScope in

the Australian market. While in cross-examination Mr Ellis first denied that BlueScope competed with Yieh Phui, he subsequently agreed that the companies were in competition. Mr Hennessy also gave evidence about an email he sent to Mr Ellis on 19 September 2013 in relation to a planned trip to visit overseas mills by Mr Schulz. The email listed a number of mills that Mr Hennessy recommended be visited, which list included mills located in Korea, Taiwan (including Yieh Phui), India, Japan and Vietnam. Mr Hennessy said that the mills he listed in the email were competitors to BlueScope CIPA in Australia, and that he provided the information to Mr Ellis, at Mr Ellis's request, to assist Mr Schulz in an upcoming trip involving visits to overseas competitor mills.

528 Fifth, one of Mr Ellis's priorities upon commencing his new role as General Manager of CIPA's Sales and Marketing Division was to develop new strategies for dealing with the overseas mills with a view to BlueScope increasing its market position. As discussed in more detail later in these reasons, Mr Ellis arranged a trip with Mr Schulz to meet with representatives of overseas mills. In an email sent to Mr Vassella on 6 November 2013, Mr Ellis described his agenda as being to visit the key Korean and Taiwanese mills supplying into Australia with the objective of understanding "volumes, rationale, strategy, alternatives, new products etc being targeted to the Australian market". At the meeting Mr Ellis held with representatives of Yieh Phui on 26 February 2014, Mr Ellis raised as an issue the prices being charged for Yieh Phui products in Australia. In cross-examination, Mr Ellis accepted that the meeting involved competitors discussing prices, which rendered the meeting "sensitive".

529 Sixth, the evidence established that, on some occasions, overseas steel mills supplied flat steel products directly to Australian customers and distributors and that BlueScope perceived that such direct supply was a threat:

(a) During 2012, BlueScope made six applications for anti-dumping and countervailing duties in respect of various flat steel products being imported into Australia from a number of countries in Asia including China, Korea and Taiwan. In each of these applications, BlueScope described the way in which the imported products competed with its products in the following terms:

All customers have the opportunity to purchase imported material either

- direct from the overseas mill;
- via an international trader;
- via an aligned/non-aligned Australian based stockist/reseller.

- (b) A submission made to the ACCC by BlueScope’s solicitors, Ashurst, on 3 December 2013 (in connection with BlueScope’s application for informal clearance of the acquisition of OneSteel’s sheet and coil distribution assets) stated BlueScope’s view that Western Australian customers were able to acquire imported coil from other distributors, import traders and directly from overseas steel mills. The submission gave the example of a recent tender made by SMS for a contract to supply steel to Roundel Civil Products Pty Ltd, for use in the Roy Hill mining project in the Pilbara, for which BlueScope competed directly with POSCO (a Korean steel mill) and Samsung (an import trader) to win the business.
- (c) The BlueScope document titled “Distribution S&C Channel Strategy” dated 27 August 2013 (version 9 circulated by email on 15 October 2013) contained an analysis of imported flat steel products, broken down by import trader and also contained a section to record “end customers buying direct from mills” (which, in that paper, identified a single transaction only).
- (d) Mr Hennessy gave evidence about a meeting he and Mr Ellis attended with representatives of OneSteel on 13 September 2013 in which Mr Birchall of OneSteel stated that OneSteel was purchasing a lot of steel direct from mills. In cross-examination, Mr Hennessy said that a few distributors, particularly OneSteel (both its Metalcentre and Sheet & Coil business), were purchasing flat steel products directly from overseas mills. An email from Mr Kelso to Mr Hennessy dated 28 November 2013 also stated that OneSteel’s sheet & coil business was importing approximately 600-700 metric tonnes of hot rolled coil and coil plate product per month from Hyundai (a Korean steel mill).

530 In my view, the evidence taken as a whole establishes that BlueScope CIPA faced significant competitive constraint from overseas mills in respect of the supply of flat steel products in Australia, and that BlueScope considered that overseas mills were close competitors in respect of the supply of flat steel products. In those circumstances, it is appropriate to include the overseas mills as part of the manufacture/import functional level of the Australian market, notwithstanding that overseas mills commonly arranged the importation of their products to Australia through import traders.

Geographic dimension of the market

531 The geographic dimension of the market describes the geographic area in which competition occurs, beyond which competitive constraint becomes insignificant.

532 At the distribution level of the market, the evidence establishes that a number of distributors, particularly SMS, conducted business nationally or in most states and territories, while other distributors, including Impact Steel, conducted business within a single state or territory or only a few states and territories.

533 BlueScope's internal documents reveal that BlueScope analysed market shares for the distribution of flat steel products on both a national and a state/territory basis. An October 2013 BlueScope board paper estimated the national market shares of SMS as 19%, Southern Steel as 16%, OneSteel Sheet & Coil as 14%, Coil Steels (CMC) as 13%, Selection Steel as 9%, SK Steel as 4% and Apex Steel as 3%. The board paper also estimated the state/territory market shares as follows (with the paper noting that OneSteel had sold its Victorian distribution assets to Selection Steel in April 2013):

- (a) in New South Wales, SMS as 16%, OneSteel Sheet & Coil as 19%, Coil Steels (CMC) as 15%, Southern Steel as 14%, SK Steel as 11% and East Coast Steel as 8%;
- (b) in Victoria, SMS as 25%, Southern Steel as 17%, Selection Steel as 14%, Coil Steels (CMC) as 8% and Apex Steel as 8%;
- (c) in Queensland, SMS as 15%, Queensland Steel and Sheet as 20%, Vulcan Steel as 19%, OneSteel Sheet & Coil as 15%, Coil Steels (CMC) as 12% and Southern Steel as 9%;
- (d) in South Australia/Northern Territory, SMS as 23%, Southern Steel as 34%, OneSteel as 16%, Coil Steels (CMC) as 22% and Selection Steel as 3%;
- (e) in Western Australia, SMS as 10%, OneSteel as 16%, Coil Steels (CMC) as 16%, Southern Steel as 8% and Selection Steel as 6%.

534 The structure of the industry at the distribution level of the market suggests that competition occurred within state and territory boundaries. Many of the distributors had facilities in one or only a few states, and engaged in the distribution of flat steel products within the states in which they had facilities. Although not addressed directly in the evidence, it can be readily inferred that transportation costs would limit the ability of a distributor whose facilities were located in one state to compete effectively in supplying flat steel products to another customer in another state.

535 Whether the distribution level of the market is defined as national or state/territory based, it is apparent from the evidence that SMS, having a national presence and operation, competed with aligned and non-aligned distributors in each state and territory. That was not disputed by the respondents.

536 At the manufacture/import level of the market, the evidence establishes that BlueScope CIPA conducted a national business. There was limited evidence adduced about the geographic reach of the businesses conducted by import traders. The evidence given by Mr Wright in relation to the Wright Steel-Citic JV indicates that the business operated nationally. As is customary for import traders, Mr Wright said that the Wright Steel-Citic JV did not carry inventory of steel products in Australia and Wright Steel did not order steel products from a mill until it had a confirmed order from the customer. The JV arranged all necessary freight services to transport the flat steel products to Australia and thence to the customer, but the JV did not physically undertake transportation activities itself.

537 In the various submissions and briefing papers provided by BlueScope to the ACCC in August 2013 in connection with BlueScope's application for informal clearance of the acquisition of OneSteel's sheet and coil distribution assets, BlueScope described the market share of CIPA and imported steel on a national basis, and did not suggest that competition at the manufacture/import level differed across geographic regions of Australia.

538 The available evidence supports a conclusion that the manufacture/import level of the market was national. Ultimately, though, nothing turns on the geographic boundary because, for the reasons given earlier, the evidence supports the conclusion that BlueScope CIPA was in competition with Yieh Phui and Wright Steel/Citic.

Conclusions with respect to markets and competition

539 The evidence establishes that, in the relevant period:

- (a) there was a national market for the manufacture and importation of flat steel products for supply to distributors and large end customers, in which BlueScope CIPA, NZSA, import traders including Wright Steel/Citic, and overseas steel mills importing flat steel products into Australia including Yieh Phui were in competition in relation to the supply of flat steel products; and

- (b) there were state/territory markets for the distribution of flat steel products, in which BSD, SMS and Impact Steel and one or more aligned and non-aligned distributors were in competition in relation to the supply of flat steel products.

540 It follows from the foregoing that I am satisfied that, in the relevant period:

- (a) BlueScope CIPA and NZSA were in competition with Wright Steel or Citic or both in relation to the supply of flat steel products, as alleged by the ACCC;
- (b) BlueScope CIPA and NZSA were in competition with Yieh Phui in relation to the supply of flat steel products, as alleged by the ACCC; and
- (c) BlueScope Distribution was in competition with each of Selection Steel, Apex Steel, Southern Steel, Vulcan Steel, Selwood Steel, CMC Steel and OneSteel in relation to the supply (as distributors) of flat steel products, as alleged by the ACCC.

541 I am therefore satisfied that, in respect of each of the understandings that were the subject of the alleged attempts, the ACCC has established that the competition condition in s 44ZZRD(4) was capable of being satisfied if the attempt had been successful and the understanding was reached. In the case of the understandings that were the subject of the alleged attempts concerning the distributors (Selection Steel, Apex Steel, Southern Steel, Vulcan Steel, Selwood Steel, CMC Steel and OneSteel), the competition condition was capable of being satisfied by virtue of the operation of s 44ZZRC, whereby if BlueScope CIPA had reached an understanding with a distributor, BlueScope Distribution, as a related body corporate of BlueScope CIPA, would have been taken to be a party to the understanding.

542 I am also satisfied that, in the relevant period, BlueScope and Mr Ellis were aware of the existence of competition in the terms that I have found. In respect of Mr Ellis, that awareness is confirmed by the evidence he gave, his receipt of relevant documents as referred to above, and his conduct in meeting with the counterparties to discuss their supply into the market and market prices. In respect of BlueScope, the awareness of Messrs Vassella, Ellis and Hennessy should be attributed to BlueScope. As noted above, Mr Vassella acknowledged in his s 155 examination that Yieh Phui was a competitor of BlueScope. In respect of Mr Hennessy, the awareness is confirmed by the evidence he gave, his receipt of relevant documents as referred to above, and his conduct in meeting with the counterparties to discuss their supply into the market and market prices.

J. CIPA'S DISTRIBUTION MARKET SALES STRATEGY BEFORE SEPTEMBER 2013

Supply to aligned and non-aligned distributors

543 The evidence indicates that, during the period that Mr Garey was CIPA's General Manager of Sales and Marketing, CIPA distributed flat steel products predominantly through its own distributors, BSD, SMS and Impact Steel, and through its aligned distributors. Mr Sparks said that the Distribution Markets team's sales strategy was to focus on selling steel almost exclusively to aligned distributors.

544 However, Mr Hennessy also said that Mr Garey's strategy was to expand CIPA's sales channels by increasing the volume of sales to both aligned and non-aligned distributors. To do this, Mr Garey and Mr Hennessy proposed selectively reducing CIPA's price to a level where distributors were attracted to buy greater volumes. Mr Hennessy explained that this would involve a price/volume trade off. BlueScope's internal documents showed CIPA's awareness that seeking to increase sales volumes to non-aligned distributors would require a reduction in sales prices. A presentation titled "S&M Distribution Market Structure Opportunities" dated 3 April 2013 proposed alternative strategies for the Distribution Markets sales team. The first was to pursue an "open distribution" strategy. The presentation explained that the objective would be to obtain a 75% share of 95% of the distribution market but with sales prices having no premium to import prices. The presentation contrasted CIPA's present strategy which gave it an 85% share of 75% of the distribution market but with sales prices at a 5% premium to import prices. The second strategy, described as a fallback, was to "circumspectly" expand the distribution channel by selling transactional (mainly non-branded) volumes to Vulcan Steel, Apex Steel in Brisbane and Selection Steel.

545 There was also concern within the Distribution Markets sales team that increasing the volume of sales to non-aligned distributors created the risk of upsetting BlueScope's aligned distributors. Mr Sparks' statement records that, in the month or two before Mr Ellis commenced employment, the Distribution Markets sales team had commenced selling a small volume of steel to Selection Steel. Mr Sparks was told about this development by Mr Hennessy, and Mr Sparks raised his concern that the aligned distributors would not be happy because they would be facing competition from the non-aligned distributors for the sale of BlueScope products. Around this time, Mr Sparks also learnt that BlueScope had commenced selling steel to Vulcan Steel.

546 At the time that Mr Ellis took over from Mr Garey on 1 September 2013, CIPA’s Distribution Markets sales team were continuing work on a strategy to increase sales to non-aligned distributors, recognising that this would require lower sales prices (to compete with import prices) and therefore a price/volume trade off. A document titled “Distribution S&C Strategy” was first prepared on 27 August 2013. The earliest iteration in evidence was version 6 circulated by email by Mr Hennessy on 4 September 2013. Version 7 of the document was emailed by Mr Hennessy to Mr Ellis on 5 September 2013 for the purposes of discussion. The document contained the output of a model seeking to quantify the volume/margin trade off from expanding sales to non-aligned distributors (and foregoing a price premium to import prices). The document noted that CIPA had already been trading off price premium to secure additional volume in FY2013 and FY2014, both with existing distribution customers and selectively growing the distribution channel (sales to Selection Steel and Vulcan Steel). The document also noted, as factors for consideration, the potential adverse consequences of expanding the sales channel being:

- (a) upsetting CIPA’s existing distribution channel (who may decide to import more volume, more frequently in response);
- (b) adding credibility to the non-aligned distributors (who imported product); and
- (c) the additional volume gained via non-aligned distributors being less than volume lost from current aligned distributors.

Prices offered to the distribution market for flat steel products

CIPA’s Distribution Market price lists

547 Messrs Hennessy and Kelso gave evidence about the prices offered by BlueScope CIPA to the distribution market. They explained that BlueScope CIPA provided price lists to aligned distributors on a monthly basis for steel products manufactured by BlueScope. The principal monthly price list that is relevant to this proceeding is the price list for sheet and coil products supplied to the distribution market (which was titled “Distributor Price Schedule – Sheet & Coil”). However, CIPA also produced price lists for plate products supplied to the distribution market, which are also relevant to the proceeding. In these reasons, CIPA’s price lists for products supplied to the distribution market are referred to as “CIPA’s Distribution Market price lists” or simply “CIPA’s price lists”. The price at which CIPA sold flat steel products to distributors was the price stated in the Distribution Market price lists less discounts and rebates. The discounts and rebates are discussed below.

548 Typically, the monthly price lists were applicable to deliveries that were to occur three months later. The price lists were provided under cover of a letter. In the case of the Distribution Market price list for sheet and coil products, the letter was typically from Mr Hennessy. As an example, in evidence was a letter dated 1 July 2013 from Mr Hennessy to CMC Steel with an attached Distribution Market price list for sheet and coil products. The letter stated as follows:

BlueScope Steel wishes to advise the Distribution Sheet & Coil prices for September 2013, which includes the delivery period 1st September 2013 (DW36) to 28th September 2013 (DW39).

The nominal price movements are:

Steel Product	Price Change (%)
BlueScope Steel Hot Rolled - Dry	+4%
BlueScope Steel Hot Rolled – Pickled & Oiled	+3.5%
BlueScope Steel Cold Rolled	No Change
BlueScope Steel Metallic Coated - GALVABOND® steel	+3%
BlueScope Steel Metallic Coated - ZINCANNEAL® steel	+3%
ZINCALUME® G300 steel – Advanced Range	+3%
ZINCALUME® G300 steel – Custom Range	+3%
GALVSPAN® steel	No Change

549 The accompanying price list was a booklet which was titled as follows:

BlueScope Steel
 Distributor Price Schedule – Sheet & Coil
 September 2013 – Delivery Weeks 36 to 39
 ...
 Issue Date: 1st July 2013

550 The Distribution Market price list for sheet and coil products contained prices for each of the sheet and coil products offered by BlueScope. Each product category contained numerous specifications for thickness, width, mass and order lead time, with prices varying depending upon different specifications. The prices were specified as “Invoice Price (ex GST) (\$/t)”. BlueScope’s terms and conditions of sale were also included in the booklet.

551 For most product categories, the Distribution Market price list for sheet and coil products contained an “Advanced Offer” and a “Custom Offer”. Mr Hennessy confirmed what was apparent from the content of the price list: that the “Advanced Offer” was an offer for products manufactured with standard specifications. For each product category, the Advanced Offer stipulated the required “lead time”, being the minimum period in weeks between order and delivery. The lead time varied between four and eight weeks. In contrast, the lead time for the “Custom Offer” varied between eight and ten weeks depending upon the location of delivery. In their evidence, a number of witnesses used the acronym “alto”. It was apparent from the evidence that the acronym was an abbreviation for “advanced lead time offer” and was a reference to the Advanced Offer in BlueScope’s monthly Distribution Market price list for sheet and coil products.

552 Mr Hennessy confirmed that, when CIPA sent out a new monthly price list to distributors, it would usually send a letter indicating the percentage change in prices for particular product categories, as shown above in the letter dated 1 July 2013. Mr Hennessy also confirmed that he was aware that distributors had used the percentage change information in the letter as a means of explaining their own price increases to their customers. Mr Hennessy explained that, while distributors incurred costs (such as for processing services) in addition to the supply cost of the flat steel products, the supply cost of the steel constituted a large proportion of the distributors’ overall costs of supply to their customers.

Setting prices by reference to import parity prices

553 The process by which CIPA determined the prices to be included in the monthly price lists was described in similar terms in the evidence given by Messrs Hennessy and Kelso, in Mr Sparks’s statement and by Mr Unicomb in his s 155 examination.

554 The Distribution Markets sales team (including Messrs Hennessy, Kelso, Gent, Bryers and Sparks) and the Pricing Managers (Messrs Palermo and Unicomb) held a pricing meeting each month. The purpose of these meetings was to determine both the invoice price (being the list price before discounts or rebates) and also the “net net price” (being the price at which the

distributors would purchase steel following discounts and rebates). The list price and “net net price” were based on the import parity price for the relevant product, but with a premium to take into account the additional value BlueScope offered by supplying domestically. Mr Kelso described the additional value offered by BlueScope as including: superior quality of steel; warranties/guarantees incorporated in BlueScope’s offers; a reliable, ongoing source of supply; shorter lead times for supply than imports; and lower minimum order quantities than imports. Mr Hennessy gave similar evidence.

555 To determine the import parity price, the Distribution Markets sales team provided information about import offers available in the market. Typically, the import parity price would be based on the lowest import offer for product supplied by a “tier 1” mill (being a mill that produced high quality steel and that regularly offered steel into Australia). Mr Kelso confirmed that, in his experience, BlueScope would usually only take into account the price offered for a particular imported product if members of the sales team were aware of the mill that the product was being sourced from. This was because the identity of the mill was relevant to the lead time and reliability of that product. Mr Kelso agreed that, in working out for a particular product what the BlueScope premium might be over the import parity price for that product, it might be necessary to know some details of the product, including its quality and likely lead time, because that was relevant to the extent of the premium that BlueScope was likely to be able to charge.

556 After reaching an initial position internally, account managers were instructed by Mr Hennessy to discuss the proposed list prices and net net prices with their distribution customers, to receive feedback on the competitiveness in the market of the proposed prices.

557 The evidence indicates that CIPA’s prices for a given month were finalised in a forum called the “BANZ Pricing Forum”. The minutes of a number of meetings of the BANZ Pricing Forum were in evidence. The earliest such minutes concern a meeting held on 25 June 2012 which was chaired by Mr Hennessy. Messrs Palermo and Cornelius were apologies for the meeting. It is significant to note that the pricing forum comprised representatives of CIPA (including Mr Hennessy and, ordinarily, Mr Palermo), BlueScope Distribution (Messrs Cornelius, Watson, Cousins, Zafiris and Hussey) and NZSA (Mr O’Brien). The composition of the forum suggests that there was price discussion and coordination between CIPA, BlueScope Distribution and NZSA. As those entities were related companies, there is nothing unlawful in such discussions and coordination. However, at the trial the respondents vigorously maintained that CIPA had

no influence over the pricing decisions of BlueScope Distribution and NZSA. The minutes contain a section titled “Timing for CIPA’s Sept Pricing into the Market” which contains the bullet points:

- CIPA will be publishing September Price List and associated information this week, by Thursday / Friday 28/29th June.
- BSL DIST to prepare relevant external communications around the agreed price movements, ready for publication shortly after CIPA pricing is released.

558 The second bullet point suggests close coordination of CIPA’s monthly price list and BlueScope Distribution’s market prices. As discussed below, there was also close coordination with NZSA’s prices.

559 On 26 August 2013, Mr Palermo circulated an email with the subject “BANZ Pricing Forum - Minutes / Price Position for Nov 2013”. The email was circulated to representatives of CIPA (including Messrs Hennessy and Gent), BlueScope Distribution (Messrs Cornelius, Watson, Cousins, Zafiridis and Hussey) and NZSA (Messrs O’Brien and Fogarty). The email commenced with the statement:

Summary of the CIPA price position for November 2013 following our phone hook-up on Friday 23 August.

560 The email then set out the recommended list prices and discounts to be offered in respect of each of the categories of flat steel products. The email advised that the formal price announcement would be made by 29 August 2013.

561 Attached to the email were spreadsheets showing the calculation of import parity prices and a spreadsheet titled “CIPA Benchmarks and Premiums”. That form of spreadsheet becomes significant because, in September 2013, it was provided in a modified form to distributors in connection with the benchmarking strategy.

Discounts and rebates

562 In the period prior to September 2013, BlueScope CIPA offered its aligned distributors a range of discounts and rebates to the list price. Mr Hennessy said that those discounts and rebates were:

- (a) an early order offer that applied to orders placed approximately six to eight weeks before delivery, which was generally in the range of \$20 to \$60 per tonne;
- (b) an early settlement rebate that applied to orders paid before a specified date, which was generally in the range of 1% to 2%; and

(c) a loyalty rebate that was a bespoke rebate given to a particular distributor and which varied between distributors (depending on what the distributor had managed to negotiate with CIPA), and which varied between approximately 3.25% and 6%.

563 The discounts and rebates offered by BlueScope CIPA as at September 2013 were also recorded in a submission dated 18 September 2013 made by BlueScope’s legal advisers, Ashurst, to the ACCC in connection with the proposed acquisition of OneSteel’s sheet & coil business. The submission confirmed that BlueScope CIPA’s pricing to the BlueScope owned distributors (BSD, SMS and Impact Steel) and aligned distributors was based on CIPA’s monthly price list, with the various forms of loyalty rebate and early settlement discounts provided by CIPA. The submission indicates some variation in the level of rebates offered to BlueScope owned distributors and aligned distributors, which was the subject of complaint by distributors to Mr Ellis when he commenced with CIPA (as referred to later in these reasons).

564 Mr Kelso said that the list price less the loyalty rebate and the early order offer was referred to as the “net price”, and the final price after allowance for any early settlement rebate was referred to as the “net net price”.

565 Mr Hennessy said that, for non-aligned distributors, CIPA offered a negotiated discounted price, typically at or around the same time that those distributors were considering import offers.

566 In addition to the above discounts, BlueScope provided “tactical pricing” to its distribution customers, which was also referred to as “end user targeted rebates” (EUTs). Mr Kelso said that these offers were ad hoc and represented additional discounts provided to distributors in response to a specific request by them for even further discounts to the “net net price” that they would otherwise pay to BlueScope. Tactical pricing was offered for the purpose of enabling distributors to compete with import offers for a particular parcel of steel to their end customer. Mr Hennessy gave similar evidence about tactical pricing.

K. NZSA SALES STRATEGY BEFORE SEPTEMBER 2013

567 Mr O’Brien was employed as Manager of NZSA between May 2008 and July 2014 and was located at NZSA’s office in Hawthorn East, Victoria. He gave evidence about NZSA’s sales strategy in the period before Mr Ellis commenced employment with CIPA on 1 September 2013, and the communications between BlueScope and NZSA about its sales strategy after that date. This section of the reasons concerns the period before September 2013.

568 NZSA sold sheet and coil steel that was produced by NZ Steel. Any supply of steel that exceeded NZSA's domestic requirements was available for export from New Zealand to Australia for NZSA to on-sell to customers within Australia.

569 Over the first five years of Mr O'Brien's time at NZSA, the customer base was stable. NZSA was not driving for significant expansion in terms of the customers to whom it was supplying steel. Mr O'Brien had full autonomy in relation to the prices at which NZSA sold steel in Australia. Mr O'Brien said NZSA priced its steel products at a level that allowed an achievable premium over the prices of other imported steel. The premium reflected a value proposition that was superior to its (import) competitors and which included better quality steel, service and visibility and consistency of supply when compared to its import competitors. Mr O'Brien considered that NZSA had a reputation with its customers of operating independently to BlueScope (despite the fact it was generally known that NZSA was a wholly owned subsidiary of BlueScope).

570 Mr O'Brien said that NZSA's service offer differed from the service offer that CIPA was able to provide to its customers in Australia. While CIPA was able to provide warranties on their steel and much shorter lead times, NZSA offered steel without the same level of warranties and with a much longer lead time of three months (between order and delivery of the product).

571 Mr O'Brien said that he would usually send out offers to NZSA's customers on a monthly basis (generally in the middle of a given month) which referred to the "base price" for various steel products and a schedule of "extras" for particular gauges, widths and grades of steel products, which customers paid for in addition to the base prices. NZSA also processed the flat steel which involved extra charges. Mr O'Brien explained that NZSA's offers came before CIPA's offers because of the longer lead time between order and delivery. By way of example, Mr O'Brien said that NZSA's December shipment offers, which were sent out in September, were considered to be January supply. The timing of NZSA's offers matched the timing of other import offers for the same month of supply.

572 In the period May 2008 to mid-2013, Mr O'Brien had monthly discussions with CIPA, including Messrs Gent, Palermo and Unicomb, about market conditions and pricing in Australia. This was by way of sharing information in relation to the import parity price and also involved the occasional justification of NZSA's pricing position. Mr O'Brien said that NZSA set its prices at approximately \$20 to \$30 per metric tonne above the lowest of the

comparable imported product prices. This reflected the premium that NZSA put on its service offer in comparison to other imports.

573 Mr O’Brien was aware that the prices at which NZSA sold steel in Australia were lower than the prices that CIPA sold steel to its Australian customers. Mr O’Brien considered that, if NZSA attempted to sell its steel at CIPA’s price levels, it would not attract any customers.

574 Mr O’Brien said that NZSA’s strategy was not to maximise its volume at the expense of CIPA. If there was a particular customer that CIPA could supply, it would be better for BANZ overall if CIPA supplied that customer rather than NZSA. Mr O’Brien noted, however, that there were a number of elements that went into an assessment of the best financial outcome for BANZ, including whether the customer wished to purchase through CIPA, whether CIPA wished to supply the customer and the next best alternative for the sale of NZ Steel in overseas markets.

575 Mr O’Brien acknowledged that while CIPA could not direct NZSA in relation to pricing, if CIPA was unhappy with NZSA’s pricing it could try and bring about changes through internal discussions. Mr O’Brien stated that NZSA would occasionally discuss with BlueScope the rationale for pricing a product at a particular price. Mr O’Brien said that Mr Palermo often questioned him about where NZSA’s prices were sitting and, on occasion, took issue with the level at which NZSA was pricing. However, Mr O’Brien said he did not recall Mr Palermo ever giving him specific directions or an instruction as to how he should be pricing NZ Steel products in the Australian domestic market.

576 BlueScope internal documents confirm that, in the period 2012 to mid-2013, there was some discussion, and probably disagreement, between CIPA and NZSA in relation to NZSA’s pricing of steel into the Australian market. On 2 May 2012, Mr O’Brien sent Mr Fuller and Mr Hennessy by email a draft document he had prepared titled “Recharging BANZ - NZSA Growth Plan Discussion Paper”. The email indicated that the draft paper was to be discussed at a forthcoming BANZ meeting on 15 May 2012. The document commenced with the following observations:

The NZSA Strategy has been well established and reasonably successful to this point – however with the formation of the BANZ business it is timely to a) review the strategy and ensure it is still right and relevant for the business (alignment); and b) see how much further the business model and strategy can be pushed for the overall benefit of BANZ.

As it stands, NZSA operates under the clear direction to maximise BlueScope Steel’s share of the import market – simple in its description but far more challenging in its application. For NZSA to grow significantly as proposed here, there will be increased

tension in the business as NZ Steel product invariably comes into increasing contact and conflict with CIPA channels.

Part of an increased presence of NZSA in the import market has to be an ultimate aim to transition supply of as much of the import channel back to domestic supply. The strategy to achieve this sits with both CIPA and NZSA, and needs to be clear and accepted by all involved.

577 The minutes of the “BANZ Pricing Forum” which was held on 25 June 2012, referred to earlier, contain a section titled “NZS Pricing into Australia”. The bullet points under that heading include the following statements (emphasis in original):

- There was some debate around the pricing being provided by Sean in regards to NZS pricing into Australia.
- ...
- After some discussion, it was agreed by CIPA, BSD and SMS that what is really required is NZS pricing to Impact Steel and to Non-aligned Distributors, as this is a better representation of NZSA’s actual pricing into Australian domestic market.
- Sean was reluctant to disclose this level of detail...
- As described by Sean the role of NZSA in the Australian Domestic market is to displace imported steel which CIPA is not winning, with NZSA feed and preferably with a premium for the steel it is displacing.
- BUT – MH reinforced the work that was done to show that if NZSA feed actually displaces CIPA feed, then overall BANZ is worse-off by > \$200/t. This is not the best outcome for BANZ.

As a core outcome of the Price Forum, we must ensure Alignment, so that NZSA pricing is positioned appropriately relative to both import benchmarks, and also to CIPA, so as to drive the optimum profitability outcome for BANZ – not for CIPA, not for NZSA, not for Impact, not for BSLDIST – for BANZ.

578 I infer that the initials “MH” in the minutes refer to Mr Hennessy. From about March/April 2013, Mr O’Brien recalls feeling increasing amounts of pressure from Mr Hennessy to raise the prices of NZSA steel in the market. Mr O’Brien said that Mr Hennessy called him once or twice a week and questioned him about the prices he was quoting to individual customers of NZSA. Mr O’Brien recalled a telephone conference with Messrs Hennessy, Fuller and Fogarty in or about mid-2013 (but before September 2013) during which there was a conversation in words to the following effect:

Mr Hennessy: The price of the steel that you sell is too cheap. You are undercutting the value of our steel in the market. We are losing business because of you.

Mr O’Brien: We provide a very different service offer. We have customers who would never buy from you.

Mr Hennessy: Who? Who won't buy from us?

Mr O'Brien: Come on Matt. You know there are people out there who won't buy from you.

Mr Hennessy: NZSA is selling too cheap. You are competing with BSL and that isn't what BSL sees as your role in the market.

Mr O'Brien: I agree that it isn't our role in the market to compete with BSL. But I don't think we are competing with BSL's offer. We have a completely different value proposition. I put what I think is an achievable premium over the steel that we sell. We have a much longer lead time, don't offer the same level of warranties, and offer products that are a different quality to BSL's steel.

579 Mr O'Brien said that these kinds of conversations between Mr Hennessy and himself continued until Mr Ellis commenced at CIPA, when the pressure and control on NZSA in relation to its pricing increased.

L. MARKET CONDITIONS IN 2013

580 It was uncontroversial that, following the global financial crisis in 2008, demand for steel world-wide had declined and remained depressed for a number of years. The reduction in demand had led to an over-supply of steel production and distribution capacity.

581 In its submission to the ACCC in August 2013 (in support of its application for informal clearance of the acquisition of OneSteel's sheet and coil distribution assets), BlueScope summarised the market conditions at that time as follows:

- (a) Substantial volumes of flat steel products were being imported into Australia. From FY2010 to FY2012, imports of hot rolled coil represented 20% of domestic consumption, galvanised coil represented 36%, aluminium zinc coated coil represented 37% and plate represented 22%.
- (b) The prices of flat steel products in Australia were closely correlated with import prices.
- (c) The volume of BlueScope's production of raw steel was essentially fixed. It was not technically or economically feasible for BlueScope to make material reductions in the volume of raw steel which it produced. BlueScope operated a single blast furnace which was designed to operate at a specific daily rate to maximise efficiency and minimise wear in the furnace. Lowering the output of the blast furnace made it uneconomic to operate because fixed costs were not proportionately reduced and maintenance and repair costs increased significantly. Accordingly, when BlueScope lost sales as a result

of import competition, this increased the residual product volume that needed to be exported.

- (d) Domestic sales made higher average contribution margins for BlueScope than export sales. BlueScope had calculated that, in FY2013, the weighted average domestic contribution margin on sales of hot rolled coil to distributors was approximately \$389/tonne, whereas the weighted average contribution margin on export sales of hot rolled coil was approximately \$118/tonne.
- (e) BlueScope's sheet and coil distribution business faced vigorous competition from a number of distributors in each region in which it operated.
- (f) Sheet and coil distributors had substantial excess capacity. Since 2008, demand for flat products had declined in Australia by approximately 35% and there had, to 2013, been limited rationalisation of sheet and coil distribution capacity. As a result, there was substantial excess capacity in sheet and coil distribution.
- (g) Customers of sheet and coil distributors switched easily between distributors.
- (h) Barriers to expansion and entry to distribution were low. Existing distributors with excess capacity could substantially expand their throughput without incurring material additional costs.

582 A number of the ACCC's witnesses gave evidence confirming the above market conditions. With respect to steel production, Mr Hennessy gave evidence that:

Steel mills by the nature of their operations have limited ability to reduce volumes manufactured. Steel is produced in blast furnaces which need to run continuously when operational. Unless mills are closed or blast furnaces decommissioned the volume of steel produced remains largely constant.

The minimum quantity produced from BlueScope's only blast furnace at Port Kembla is about 2.3 million tonnes per annum. In 2013 about 1.7 million tonnes was sold by BSL CIPA into the domestic market, and the remaining 600,000 tonnes was exported.

Because of the world-wide over supply of steel in 2013, BSL CIPA was also under price pressure in overseas markets. At that time, higher prices could be obtained for steel products in the domestic market than in overseas markets and there was therefore a financial incentive of BSL CIPA to increase domestic sales.

583 Messrs Schulz and Inomata gave similar evidence, explaining that, in the period 2012 to 2014, the global steel industry was suffering from overcapacity which was mainly driven by increased production from steel mills in China and India. In his s 155 examination, Mr Vassella stated that in the period of at least five years before the latter part of 2013, BlueScope had been generally unprofitable, largely as a result of the impact of the global financial crisis and the

growth of steel production and exports from China which had left the steel industry in a state of financial distress.

584 A BlueScope internal presentation from Messrs Vassella and Ellis dated 24 October 2013 and titled “CIPA Strategic Opportunity Workshop Introduction Pack” recorded that CIPA’s reported earnings before interest and taxes (**EBIT**) for FY2011 to FY2013 were losses of \$1,063 million, \$726 million and \$45 million respectively. The presentation described import competition as “intense” and recorded that CIPA had lowered domestic premiums to the import parity price in order to minimise market share decline.

585 With respect to the distribution market, Mr Hennessy gave evidence that, in 2013, distributors of flat steel products in Australia had substantially more processing and handling capacity than was needed to meet existing demand for flat steel products in Australia. While demand for flat steel products had fallen following the global financial crisis, there had not been a corresponding reduction in warehouse space and processing facilities. As a result, these facilities were under-utilised. During 2013, distributors were experiencing poor profitability as a result of at least two issues: the reduction in demand for flat steel products generally (leading to under-utilisation of their facilities) and volatility and depressed prices for flat steel products.

586 A BlueScope internal presentation titled “BlueScope Board Strategy Review dated 15 to 16 October 2013 recorded that BlueScope’s distribution business’s underlying EBIT for FY2011 to FY2013 were losses of \$34 million, \$36 million and \$27 million respectively, with a forecast loss for FY2014 of \$18 million.

587 Mr Kelso similarly gave evidence that, as at 2013, there was a lot of competition in Australia from imported flat steel products. As a result, there was significant price competition between distributors. Mr Kelso said that he frequently heard complaints from distributors to the effect that their margins were being impacted by the prices being offered by other distributors and that they had to reduce margins to win business. Mr Kelso also received complaints from distributors about their perception that BlueScope was selling steel to its own distributors (SMS and Impact Steel) at low prices. Mr Hennessy gave similar evidence.

588 A BlueScope internal presentation titled “Distribution S&C [Sheet & Coil] Channel Strategy” dated 27 August 2013 (version 9 circulated 15 October 2013) recorded BlueScope’s concern that aligned distributors had adopted a strategy of using imports to leverage down their average

cost of flat steel products and that aligned distributors had an ongoing incentive to continue increasing their percentage of imports over time.

589 In response to the increasing volume of flat steel imports, during 2012 BlueScope initiated a significant number of applications under Pt XVB of the *Customs Act 1901* (Cth) seeking the imposition of anti-dumping duties or countervailing duties on specific categories of flat steel products exported from various countries. Those applications included:

- (a) an application dated May 2012 in respect of hot rolled coil exported from the Republic of Korea, Taiwan, Japan and Malaysia;
- (b) an application dated August 2012 in respect of galvanized steel exported from the People's Republic of China, Republic of Korea and Taiwan;
- (c) an application dated August 2012 in respect of aluminium zinc coated steel exported from the People's Republic of China, Republic of Korea and Taiwan;
- (d) an application dated October 2012 in respect of galvanized steel exported from the People's Republic of China;
- (e) an application dated October 2012 in respect of aluminium zinc coated steel exported from the People's Republic of China; and
- (f) an application dated December 2012 in respect of plate steel exported from the People's Republic of China, Indonesia, Japan, the Republic of Korea and Taiwan.

590 Mr Wright gave evidence that anti-dumping applications, in themselves, caused disruption for import traders because customers do not like the uncertainty that an anti-dumping investigation creates. Mr Wright explained that, in response to anti-dumping applications, import traders inserted "dumping clauses" into sales contracts to protect against the imposition of duties. This caused concern to customers because they would not have certainty in respect of the ultimate purchase price.

M. THE BENCHMARKING STRATEGY

Overview

591 A central allegation of the ACCC in this proceeding is that, when Mr Ellis commenced employment at CIPA on 1 September 2013, he introduced the benchmarking strategy. As explained earlier, the ACCC alleges that the benchmarking strategy comprised:

- (a) providing distributors with a recommended retail (or resale) price for flat steel products that would be or was higher than the market price before the implementation of the benchmarking strategy;
- (b) persuading distributors to use the recommended retail price to set the price at which those distributors would sell flat steel products to steel users if BlueScope caused BlueScope Distribution and NZSA to price in accordance with the suggested or recommended retail price; and
- (c) causing BlueScope Distribution and NZSA to set their prices for flat steel products in accordance with the suggested or recommended retail price, including by limiting the use and availability of tactical pricing.

592 Although not stated clearly in its statement of claim, during the trial the ACCC made clear that it alleged that, by the benchmarking strategy, BlueScope and Mr Ellis attempted to induce distributors to set their prices for flat steel products at or above BlueScope’s recommended resale price. In other words, the recommended resale price would be the base or floor price for the resale of flat steel products by distributors, to which an additional amount might be added on account of processing costs.

593 The respondents did not dispute that Mr Ellis implemented a business strategy at CIPA by which the prices listed in CIPA’s price lists were recast and promoted to distributors as “benchmark” prices or “recommended resale” prices. Nor did they dispute that the “benchmark” prices or “recommended resale” prices were promoted to distributors to whom CIPA supplied flat steel products and to distributors who imported flat steel products, and promoted as a “benchmark” for pricing both BlueScope products and imported products. Nor did the respondents dispute that the use of the “benchmark” prices was promoted to distributors as a way of distributors increasing their prices. The respondents disputed, however, that they attempted to induce distributors to reach an understanding with CIPA that distributors would use those prices as a benchmark, or base price, in setting their prices for the supply of flat steel products.

594 While the respondents did not dispute that Mr Ellis introduced a “benchmarking” or “recommended resale” price strategy, there were very few business documents in evidence that discussed or described the strategy. The principal contemporaneous documents relating to the strategy were:

- (a) the December 2013 Benchmark spreadsheet (described in further detail below);

- (b) CIPA’s Distribution Market price lists for the months of December 2013, January 2014, February 2014, March 2014, April 2014, May 2014, June 2014, July 2014 and August 2014;
- (c) price notification letters sent by CIPA to distributors enclosing the monthly Distribution Market price lists;
- (d) internal BlueScope emails relating to the benchmarking strategy;
- (e) notes of discussions with distributors recorded in the Salesforce system; and
- (f) an internal BlueScope presentation titled “CIPA Sales and Marketing – FY15 Pricing and Volume Review” (version 2 dated 9 April 2014).

595 The evidence concerning the substance or content of the benchmarking strategy fell into two categories. The first category comprised evidence of discussions between CIPA and distributors concerning the “benchmark” or “recommended resale” prices strategy. Such evidence consists of notes of discussions recorded in the Salesforce system or in emails, as well as the recollections of various witnesses, both BlueScope and distributors. The second category comprised evidence of certain BlueScope employees, specifically Messrs Ellis, Hennessy, Kelso and O’Brien, as to the purpose of, or their understanding of, the benchmarking strategy.

596 The notes of discussions recorded in the Salesforce system comprised significant evidence in the proceeding as they are a contemporaneous or near contemporaneous record of discussions. However, the level of detail recorded in the Salesforce system varied depending upon the author of the record. In his written statement, Mr Hennessy stated that he considered that various discussions that he participated in with distributors in relation to the benchmarking strategy were sensitive and potentially illegal. For that reason, Mr Hennessy said that he did not record the substantive content of those discussions in his Salesforce entries because he did not want a documentary record to exist.

597 The evidence that is dependent on the recollections of witnesses must be approached with caution. Recollections fade with time and become unreliable. Generally, I place more weight on the witness evidence concerning statements made by BlueScope representatives to distributor representatives about pricing, in comparison to the witness evidence reflecting on the purpose or object of the benchmarking strategy. The statements made by BlueScope representatives to distributor representatives about pricing concerned a change in BlueScope’s commercial strategy with respect to distributors and, in that sense, was likely to be of importance to distributors and therefore memorable. Further, I do not believe that the

distributor witnesses that gave evidence had any incentive to re-characterise the substance of the statements made to them, whether consciously or subconsciously. In contrast, in giving evidence about the purpose or object of the benchmarking strategy, Mr Ellis had a strong incentive to re-characterise the substance and intent of the strategy and cast it in a more legally benign manner. For reasons expressed earlier, I place little weight on Mr Ellis's evidence unless it was uncontroversial or corroborated. Mr Hennessy and Mr Kelso were not respondents to the proceeding and therefore had a lesser incentive to re-characterise their business conduct in a more benign way. I therefore put more weight on their evidence as to their understanding of the benchmarking strategy. Nevertheless, for the reasons discussed below, I also treat aspects of their evidence with a degree of caution and consider that it must be weighed carefully with other evidence. I place more weight on the evidence of Mr O'Brien as I considered that he gave his evidence dispassionately and had no incentive to re-characterise the discussions he was involved in.

598 The evidence shows that representatives of CIPA met or spoke with representatives of aligned and unaligned distributors frequently. There is nothing surprising or untoward in that fact, given that CIPA was a supplier to those distributors. However, this meant that there were numerous occasions on which representatives of CIPA had the opportunity to discuss the benchmarking strategy with representatives of distributors. While the evidence adduced in the proceeding concerned a significant number of meetings or discussions between CIPA and distributors, the evidence also showed that there were numerous other meetings or discussions for which no evidence was available as to what was discussed.

Evidence given by Mr Ellis

599 Although I place little weight on Mr Ellis's evidence, it is necessary to refer to his evidence at some length in order to assess properly the entirety of the evidence before me. As stated earlier, I consider that Mr Ellis was an unsatisfactory, unreliable and, in some respects, dishonest witness. However, that does not mean that I reject all aspects of his evidence. Some aspects are uncontroversial and are corroborated by other witnesses. It does mean, though, that I place no weight on the central aspect of his evidence: that in formulating the benchmarking strategy, Mr Ellis did not intend to induce counterparties to reach an understanding to adopt the benchmark prices (the recommended retail prices) in setting their prices, and merely sought to provide an "opportunity" for counterparties to consider the benchmark prices in setting their own prices. The evidence taken as a whole contradicts that central aspect of Mr Ellis's evidence.

Mr Ellis's experience in pricing at CMC Steel

600 Mr Ellis gave evidence concerning his business experience as Group General Manager for CMC Steel in Australia between February 2008 and March 2010. The purpose of that evidence was to provide context to Mr Ellis's evidence about his business strategies when he commenced with CIPA in September 2013.

601 Mr Ellis said that, during this period, CMC Steel operated as a distributor of long steel products and flat steel products in New South Wales, Queensland, Victoria, South Australia and Western Australia. CMC Steel also operated an import trading business, but Mr Ellis was not involved in that part of the business.

602 During Mr Ellis's time as CMC Steel's Group General Manager, it was an "aligned" distributor of CIPA which meant that it purchased most of its steel requirements from CIPA, with the balance purchased from import traders. However, during the pre-GFC period, the proportion of steel that CMC Steel purchased from CIPA reduced and, at times, CMC Steel purchased more than 50% of its steel from import traders. The fact that CMC Steel varied the proportion of steel it purchased from CIPA (including, at times, to less than half of its steel from CIPA) prompted Mr Ellis to question whether it remained relevant to categorise distributors as "aligned" or "non-aligned" with CIPA.

603 Mr Ellis said that he was regularly involved in pricing discussions with CMC Steel's larger customers. Mr Ellis also supervised CMC Steel's five State Managers, each of whom had responsibility for price-setting in their respective states. In the course of supervising those State Managers, Mr Ellis had oversight of, and was aware of, the manner in which CMC Steel set its prices for smaller customers (customers with volume that was less than 100 tonnes per month).

604 Mr Ellis said that, at the time, CIPA circulated a standard price list to CMC Steel each month and Mr Ellis understood it sent the same price lists to other distributors too. The price lists that CIPA distributed were substantially similar in form, if not exactly the same, as the price lists it was distributing when Mr Ellis commenced at CIPA in September 2013. The prices recorded in the price lists were not the ultimate prices that CMC Steel paid to CIPA for any particular product. Instead, the prices recorded in the price lists were a "base price" to which a range of discounts and rebates were applied in order to arrive at the net purchase price that CMC Steel paid for the product. The various applicable discounts and rebates were defined in a written supply agreement between CMC Steel and CIPA.

605 Mr Ellis said that when it came to determining pricing offers to CMC Steel's smaller customers, before the global financial crisis Mr Ellis's State Managers took the CIPA price lists into account as a starting point for developing the price to be offered to the customer. For example, Mr Ellis's State Managers typically used the prices in the CIPA price list as a starting price or reference price, and then built up the ultimate price to be offered to the customer by adding or subtracting amounts to reflect a range of factors such as CMC Steel's processing cost for the product being supplied (which depended on the nature and extent of the processing including, for example, the extent to which slitting and shearing was required), the nature and quantity of the order, the cost of delivery to the customer, the cost of any value-added services that CMC Steel may have been offering such as inventory management, the size of the customer and the relationship between CMC Steel and the customer in question, market dynamics at the time and any other relevant factors.

606 Throughout Mr Ellis's time at CMC Steel, he observed, and understood that, his State Managers and their subordinates also regularly showed customers letters that CIPA sent CMC Steel from time to time when CIPA announced increases to the prices in the CIPA price lists. Mr Ellis's understanding was that State Managers did this for the same reason as showing customers the CIPA price lists; namely, to explain how their prices had increased as a result of increases in price from CIPA.

607 When it came to determining pricing offers for larger customers, Mr Ellis said that the process which his State Managers followed was different. Larger customers typically conducted tenders for their business, or obtained multiple quotes, and often purchased steel on the basis of a short-term agreement or an agreement for the supply of a particular volume of steel delivered over a period of time. This meant that CMC Steel had to take into account market intelligence from CMC's trading business regarding offers for imported steel in order to formulate pricing offers that would be competitive with offers that may be offered by other distributors. This meant that the CIPA price list had less of a role to play as a starting point in those circumstances. In addition, when CMC Steel was competing for larger customers against bids from other distributors using imported steel, CMC Steel often approached CIPA to request tactical pricing support.

608 I generally accept Mr Ellis's evidence regarding his business experience at CMC Steel. In my view, however, that evidence has no material bearing on the central allegations in this proceeding. The evidence confirms that BlueScope had published price lists for the supply of flat steel products to distributors for many years. Consistently with the evidence given by

Messrs Hennessy and Kelso set out earlier, CIPA offered distributors various discounts and rebates from the list prices, and also offered tactical pricing relief from time to time. It is commercially understandable that aligned distributors purchasing steel products from CIPA took CIPA's list prices into account in determining prices for certain customers, particularly smaller customers. As discussed earlier, the evidence indicates that the cost of steel is the largest component of distributors' overall costs in supplying flat steel products to their customers. In his evidence, Mr Ellis does not suggest that CIPA proffered its list prices to CMC Steel as recommended resale prices, and Mr Ellis does not suggest that CIPA sought to induce CMC Steel (or any other distributor) to use the list prices as a benchmark in setting prices to their customers. The benchmarking strategy introduced by Mr Ellis at CIPA differed markedly from CIPA's previous pricing practices.

Mr Ellis's experience at BSL Thailand

609 Mr Ellis resigned from his role at CMC Steel and commenced his role as President of BSL Thailand in April 2010. In this role, Mr Ellis was responsible for running the BSL Thailand steel mill and had ultimate oversight of BSL Thailand's sales function in Thailand. BSL Thailand had three primary categories of customers: roll formers, distributors and manufacturing end-users.

610 Mr Ellis said that when he commenced as President of BSL Thailand in April 2010, BSL Thailand was operating at a loss and had reduced its manufacturing capacity due to a lack of orders from customers. Mr Ellis conducted several rounds of customer engagement forums to ascertain why BSL Thailand was not winning more business, and met with various participants in the market. Mr Ellis said that, based on the information he obtained, he implemented a number of steps at BSL Thailand including:

- (a) improving what Mr Ellis perceived to be poor customer engagement by encouraging better relationships between sales staff and their customers;
- (b) reducing BSL Thailand's pricing premium in the market and making BSL Thailand's prices more competitive;
- (c) increasing the product diversity of BSL Thailand; and
- (d) creating a new retail distribution channel to market.

611 Another initiative that Mr Ellis caused to be implemented was the introduction of a document known as BSL Thailand's "Retail Price Book" to BSL Thailand's retail distribution customers. The Retail Price Book listed prices akin to recommended resale prices for BSL Thailand's

products. This represented BSL Thailand's view of the value its products should have in the marketplace in Thailand when sold by its customers, which would allow them to price by reference to it if they wanted. The Retail Price Book could be used by retail distribution customers to explain when their prices had increased as a result of increases in price from BSL Thailand. Mr Ellis said that there was no obligation on BSL Thailand's customers to price at the prices listed in the Retail Price Book, or to price by reference to it. Mr Ellis viewed it both as helpful information, and a tool, that customers could use if they wanted.

612 I generally accept Mr Ellis's evidence regarding his business experience at BSL Thailand. The evidence explains the origin of Mr Ellis's strategy, implemented soon after he returned to Australia and commenced his role with CIPA, of introducing a benchmarking strategy using recommended resale prices. It is of some significance, and supportive of the ACCC's allegations, that Mr Ellis was aware that the Retail Price Book used by BSL Thailand enabled its distribution customers to set their own prices by reference to the Retail Price Book. The evidence supports a finding that, within the Australian distribution market for flat steel products, Mr Ellis knew that recommended resale prices published by CIPA would be capable of being used by distributors in setting prices to their customers. Otherwise, though, the evidence concerning BSL Thailand has little bearing on the question whether Mr Ellis attempted to induce distributors and other counterparties to reach an understanding about pricing by reference to the recommended resale prices.

Mr Ellis's commercial strategies and initiatives upon commencement at CIPA

613 Mr Vassella announced the appointment of Mr Ellis as General Manager of Sales and Marketing at BlueScope CIPA on 12 August 2013 by an email sent to BlueScope staff. Mr Ellis formally commenced his role on 1 September 2013. However, the evidence shows that Mr Ellis commenced meetings with the Sales and Marketing staff of CIPA and with customers from mid-August 2013. The evidence concerning those meetings is considered below.

614 Mr Ellis said that, before arriving back in Australia, he had formed the view that the primary issue facing CIPA that needed to be addressed was the substantial reduction in its share of steel sales in Australia between 2008 and 2012. Mr Ellis believed that BlueScope wanted him to do his best to reverse that trend. Mr Ellis said that, before he started, he had three ideas in mind to reverse the reduction in CIPA's market share:

- (a) First, Mr Ellis wanted to speak with aligned and non-aligned distributors to increase sales. With respect to aligned distributors, Mr Ellis believed that even the aligned

distributors were now purchasing increasing amounts of imported steel products (based on his experience at CMC Steel). He believed that CIPA had not reviewed its strategy for engaging with customers since the early 2000s which had assisted import traders to become significant suppliers of steel products in the Australian marketplace. Mr Ellis believed that CIPA needed to engage better with aligned distributors in order to improve CIPA's relationship with them. With respect to non-aligned distributors, Mr Ellis believed that they represented a significant potential opportunity for increasing CIPA's sales.

- (b) Second, Mr Ellis said that he had in mind that "there may be something in the concept of giving customers a tool that provided them with the opportunity to price by reference to a CIPA recommended resale price", similar to the Retail Price Book issued by BSL Thailand.
- (c) Third, Mr Ellis said that he also had in mind that he would attempt to simplify CIPA's pricing offer, import tonnes to improve security of supply and introduce an import trader replacement strategy that later became known as a last right of refusal.

615 Mr Ellis said that, upon starting as General Manager of Sales and Marketing on 2 September 2013, he was aware of the following matters:

- (a) CIPA was struggling to win orders from distributors and had a significant reputational issue with customers (in particular, CIPA had a reputation for arrogance, poor customer engagement, poor customer service, inflexibility and high prices at the expense of its customers' profitability);
- (b) CIPA was losing millions of dollars each month; and
- (c) because CIPA was selling fewer flat steel products to domestic distributors, it was necessary for it to export increased amounts of flat steel products and CIPA was generally losing money on those export sales.

616 Mr Ellis said that his initial focus was to meet as many industry participants as possible to develop an understanding of BlueScope's position in the marketplace from the perspective of its distributor, building and manufacturing customers, key industry figures and CIPA's competitors. To this end, Mr Ellis held dozens of meetings with a range of industry participants in his first few months at CIPA.

617 Mr Ellis said that his objective was to win a greater “share of wallet” from distributors, whether aligned or non-aligned. Mr Ellis said that he viewed the aligned distributor concept as flawed because most of the aligned distributors (like CMC Steel) were importing significant volumes of steel. Mr Ellis said it was also his view that it would be important for CIPA to change its form of engagement with customers in order to address its perceived arrogance. Mr Ellis thought that if distributors saw a senior member of CIPA being prepared to meet with them and genuinely listen to their concerns and understand what actions were required by CIPA to improve, that was likely to improve the relationships with distributors and, ultimately, to lead to increased sales.

618 Mr Ellis said that in response to the various issues facing the CIPA business in September 2013, under his direction CIPA undertook took a number of steps including the following:

- (a) seeking to improve the level of engagement and relationship between CIPA and distributors;
- (b) seeking to increase the level of sales to non-aligned distributors where practicable;
- (c) tightening the process for the approval of tactical pricing, to better ensure that such pricing was only available where necessary to support a BlueScope distributor competing with another distributor using imported steel and where the business would otherwise reduce the amount of BlueScope steel sold in the market;
- (d) describing the CIPA price list as a benchmark or recommended resale price for distributors to consider when making their pricing decisions about the prices that they would charge to their customers;
- (e) simplifying the price list to make it easier to use;
- (f) developing a single source supplier initiative;
- (g) undertaking an internal restructure of CIPA;
- (h) introducing a “Last Right of Refusal” (or LROR) offer; and
- (i) various initiatives in relation to imported steel.

619 The following aspects of Mr Ellis’s evidence are generally uncontroversial and can be accepted. They were not challenged in cross-examination.

620 First, and as discussed earlier in these reasons, when Mr Ellis commenced employment with CIPA, the business was suffering losses and there was substantial excess capacity at both the manufacturing and the distribution levels of the market.

621 Second, Mr Ellis's evidence that he wished to improve CIPA's relationship with distributors is supported by other evidence and can generally be accepted. There is some support for Mr Ellis's evidence that he wished to sell more flat steel products to non-aligned distributors. Mr Sparks's statement records that he understood that this was part of CIPA's strategic direction under Mr Ellis (particularly in relation to Vulcan Steel and Selection Steel). However, as discussed earlier in these reasons, in 2012 and 2013 CIPA had been giving consideration to expanding sales to non-aligned distributors (who predominantly imported flat steel products), again particularly Vulcan Steel and Selection Steel. CIPA appreciated, though, that such increased sales would come at the cost of losing CIPA's traditional pricing premium, because CIPA would be forced to lower its prices to compete against the price of imported products. The evidence shows that Mr Ellis's strategy was not to pursue increased sales to non-aligned distributors by lowering CIPA's prices; rather, the strategy was to attempt to use the benchmarking or RRP strategy to increase prices at the distribution level of the market, thereby improving the commercial attractiveness of CIPA's prices.

622 Third, Mr Ellis's evidence that he wished to tighten the process for the approval of tactical pricing is also supported by other evidence and can be accepted. Indeed, it is common ground that CIPA took that step. The ACCC alleges that CIPA told distributors that it would take that step as an inducement for distributors to adopt CIPA's revised price list as a benchmark in setting their own prices. As discussed below, I accept that that occurred.

623 Fourth, there is no reason not to accept Mr Ellis's evidence that he implemented an internal restructure of CIPA, although very little evidence was given on that topic. Mr Ellis said that, from his engagement with industry participants, he formed the view that BlueScope's existing organisational structure made it difficult for CIPA to meet and respond to its customers. Mr Ellis gave as an example the fact that account managers in Western Australia were supporting customers in Brisbane. Mr Ellis said that AT Kearney were appointed as external consultants to review and recommend changes to CIPA's organisational structure.

624 Fifth, there is also no reason not to accept Mr Ellis's evidence that, in early 2014, he introduced a "Last Right of Refusal" or LROR offer, by which CIPA offered its products with a longer lead time (consistent with the lead time offered by import traders) at similar import prices. Under this offer, CIPA had a longer lead time to process the material in the most economical scheduling manner and compete to win the long lead time work from customers (that would otherwise have purchased from import traders).

625 Sixth, it can also be accepted that the changes that were made in December 2013 to CIPA's price lists were in part motivated by the object of simplifying the price lists. The evidence shows that the changes were also motivated by the benchmarking strategy and the object of promoting more clearly the recommended resale prices.

626 Ultimately, there were two aspects of Mr Ellis's evidence that were controversial: the benchmarking strategy (by which CIPA's price lists for flat steel products were revised and proffered to distributors as recommended resale prices which could be used by distributors as a benchmark for the pricing of their sales to customers); and the initiatives or proposals concerning imported steel, particularly as related to Mr Ellis's visits to overseas steel mills (and specifically Yieh Phui). This section of the reasons concerns the benchmarking strategy. The initiatives concerning overseas steel mills are considered later in these reasons.

The benchmarking strategy

627 In respect of the benchmarking strategy, Mr Ellis said that his intention was that CIPA's price lists would serve as a recommended price which distributors could choose to take into account in making their own pricing decisions. Mr Ellis said that he considered that it was entirely a matter for distributors as to whether they chose to use the price lists in that way. He said that he hoped that, over time, distributors would see the merit of using CIPA's price lists as a starting point or reference and would increasingly use it in that way. Mr Ellis said that he was also conscious that distributors would need to retain flexibility to respond to competition in the market and also to negotiate prices with customers. Larger customers of distributors, for example, would continue to negotiate discounts and would require bespoke prices. Further, prices actually charged to customers would continue to incorporate other costs, such as processing and servicing costs. Mr Ellis said that he did not think that there was any prospect that the prices in CIPA's price lists would simply become standard prices across the industry. Rather, he was hoping that the idea of utilising CIPA's price lists as a benchmark might lead to the price lists being used as the starting point for consideration, before the application of discounts for particular customers, which Mr Ellis described as a "list price minus" approach (as compared to the "cost plus" approach that was then prevalent post-GFC). Mr Ellis said that he also hoped that the use of CIPA's price lists might be of particular assistance with pricing to smaller customers (as smaller customers accounted for about 80% of a typical distributor's customer base but only represented about 20% of a typical distributor's volumes). Mr Ellis said that he did not think that he had any ability to control the pricing of distributors, and he was

not seeking to do so. He simply hoped that distributors would see that it was in their interests to use CIPA's price lists as a reference point.

628 Mr Ellis said that he had no intention of entering into, or any BlueScope entity entering into, any arrangement or understanding with any distributor in relation to the use of the price lists. Mr Ellis also said that he had no intention that any distributor would be under any obligation to any BlueScope entity, or would make any sort of commitment to any BlueScope entity, or enter into any agreement with any BlueScope entity, to utilise the price lists in any way, or to increase prices. Mr Ellis gave three reasons why this was not part of his intention:

- (a) first, it was never part of Mr Ellis's strategy;
- (b) second, it was not commercially feasible for Mr Ellis to seek that a distributor undertake any obligation that constrained its pricing, as distributors faced a high degree of competition when selling flat steel products and needed to retain pricing flexibility (including because prices offered to particular customers were frequently bespoke); and
- (c) third, Mr Ellis was aware that the actual pricing charged to customers by distributors was a function of various matters, including the costs of processing and the services supplied by distributors, and that, if Mr Ellis had sought any arrangement or understanding to use CIPA's price lists, it would have been unclear what was required of the distributors.

629 In cross-examination, Mr Ellis said that he could not recall if there was a specific document that defined or articulated the benchmarking strategy. He did recall the pricing team producing documents that described the "mechanics" of the recommended resale price (being the price lists, the changes to the price lists, their simplification, etc). He also recalled seeing a legally privileged document that recorded how BlueScope employees were to explain the concept of the recommended resale price to distributors, but no such document was adduced in evidence. Other than that, however, Mr Ellis did not recall any other documents created by CIPA that explained how the benchmarking strategy was to be communicated to distributors.

630 I place no reliance on Mr Ellis's evidence on this central topic. In addition to Mr Ellis's general unreliability as a witness, I note the following further matters that cause me to disbelieve his evidence.

631 First, in answer to the ACCC's allegations, Mr Ellis repeatedly emphasised that it was not commercially feasible for BlueScope to reach an understanding with distributors to use the

CIPA price lists as a benchmark in setting their own prices because distributors faced a high degree of competition, needed to retain pricing flexibility to negotiate prices with large customers and needed to incorporate their own costs into their prices. I do not find that evidence persuasive in the circumstances of this case. It can be accepted that those features of the distribution market increased the difficulty of engaging in cartel conduct in that market. Generally, a high degree of competition in a market is associated with numerous competitors (a feature of the distribution market), which increases the difficulty of bringing about an arrangement or understanding. So too, a market that is characterised by negotiated prices which are not publicly disclosed increases the difficulty of cartel conduct because the cartel cannot be easily enforced (non-compliance cannot be monitored). However, those features of the distribution market are not a barrier to cartel conduct (far less to attempting to induce cartel conduct). A high degree of competition renders cartel conduct more difficult, but it also creates the commercial incentive to attempt to engage in cartel conduct to increase prices and thereby increase profits (or reduce losses). Negotiated prices make cartel enforcement more difficult, but they create an incentive to reduce competitive pressures by moving toward a common price “benchmark”. Mr Ellis’s evidence in this respect also suffered from a degree of inconsistency. Mr Ellis repeatedly said that he believed that the benchmarking strategy gave distributors an “opportunity” to price by reference to CIPA’s price lists and that he “hoped” that distributors would set their prices on that basis. That “opportunity” required distributors to do the very thing that Mr Ellis said was too difficult because of a high degree of competition and the existence of negotiated prices.

632 Second, when asked in cross-examination about the commercial objective of the benchmarking strategy, Mr Ellis refused to admit that his objective was to increase CIPA’s sales revenue to distributors. I consider that Mr Ellis’s answers lacked credibility. Mr Ellis initially agreed with the proposition that what mattered to him was trying to increase the volume of sales of steel that CIPA was able to make to distributors and other customers. The cross-examination continued:

...Just focusing on distributors. And do you agree with me that the idea of a recommended resale price ... was ultimately directed at a purpose of trying to obtain more sales for BlueScope CIPA of its steel? --- No. I think the purpose was to assist the customers in increasing or improving their margins, number 1, and number 2, the secondary purpose was to assist those customers with an ease of pricing by reference particularly for their smaller customers.

I understand. But the reason you wanted to increase their margin was not altruism, was it? It was in order to try to generate sales of BlueScope CIPA’s steel to distributors? -

-- I wouldn't describe it as altruism, Mr Hodge, but the intangible benefit of appearing to be supportive of your customers and be concerned about their margins was very much part of the RRP strategy ...

...

And is it your evidence that no part of your motivation for suggesting or proposing the concept of an RRP was about increasing sales of CIPA flat steel products to distributors? --- It wasn't a primary motivation, Mr Hodge. Distributors are pretty simple people. The only thing that they will do in changing their buying patterns, in my experience, is buying at lower rates.

633 In my view, the above passage is illustrative of numerous occasions during cross-examination in which Mr Ellis refused to accept obvious commercial propositions and gave obfuscatory responses. As Mr Ellis initially accepted, his primary concern was increasing CIPA's sales revenue. It is not credible to suggest that the benchmarking strategy was not directed to that concern. It is an obvious commercial fact that, if the benchmarking strategy was implemented successfully and distribution customers were able to earn higher margins on the sale of CIPA products, that would enable CIPA to maintain the level of its "net" prices (and avoid having to offer deeper discounts). That would result in higher sales revenue for CIPA.

634 Third, I formed the impression that Mr Ellis's evidence concerning the nature and purpose of the benchmarking strategy was rehearsed and contrived. As noted earlier in these reasons, Mr Ellis's evidence displayed a dogged adherence to the use of the word "hope" when describing his intentions with respect to the benchmarking strategy. Mr Ellis's evidence was that he hoped distributors would use the CIPA price lists as a benchmark or price reference tool, and thereby earn better margins. When Mr Ellis was asked in cross-examination whether he wanted or desired this outcome from the benchmarking strategy, he refused to accept the proposition and insisted on using the term "hope". The following extracts from Mr Ellis's cross-examination are illustrative:

And a primary purpose of introducing the RRP was to assist them to earn a greater margin? --- That was – my hope was that there could be an opportunity for those distributors to increase their margins.

...

But you wanted it – I'm sorry, do you not agree, Mr Ellis, that, in making this proposal to them, you wanted them to act in accordance with it? --- I hoped that they would use it as a price reference tool.

And you wanted them to do so? --- I don't understand the difference between "want" and "hope". I'm using hope.

...

... as I understand it, you hoped that they would use the price list in the way that you

were proposing? --- Yes, correct.

And you wanted them to use the price list in the way that you were proposing? --- ... I hoped that they would use it in the way that we were proposing.

It was an outcome that you desired that they would price in the way that you have described? --- I hoped that they would use it...

Yes. It was an outcome that you desired? --- I'm not sure how else I can say this, I hoped that they would use it.

635 Mr Ellis was asked to explain the difference between hoping that distributors would use CIPA's price list as a benchmark and wanting or desiring them to do so. I found his answers unsatisfactory, as illustrated by the following exchanges:

Is "hoped" they would use it the same as "desiring" that they would use it? --- I never - I never thought about "desire" in regards a price list. That's not something that I would think about in a price list but I certainly hoped that they would use it.

... And does that mean you don't see a difference between "want" and "hope" or does it mean something else? --- No, it just means - it just means that at that point in time, in September 2013, in fact for the period of the whole of 2013 that I was in Australia, I hoped that the distributors would use the RRP as the way I've described.

Okay. And if I suggest to you that you wanted them to use the price list in the way that you have described, do you disagree with that? --- I disagree, because it's not words that I would use. The words I would use, and given it's my evidence, I would say that I hoped that they would use it.

636 In my view, there is no relevant difference in the meaning of "hope" and "want" or "desire" in this context. It must follow that, if Mr Ellis hoped that distributors would use CIPA's price lists as a benchmark for setting their own prices (to improve their sales margins), Mr Ellis also wanted or desired them to do so. The commercial object of the strategy was to assist the distributors, and BlueScope's own distributors of flat steel products, to increase their margins. Despite Mr Ellis's refusal to accept the proposition, the strategy was intended to benefit CIPA. The only explanation Mr Ellis was able to offer for drawing a distinction between the words "hope" and "want" or "desire" is that the latter were not words that he would use to describe his state of mind. However, he did use this language at other times in his oral evidence:

Mr Ellis, is this fair: that you thought that pricing in accordance with the price list pricing methodology would increase prices and so the more distributors that were increasing prices the more likely it was that any one distributor would be able to increase their prices? --- Mr Hodge, you used the word "in accordance" and I just don't know what you mean by that. But my words aren't by reference to the price book and our hope was - our desire was for our customers, if they could improve their margins that would be fantastic for them.

...

And that seems to reflect the way that you've expressed yourself throughout your

evidence that you would always choose to use the word “hope,” if you could; do you agree? --- Well, that was my hope, yes.

And the reason that you have done that throughout your evidence is because you think that if you only hoped for a result then the ACCC’s case will fail? --- No, Mr Hodge. My desire, my hope, was that the distributors would see virtue in pricing by reference to the BlueScope CIPA RRP. If they chose not to do so then that’s – you know, that was their decision.

637 I infer that, prior to giving evidence, Mr Ellis had learned that case law has established that a mere hope or expectation that a party will act in a particular way is insufficient to constitute an understanding within the meaning of the Act (as per *Apco* at [47]). I consider that Mr Ellis believed that describing his business intention in terms of a “hope” would take the conduct outside the reach of the Act. I consider that this aspect of his evidence was contrived.

638 Fourth, Mr Ellis’s evidence concerning the purpose of the benchmarking strategy is inconsistent with a considerable body of other evidence, which is set out in detail later in these reasons.

639 One aspect of Mr Ellis’s evidence concerning the benchmarking strategy requires noting. Both Mr Ellis’s evidence, and the evidence of others, shows that during the relevant period Mr Ellis regularly referred to the benchmarking strategy as providing an “opportunity” for distributors to set their prices by reference to CIPA’s recommended resale price. The word “opportunity” means a time or set of circumstances that makes something possible. In cross-examination, Mr Ellis was asked to explain how the benchmarking strategy created the opportunity for distributors to change the manner in which they set their prices. Mr Ellis said that the “opportunity” was the potential for distributors to change their pricing methodology from a “cost-plus” approach to a “price list minus” approach. By “cost-plus”, Mr Ellis meant that a distributor would base their prices on the cost of the steel purchased from CIPA (the net net price) and then add a margin for their own costs and required return. By “price list minus”, Mr Ellis meant that a distributor would base their price on the CIPA recommended resale price (which, by definition, was higher than the net net price and therefore already included a margin for the distributor’s own costs and required return) and discount that price to meet competition if need be.

640 In my view, Mr Ellis’s answer was unpersuasive. As discussed further below, the benchmarking strategy did not materially alter CIPA’s net pricing to distributors. The price list had always, and continued, to list an “advanced offer” (or “alto”) price, and CIPA had sold steel to distributors at the list price less various discounts (generating the net net price, as

referred to by CIPA). Distributors had always had the opportunity to set their prices to their own customers in accordance with the CIPA price lists (ie, a price list minus approach). Further, none of the documentary evidence concerning the benchmarking strategy mentions the “price list minus” method of pricing. Nor did Mr Ellis suggest in evidence that he used the language of “price list minus” when speaking to distributors. When that was put to Mr Ellis in cross-examination, he said that, in September 2013, a “price list minus” methodology was implied by the language of pricing by reference to the price list and was well understood by the industry. However, a short time later Mr Ellis contradicted himself and said that a “price list minus” methodology of pricing was not known in September 2013. When the contradiction was pointed out to Mr Ellis, his evidence changed again and he said that it was a common pricing methodology in the pre-GFC period and people who had been in the industry for some time would remember that methodology.

641 As already noted, the evidence shows that Mr Ellis regularly referred to the benchmarking strategy as providing an “opportunity” for distributors to set their prices by reference to CIPA’s recommended resale price. In my view, the word “opportunity”, as used by Mr Ellis, had a different meaning to that proffered by Mr Ellis in evidence. The opportunity was created by BlueScope seeking to induce a significant number of distributors to set their prices by reference to CIPA’s price lists. If a significant number of distributors adopted that course, it would create the set of circumstances in which the distributors could successfully implement the benchmarking strategy, without the commercial risk of losing sales to other distributors. The evidence shows that BlueScope promoted the benchmarking strategy to a significant number of distributors and, in doing so, made clear that the strategy was being promoted to other distributors in the market. There is also evidence of BlueScope stating to a distributor that other distributors had agreed to set their prices in accordance with CIPA’s price lists.

642 There is one aspect of Mr Ellis’s evidence concerning the benchmarking strategy that I do accept, because it is contrary to his interests in the proceeding. Mr Ellis acknowledged that he was “happy” for CIPA’s price lists (as recommended resale prices) to be used widely in the market as a benchmark, including by distributors who imported flat steel products. That acknowledgement was typified by the following exchange during cross-examination:

And you wanted the price list to go to distributors selling predominantly imported steel along with distributors selling predominantly BlueScope steel? --- I was happy for the BlueScope CIPA benchmark price or RRP to be used widely in the marketplace, Mr Hodge.

And the distributors who predominantly imported steel had imported products that have equivalents to the BlueScope products? --- In most cases, yes, but not always, of course. There were performance characteristics that were different. But, for the most part, I would agree with your statement.

643 The significance of that acknowledgment is that it showed that the benchmarking strategy was not a typical business practice involving the use of recommended resale prices. As discussed earlier, a typical use of recommended resale prices involves a supplier providing recommended resale prices to its resellers (whether distributors or retailers). The recommended resale prices are set at a level above the reseller's costs (including the costs of the goods) such that, if the reseller sells the goods at that level, the reseller is able to recover its economic costs of supply (being its purchase costs, its own business costs and a return on capital or profit margin). The recommended resale price may assist the reseller in determining its own resale or retail price. It may also provide a marketing benefit to the reseller in so far as the recommended resale price is publicised to the reseller's customers and the customers gain the impression that the recommended resale price is a reasonable price in the market (and any discount from that price represents good value).

644 However, none of the foregoing commercial considerations apply in the case of competing resellers who do not purchase the relevant products from the supplier. By definition, the recommended resale price is not directly applicable to their sales because they are not reselling products supplied by the supplier. Competing resellers who purchase from others may or may not have the same purchase costs. For a supplier to encourage a competing reseller, who is not supplied by the supplier, to adopt the recommended resale price published by the supplier is an attempt to encourage common resale pricing. It gives rise to the real potential of infringing the cartel conduct prohibitions in the Act.

Evidence given by Mr Hennessy

645 Mr Hennessy gave evidence of statements made to him by Mr Ellis in one or more conversations after Mr Ellis commenced with CIPA. Mr Hennessy recounted that Mr Ellis said to Mr Hennessy that he (Mr Ellis) "was brought specifically into this role to shake things up and change the game in Australia. I was able to turn around Thailand and BlueScope wants me to do the same in Australia" and that "I won't be in this role for long. I want a role at an Executive Leadership level". Mr Hennessy was not challenged on that evidence and I accept it. The evidence supports two conclusions: first, that Mr Ellis was ambitious and his ambition was directed toward "turning around" CIPA and "changing the game in Australia"; second, that BlueScope wanted Mr Ellis to "do the same" in Australia as he had done in Thailand.

646 Mr Hennessy said that his first substantial meeting with Mr Ellis, in Mr Ellis's capacity as Mr Hennessy's boss, was in late August 2013 at BlueScope's head office in Alexandria. Mr Hennessy recalled that Mr Ellis referred to the volume of steel products being exported by BlueScope and that his aim was to convert the export sales into domestic sales to get better margins on the products, and that BlueScope's distributors were the biggest opportunity to achieve that conversion. Mr Hennessy explained BlueScope's existing strategy which was to focus on selling more products to BlueScope's aligned distributors and other distributors who BlueScope had not previously sold to, such as Selection Steel and Vulcan Steel, who were predominantly buying imports. Mr Hennessy also explained that BlueScope's existing strategy was to consider lowering its prices to some of its distributors in order to win more volume. Mr Ellis responded by stating that he wanted to hear from distributors what BlueScope CIPA needed to do to increase sales to them.

647 I accept that a primary business strategy for Mr Ellis when he commenced at CIPA was to seek to convert export sales of flat steel products into domestic sales through increasing sales to distributors. That is corroborated by BlueScope internal documents and the evidence of initial meetings held between Messrs Ellis and Hennessy and representatives of distributors in late August and early September 2013. The evidence concerning those meetings is set out below. In those meetings, Mr Ellis generally asked what BlueScope could do to win more sales. The answer from distributors generally related to the (lack of) competitiveness of CIPA's pricing.

648 Mr Hennessy gave evidence that Mr Ellis first spoke to him about the benchmarking strategy on 6 September 2013 on the way to the Melbourne Airport meeting. Mr Hennessy's evidence was that Mr Ellis said words to the following effect:

There are three things that we need to do.

One - We need to find a way to increase our price to BSD and SMS.

Two - We need to tighten our controls substantially around tactical pricing. I want you to approve all tactical pricing offers.

Three - we need to encourage the distributors to use the BSL CIPA price list as a benchmark when they are setting their prices. That is the way it used to work when I was at CMC. At that time, the distributors used the Bluescope price list as a benchmark for their prices.

649 Mr Hennessy said that he was aware at that time that there was a lot of pricing by the distributors of BlueScope's products and imports which were below CIPA's list price. Mr Hennessy said that he understood that the strategy that Mr Ellis outlined to him was part of a larger plan to increase BlueScope's market share by capturing more volume from distributors

that were buying imports at lower prices. Mr Hennessy also gave evidence that he implemented Mr Ellis's direction to tighten BlueScope's controls around tactical pricing and that he subsequently approved tactical pricing offers.

650 I accept Mr Hennessy's evidence. While Mr Ellis disagreed that he referred to increasing CIPA's pricing to BSD and SMS, Mr Hennessy's evidence is consistent with CIPA's subsequent conduct and I consider Mr Hennessy to be a generally reliable witness.

651 Mr Hennessy's evidence concerning his conversation with Mr Ellis on the way to the Melbourne Airport meeting is significant. It shows that Mr Ellis's strategy in relation to distributors had a number of interconnected or complementary elements. The first element was to reduce the capacity of BSD and SMS to lower prices in competition with external distributors. The second element was to reduce the capacity of all distributors to lower prices by tightening controls over tactical pricing discounts. The third element was to encourage the distributors to use CIPA's price lists as a benchmark when setting their prices. Mr Ellis explained this element to Mr Hennessy as reflecting the practice that existed when he worked at CMC Steel. Mr Ellis's own evidence about that practice was that CMC Steel used the prices in the CIPA price list as a starting price or reference price, and then built up the ultimate price to be offered to the customer by adding or subtracting amounts to reflect a range of factors. At this early stage of the benchmarking strategy, I consider that Mr Ellis was intending to encourage distributors to start using CIPA's price lists as a benchmark for their pricing, and part of the inducement for them to do so was to change the pricing that BlueScope gave to BSD and SMS and to reduce the availability of tactical pricing.

652 In cross-examination, Mr Hennessy agreed with the following propositions concerning the benchmarking strategy that were put to him:

And you understood that the strategy, which was initially Mr Ellis's idea, was that BlueScope was distributing a price list with prices that CIPA was recommending for use by distributors when they set their prices to customers? --- Yes. Yes.

And distributors could consider whether to follow that recommendation? --- Yes.

Ultimately, you agree it was up to the distributor as to whether they did use those prices when they set their prices to their customers? --- That's correct.

653 Mr Hennessy also agreed that, when he subsequently told distributors that there was an opportunity for them to use CIPA's price lists as a benchmark when setting their own prices, he was not intending to suggest that the distributors "needed to give up their ability to make independent pricing decisions". Mr Hennessy also agreed that his "hope was that each

distributor would see the sense of using the ... price offer as a benchmark when making their own decisions in setting their prices”. Mr Hennessy added that what BlueScope CIPA was doing was encouraging distributors to use the price lists as a benchmark, although he agreed that this was on the understanding that distributors would make their own decisions in that regard. Mr Hennessy was also asked whether he asked any distributor for any commitment to use the price lists as a benchmark. Mr Hennessy said that he did not recall seeking any such commitment, but added:

... I’m finding that a little difficult to sort of definitively answer. So we were putting a proposal and encouraged them in tough conditions to use that. You don’t usually put a proposal like that with other substantial changes without expecting, or encouraging, yes, people to – to follow that proposal.

654 The following exchange then ensued:

Yes. I understand Mr Hennessy. But what I’m focusing on is you weren’t asking them to commit to doing it. You didn’t ask them to make a commitment to you that they would do that, did you? --- No, I – I think I already answered that.

Yes? --- Yes. That was the last question. Did we actually ask for a commitment? No, I don’t remember asking for a commitment.

Yes. And you didn’t understand anyone to be making a commitment at any stage? --- No, I don’t remember anyone making a commitment.

And you didn’t expect them to make a commitment at any stage? --- Once again, I’m – sorry, I’m – are you asking me if we – by having various conversations with them, there was a – a hope that they would follow the benchmark?

Yes. Thank you. Mr Hennessy, I will pursue it just for a moment because it may be important. When I’m asking you about a commitment, I’m talking about somebody agreeing with you that they would do something, such that, if they didn’t do it, you could say, “Well, you haven’t complied with your commitment.” Do you understand me so far? --- So that there was an express request to say, “Would you commit?”, and if they didn’t, then we would – no, I don’t remember having - - - seen and received, or receiving that.

... And that wasn’t the plan in any relevant sense, you weren’t asking for that? --- No, I don’t remember expressly asking for that.

...

The position was, wasn’t it, that you hoped that they would adopt these prices; correct? --- Yes.

But you knew at all times that it was up to them as to whether they did so or not; correct? -- -That’s – that’s correct. I’ve – yes.

Yes. And you didn’t expect to ever be in a position where you could say to any of them, “Hey, you haven’t priced at the price list and you’ve breached your commitment to us”? --- I would agree with that.

655 The foregoing evidence given by Mr Hennessy has significance in the proceeding. The respondents placed considerable reliance upon it, in effect submitting that the evidence is fatal to the ACCC's case. The submission was put on two bases, reflecting the conduct and intention elements of an attempt. First, in respect of the conduct element, the respondents submitted that there cannot be an attempt to induce reaching a price fixing understanding if BlueScope and Mr Ellis never sought a commitment from distributors to price in accordance with CIPA's price lists. Second, in respect of the intention element, the respondents submitted that there cannot have been an attempt to induce a price fixing understanding if BlueScope and Mr Ellis never intended to seek a commitment from distributors to price in accordance with CIPA's price lists.

656 I do not accept that the above evidence is fatal to the ACCC's case.

657 First, for the reasons expressed earlier, an attempt to induce a price fixing understanding does not require, as a matter of law, that BlueScope or Mr Ellis sought a commitment from distributors to price in accordance with CIPA's price lists. It requires a step towards the inducement of the price fixing understanding which is more than merely preparatory of the inducement and which is immediately and not merely remotely connected with the inducement to reach a price fixing understanding.

658 Second, while it is necessary for the ACCC to show that BlueScope and Mr Ellis intended to induce a price fixing understanding, that requires that the understanding be in contemplation and be the intended object of the attempts to induce. In that context, it is not necessary to speak in terms of "commitment", which can be misunderstood, or a commitment at any particular point in time. The relevant question is whether BlueScope offered promises (or threats) or otherwise engaged in persuasive conduct that was intended to induce a consensus about the use of CIPA's price lists, however the ultimate assent might have been communicated, whether by words or conduct.

659 Third, I consider that this aspect of Mr Hennessy's evidence does not go as far as the respondents suggested. There is considerable difficulty in interpreting Mr Hennessy's understanding of the phrase "ability to make independent pricing decisions" and the word "commitment" in this context. As a matter of legal rights and entitlements, distributors always retained the freedom to price their products as they chose. I infer that that would have been well-understood by Mr Hennessy. While an explanation of the word "commitment" was proffered in cross-examination as an aid, the explanation begs further questions about the nature and character of the commitment being described. Further, the price fixing

understanding postulated by the ACCC also contemplated that distributors would have retained freedom with respect to prices. The postulated understanding was that distributors would use CIPA's price lists as a base or floor for their pricing of flat steel products, to which they might add additional amounts in respect of processing costs or other costs. The ACCC's case was that the contemplated understanding would be likely to control or maintain prices, not fix prices.

660 Fourth, Mr Hennessy's evidence must be assessed in totality. Within the above exchange, Mr Hennessy emphasised that BlueScope was putting a proposal and encouraging and hoping that distributors would follow it. When asked whether he asked any distributor for any commitment to use the CIPA price lists as a benchmark, Mr Hennessy said that it was difficult to answer definitively, explaining that BlueScope was putting a proposal and encouraging distributors in tough conditions to use the price lists and observing that "[y]ou don't usually put a proposal like that with other substantial changes without expecting, or encouraging, yes, people to – to follow that proposal". In his affidavit, Mr Hennessy deposed that the success of the strategy depended on its acceptance by all of the distributors. Mr Hennessy explained (what I regard as an obvious fact):

The strategy that Jason Ellis and I communicated to distributors relied in its success on the overall acceptance by each of them (otherwise customers would simply choose the distributor which did not increase its price). The strategy, if it worked, would ultimately lead to an increase in profitability to all distributors in the market including BSD and SMS. Its success also depended upon distributors taking up the opportunity to raise their prices for all their products, not just BSL CIPA products, to our list prices which we provided by way of a 'benchmark'.

661 In cross-examination, Mr Hennessy was asked whether he gave any distributor an assurance that other distributors would price in accordance with the CIPA price lists, and therefore the distributor should feel safe increasing their prices. Mr Hennessy said that he did not remember giving any distributor an assurance of that kind. However, when it was put to Mr Hennessy that he was not trying to get distributors to believe that they could increase their prices because other distributors would be increasing their prices, Mr Hennessy did not accept the proposition, responding:

The success of the strategy would – it would only be successful if it actually was followed by all the distributors. So I – I struggle to agree with you – that proposal.

662 This aspect of Mr Hennessy's evidence stated an obvious commercial fact which I infer was appreciated by the relevant BlueScope employees and distributors during the relevant period. The benchmarking strategy could only succeed if a significant number of distributors implemented the strategy by adopting the prices in CIPA's price lists as a benchmark (or floor

price) in setting their own prices. Unless the strategy was adopted by a significant number of distributors, those distributors that followed the strategy faced the risk of losing sales to distributors that did not (and offered lower prices). As the evidence below shows, BlueScope promoted the benchmarking strategy widely amongst distributors and also to Wright Steel. As stated above, the evidence shows that, in promoting the benchmarking strategy to distributors, BlueScope made clear that the strategy was being promoted to other distributors in the market. The use of CIPA's price lists as the benchmark (or base) prices and the wide distribution of the price lists were at the core of the benchmarking strategy.

663 For those reasons, I consider that Mr Hennessy's evidence, when assessed in totality, is consistent with the ACCC's case and does not contradict the ACCC's case. It supports a conclusion that, by the benchmarking strategy, BlueScope and Mr Ellis were seeking to bring about a consensus with distributors to use CIPA's price lists as a benchmark for their pricing.

Evidence given by Mr Kelso

664 In his affidavit, Mr Kelso described the benchmarking strategy as providing distributors with a recommended resale price to use as a base-line (or benchmark) when pricing their steel products. Mr Kelso said that the strategy was outlined to him by Mr Hennessy over a series of conversations in September 2013. While Mr Kelso did not recall the exact words that Mr Hennessy used when explaining the strategy, or the number of occasions that they had discussions about the strategy, he said that he recalled the substance of what was communicated by Mr Hennessy, which was in words to the following effect:

Jason [Ellis] and I are having discussions with various distributors about how BlueScope can get more sales from them.

The distributors we have spoken to have informed us that they aren't making sufficient profit margins on the sale of steel to end customers.

BlueScope wants to try and raise the price of steel in the Australian domestic market, and restore some profitability, not only for distributors, but also for BlueScope.

We want to try and increase our market share as well.

The strategy involves raising the list price of BlueScope's published prices, so as to allow for a 13% – 15% margin. This list price will then be given to distributors, who will be encouraged to use our price list as a benchmark for pricing the steel that they sell to their end customers.

665 Mr Kelso said that, by mid-September 2013, he had come to understand that BlueScope was implementing a strategy to set a recommended resale price in the market which would allow distributors to use CIPA's list price as a base for their pricing.

666 Mr Kelso said that he had regular discussions with OneSteel, PCD (part of the Vulcan Group) and other customers about their profit margins, and they told him that they needed to make a margin of around 13% to 15% over the sale of their steel in order to make a decent profit. Mr Kelso said that distributors that he spoke to would often complain about the low price that other distributors were selling at, including SMS and BSD. Mr Kelso also received complaints from distributors about their perception that BlueScope was selling its steel to BSD and SMS at low prices.

667 I accept Mr Kelso's evidence. It is significant and corroborates Mr Hennessy's evidence. It describes the benchmarking strategy as raising CIPA's list prices so as to allow for a 13% to 15% margin for distributors, and encouraging distributors to use the list prices as a benchmark for pricing the steel that they sold to their end customers. It also describes the goal of the strategy as being to try and raise the price of steel in the Australian domestic market, restoring some profitability for distributors and for BlueScope and increasing BlueScope's market share.

668 As set out earlier in these reasons, at the commencement of his cross-examination, Mr Kelso agreed with a series of propositions relating to the benchmarking strategy put to him by counsel for BlueScope. Those propositions included that:

- (a) Mr Kelso was not intending to suggest to distributors, and did not suggest, that they give up their freedom to set their own prices, and did not understand that that was part of the benchmarking strategy;
- (b) Mr Kelso was hoping that distributors would see the good sense of using the CIPA price lists as a benchmark when making their own decisions when setting their prices, and that is what he understood was the strategy;
- (c) Mr Kelso was not intending to suggest, and did not suggest, that distributors make any commitment to price in accordance with the recommended resale price or any commitment to increase their prices, and did not understand that that was part of the strategy;
- (d) Mr Kelso understood, pursuant to the strategy, that distributors were to retain their pricing freedom and it was up to them whether or not they followed the price lists;
- (e) Mr Kelso was not intending that distributors would be under any obligation to BlueScope to price in accordance with the price lists or any obligation to increase their prices and Mr Kelso never suggested that and never sought such an obligation from any distributor and did not understand that that was part of the strategy; and

- (f) Mr Kelso never intended to enter into any understanding with distributors that they price in accordance with the price lists or any understanding that they would increase their prices to their customers.

669 It can be seen that Mr Kelso's response to the above propositions was similar to Mr Hennessy's response. The observations made in respect of Mr Hennessy's evidence in that regard are equally applicable to Mr Kelso. An additional consideration is that, due to his ongoing employment by BlueScope, Mr Kelso was likely to have been subject to an unconscious (if not conscious) desire to acquiesce with, or readily adopt, a characterisation of BlueScope's conduct that was more benign and favourable to BlueScope's interests in the proceeding. I accord Mr Kelso's evidence weight, while recognising that the testimony must also be assessed in light of the evidence of the communications between BlueScope and distributors about the strategy during the relevant period, including communications from Mr Kelso himself.

Evidence given by Mr O'Brien

670 In his written statement, Mr O'Brien said that he did not recall how he first found out about CIPA's RRP strategy, but he recalls discussing it with Mr Ellis. Mr O'Brien said that the only three people from CIPA that spoke to him about the strategy were Messrs Ellis, Hennessy and Palermo. It was Mr Ellis who explained the strategy to Mr O'Brien.

671 Mr O'Brien said that, when Mr Ellis explained the strategy to Mr O'Brien, he did so in words to the following effect:

I am concerned about the lack of profits around the reseller channel. I want to increase channel profitability for the resellers and CIPA.

CIPA wants to introduce a recommended resale price that we can publish broadly to the market so that they can show their customers that 'this is the market price' and resell at this level.

We need you to tow [sic] the line.

You will need to introduce an RRP in line with CIPA's price list so that they are both the same.

672 Mr O'Brien said he understood from his conversation with Mr Ellis, as well as subsequent conversations with Mr Hennessy and/or Mr Palermo, that, as part of the RRP strategy, CIPA wanted to set a level or benchmark in the market that was above the current level of resale pricing at that time (September 2013) and, by doing this, allow distributors to make better profit margins in the channel than they were making at the time. It did not matter whether the steel that resellers were selling was CIPA steel or imported steel. The object of the RRP strategy

was to give resellers the opportunity to make better profits by utilising the higher benchmark to resell their steel.

Initial meetings with distributors

673 Mr Ellis said that, when moving into new roles, it was his general practice to meet with the incumbent (in this case, Mr Garey), soon-to-be superiors (in this case, Mr Vassella) and subordinates (in this case, Mr Hennessy and others) to speak with them and gain insights into the role and industry issues, including requesting that they provide him with any background material to read. Mr Ellis also said that it was his general practice to meet with people external to the business in which he would be working, including customers and key industry figures, to obtain market feedback. I accept that evidence. It is confirmed by contemporaneous records. In an email sent on 2 September 2013 by Ms Minogue on behalf of Mr Ellis to the BAZ Sales and Marketing Team, Mr Ellis stated that it was his first day in his new role and outlined his short term objectives and goals. His objectives included: “visit as many of our key customers across the country as possible within the next 2 months. Understand their key issues and areas for opportunity” and “[f]ocus, with absolute clarity, on those limited number of key actionable ideas that can reduce the level of imports coming into Australia (and therefore offset the approx. 600kt we export each year)”.

674 In respect of meetings with distributors, Mr Hennessy confirmed that in a conversation with Mr Ellis on or around 21 August 2013, Mr Ellis asked him to organise meetings with distributors that were mainly purchasing imports. The evidence indicates that Mr Hennessy arranged a meeting with Mr Casey, Director of Vulcan Steel, at the Australian Steel Institute Conference which was to be held on 9 and 10 September 2013. On 26 August 2013, Mr Ellis’s assistant, Ms Minogue, organised a meeting between Messrs Ellis and Hennessy and Mr Gregory of Selection Steel for 13 September 2013.

675 Mr Ellis met with Scott Bourne and Kevin Smaller from Southern Steel at 8.30 am on Tuesday, 27 August 2013. An email sent later that day by Mr Ellis to Mr Hennessy indicates that, at the meeting, Mr Ellis discussed opportunities for further supply to Southern Steel.

676 On 27 August 2013, Mr Ellis also arranged (via an Outlook calendar invitation) a dinner with Mr Hennessy and Mr Wright of Wright Steel on 12 September 2013 at the Crown Complex in Melbourne. The conversation at the dinner is discussed below.

Meetings with Southern Steel on 2 September 2013

677 As noted earlier, the Southern Steel group had two main divisions: Southern Sheet & Coil which distributed sheet & coil products and Southern Steel Supplies which distributed long products. Peter Smaller was the owner of the Southern Steel group. His son, Kevin Smaller, was General Manager of Southern Steel Supplies (based at Milperra, New South Wales). Mr Larkin was the General Manager of Southern Sheet & Coil (based at Bankstown, New South Wales).

678 Messrs Ellis and Hennessy met with Mr Larkin at Southern Steel's offices in Bankstown on 2 September 2013 at lunchtime. Mr Hennessy said that, at the meeting, Mr Ellis asked Mr Larkin what CIPA needed to do for Southern Sheet & Coil to buy more steel from CIPA. Mr Hennessy said that Mr Larkin responded by identifying a number of matters, including the following:

- (a) First, Mr Larkin complained that the early order offer required him to place orders as early as import orders, but CIPA's pricing for such early orders was uncompetitive.
- (b) Second, Mr Larkin complained that CIPA was offering too much tactical pricing that did not need to be provided. As noted earlier, "tactical pricing" referred to additional discounts offered by BlueScope to enable a distributor to compete against an import offer on a transaction by transaction basis. Mr Hennessy understood that Mr Larkin was expressing the view that CIPA was offering too much "tactical pricing" and often in practice CIPA was just competing with a BlueScope product via another distributor rather than competing with imports to increase CIPA's sales to distributors.
- (c) Third, Mr Larkin complained that the prices at which SMS was selling to customers were very low, and in Mr Larkin's view, below cost. Mr Larkin complained that he could not compete at those prices selling BlueScope steel. Mr Larkin expressed his belief that there was a big differential between the prices at which CIPA sold steel to SMS and the prices at which CIPA sold steel to Southern Steel.
- (d) Fourth, Mr Larkin said that the price at which NZSA was selling steel in Australia was very low and contributing to the low price of steel in the market.

679 Mr Ellis's evidence concerning the meeting was materially the same as Mr Hennessy's evidence. In particular, Mr Ellis confirmed that Mr Larkin had complained that SMS was undermining the price in the market and the cause was BlueScope "sponsoring SMS with EUTs", and that NZSA was also undermining BlueScope's position in the market. As noted

earlier, “EUT” was an abbreviation for “end user targeted rebates”, which was another name for tactical pricing rebates. In cross-examination, Mr Ellis agreed that CIPA provided SMS an EUT “pool” to draw on for tactical pricing purposes. In that way, the EUT rebates offered to SMS differed from other distributors. SMS did not need to make a specific request for EUT support from CIPA but instead could allocate or access EUT support from the “pool” of designated funds as it saw fit each month. In contrast, other distributors applied for EUT support to respond to competitive offers from competing distributors on a transaction by transaction basis.

680 Later in the day on 2 September 2013, Messrs Ellis and Hennessy also met with Kevin Smaller at Southern Steel’s offices in Milperra. Mr Hennessy said that Mr Ellis began the meeting with a similar introduction to the one he gave to Mr Larkin, asking how CIPA could increase sales to Southern Steel Supplies. Mr Hennessy said that Mr Smaller replied that CIPA was winning most of the plate sales. However, Mr Smaller also complained about BSD’s low prices, stating that it was difficult for Southern Steel to compete with those prices and make a reasonable profit selling BlueScope steel. Mr Hennessy gave evidence that Mr Ellis responded by saying that he would like to meet with Peter Smaller to discuss that further. I accept that evidence. Mr Ellis’s evidence was to the same effect.

Distribution S&C Channel Strategy

681 On 4 September 2013, Mr Hennessy sent an email to members of his team attaching version 6 of a PowerPoint presentation titled “Distribution S&C Channel Strategy” and which bore the date 27 August 2013 (but which had been updated since that date). The document has been referred to earlier in these reasons. Relevantly for present purposes, the presentation included an overview of the sheet and coil distribution market.

Meeting with Peter and Kevin Smaller of Southern Steel on 4 September 2013

682 On Wednesday, 4 September 2013 at 7 am, Messrs Hennessy and Ellis met with Peter Smaller and Kevin Smaller of Southern Steel at the Cosmopolitan café in Double Bay, Sydney.

683 Mr Hennessy said that, at this meeting, Mr Ellis said that BlueScope wanted to substantially increase its sales in the domestic market, and that he wanted to hear from Peter Smaller regarding what BlueScope needed to do to gain more sales from Southern Steel. Mr Hennessy said that Peter Smaller’s response was very forceful and direct, stating that the biggest issue that Southern Steel had was the low prices offered by BSD and SMS in the market, and that

Southern Steel was unable to compete with the prices offered by BSD and SMS when it bought steel from BlueScope. Mr Hennessy said that Peter Smaller said words to the effect that BSD and SMS were “just acting as a channel for the mill” which Mr Hennessy understood to mean that BSD and SMS were selling volume for CIPA and did not have to operate profitably in their own right. Mr Hennessy said that, in response to those comments, Mr Ellis said that the solution would be for CIPA to increase its prices to BSD and SMS. Mr Hennessy said that, after those comments by Mr Ellis, there was then discussion about bringing together a small group of distributors to discuss the opportunity to sell more steel domestically and the issues that had been raised by Mr Smaller. Mr Hennessy recalled that Mr Ellis said to Peter Smaller words to the effect that “So, Peter, you’ll get a group together for us to explore this further?”, and Peter Smaller responded with “Okay. I’ll let you know”.

684 Mr Hennessy said that he recalled that, after the meeting, Mr Ellis said to him that BSD and SMS should be paying the highest price out of all the distributors. Mr Ellis said that this was the strategy that he employed in Thailand with success in relation to the Lysaght business. The Lysaght business operating in Thailand was a wholly owned subsidiary of BlueScope.

685 Mr Ellis also gave evidence regarding this meeting. The evidence was largely consistent with Mr Hennessy’s evidence, including Peter Smaller’s complaint about the prices being offered by BSD and SMS in the market. Mr Ellis denied that he said anything to the effect that the solution would be to increase CIPA’s prices to BSD and SMS, or that Mr Ellis had made Lysaght pay the highest price during his time at BSL Thailand. However, Mr Ellis acknowledged that the change he had made in Thailand was to reduce the tactical pricing support that Lysaght received in order to “level the playing field” with third party distributors. Mr Ellis said that, at the meeting with Peter Smaller, there may have been some discussion about whether BSD and SMS should not be given special treatment by CIPA in relation to tactical pricing.

686 In my view, there is little substantive difference in the accounts given by Mr Hennessy and Mr Ellis. To the extent the accounts differed, I prefer the evidence of Mr Hennessy. Both accounts confirm that a major concern for Southern Steel was the prices being offered by BSD and SMS in the market, and Mr Ellis indicated that CIPA would look to address that concern by increasing the prices paid by BSD and SMS to CIPA. In cross-examination, Mr Ellis protested that, while a change to the tactical pricing offered to BSD and SMS would affect their costs of acquiring steel, that would not necessarily impact their selling prices. In my view, that was

another example of Mr Ellis refusing to admit an obvious commercial conclusion: that altering the cost of purchasing steel would be likely to have an effect on the price at which the steel was resold.

Organising the Melbourne Airport meeting

687 Mr Ellis said that the idea to arrange a meeting with other distributors came from Peter Smaller at their meeting on 4 September 2013. Mr Ellis said that, at that meeting, Mr Smaller suggested meeting with Mr Calleja of Apex Steel, Mr Wells of Vulcan Steel and Mr Gregory of Selection Steel. Mr Ellis's evidence was that Mr Smaller said that he would call Messrs Calleja, Wells and Gregory to see if they were interested in meeting. Mr Ellis gave evidence that, although he did not have a specific recollection of it, Mr Smaller subsequently called Mr Ellis to confirm that the distributors were interested in meeting and provided Mr Ellis with their contact details and asked Mr Ellis to circulate meeting invitations. In support of that evidence, Mr Ellis claimed that, at the time of his meeting with Mr Smaller, he had not previously heard of Messrs Calleja, Wells or Gregory.

688 The meeting between Messrs Ellis and Hennessy, Peter Smaller and Messrs Calleja, Wells and Gregory occurred at Melbourne Airport on 6 September 2013. It is an important meeting in the ACCC's case. However, it is not critical to determine whether the idea to arrange the meeting was first suggested by Mr Ellis or by Peter Smaller. On Mr Hennessy's account, the idea appears to have arisen out of the discussions between Mr Ellis and Mr Smaller and that is the most likely scenario.

689 Nevertheless, I consider that Mr Ellis's evidence that, at the time of his meeting with Kevin and Peter Smaller (on 4 September 2013), he had not previously heard of Messrs Calleja, Wells or Gregory, is implausible. It is also implausible that Mr Ellis needed to obtain their contact details from Peter Smaller. The evidence shows that, from mid-August 2013, Mr Ellis had invested himself in identifying CIPA's distribution customers and planning meetings with those customers. On 20 August 2013, Ms Minogue had sent Mr Ellis a customer list which included the names of Peter and Kevin Smaller of Southern Steel and Mr Calleja of Apex Steel. On 25 August 2013, Mr Ellis asked Ms Minogue to print the list for him. On 26 August 2013, Ms Minogue had circulated a calendar invitation for a meeting between Mr Ellis and Mr Gregory scheduled for 13 September 2013. It is also implausible that BlueScope would not have had contact details for Messrs Calleja, Wells and Gregory who were customers of the business.

690 Mr Ellis gave evidence that the meeting was held at the ParkRoyal Hotel at Melbourne Airport because a number of the attendees, including Mr Wells, Peter Smaller, Mr Hennessy and Mr Ellis, would be flying to Melbourne for the meeting. I accept that evidence.

691 The striking feature of the decision to organise the Melbourne Airport meeting was that the meeting involved representatives of competing distributors and two of those distributors were aligned and two were non-aligned. Ms Minogue gave evidence concerning the organisation of the meeting. Ms Minogue said that Mr Ellis asked her to organise the meeting at Melbourne Airport and she initially attempted to arrange the meeting at the Qantas Meeting Rooms at Melbourne Airport. Due to their unavailability on the date required, Ms Minogue arranged for the meeting to occur at the ParkRoyal Hotel at Melbourne Airport. Ms Minogue adduced evidence of separate emails she sent to each of Mr Calleja, Mr Gregory and Kevin Smaller on 4 September 2013 setting out the details of the meeting at Melbourne Airport. Each of the emails contained the same message as follows:

As per meeting arranged with you by Jason, details of the meeting are as follows:

Bairnsdale Room
PARKROYAL Melbourne Airport
Arrival Drive, Melbourne Airport
12.30pm

If you have any questions, please do not hesitate to contact me.

692 The emails were not copied to Mr Ellis, but Ms Minogue forwarded each email to Mr Ellis a few hours later. Ms Minogue said that her ordinary practice was to issue meeting invites as Outlook calendar invitations to all participants in a single invitation, rather than via individual emails. On that basis, Ms Minogue said that she believed Mr Ellis directed her to send individual emails containing invitations for the meeting. Mr Ellis said that it was a personal style of his to issue to people he had not met before “an old-style invitation that was more personalised, albeit sent by Ms Minogue on [his] behalf, as opposed to... shoving an Outlook invitation into someone’s Outlook calendar without any more appropriate invitation...”. Mr Ellis said that he does not recall instructing Ms Minogue not to copy him to the invitation emails and he could not think of any reason why Ms Minogue did not copy him to each of those emails. Mr Ellis’s diary for 6 September 2013 records the meeting and the venue, but not the attendees.

693 I accept Ms Minogue’s evidence that the invitations for the meeting were unusual, in that they were sent individually to attendees without recording the names of other attendees.

Consistently with other evidence given below by Mr Hennessy, I infer that, at the time, Mr Ellis had an appreciation that the planned meeting was sensitive in the sense that it involved a meeting between competitors in the market for the distribution of flat steel products and that he instructed Ms Minogue to issue invitations in a manner that hid, to some extent, the attendees.

694 As can be seen from the extract reproduced above, each of the invitations commenced with the words “[a]s per meeting arranged with you by Jason”. This supports a conclusion that Mr Ellis had communicated with each of the invitees about the meeting in some manner. Mr Calleja’s evidence was that Mr Ellis spoke to him by telephone and invited him to attend the meeting. Mr Calleja’s evidence was also that Mr Ellis told him that Peter Smaller and other representatives of the steel industry, who were his competitors, would also be present at the meeting. Mr Ellis agreed that he had had a telephone discussion with Mr Calleja in advance of the arranged meeting. Mr Ellis said the conversation was short and was in the form of a “pre-introduction” of himself prior to meeting Mr Calleja formally. Mr Ellis stated that he believed that he spoke with Mr Calleja before the meeting but *after* the invitations were issued. The email invitation issued on 4 September 2013 suggests that Mr Ellis spoke to Mr Calleja before the email was sent. I do not accept Mr Ellis’s evidence to the contrary.

695 As noted above, Ms Minogue sent email invitations to Mr Calleja, Mr Gregory and Kevin Smaller. The attendees at the Melbourne Airport meeting were Mr Calleja, Mr Gregory, Peter Smaller and Mr Wells. There was no explanation as to why email invitations for Peter Smaller and Mr Wells had not been found, or why an email invitation had been issued to Kevin Smaller who did not attend.

696 Mr Ellis gave evidence that he did not call Mr Wells or Mr Gregory before the meeting at Melbourne Airport on 6 September 2013. In the case of Mr Gregory, that evidence is inconsistent with the terms of the email invitation that referred to a meeting arranged with Mr Ellis. I consider it probable that Mr Ellis had spoken to Mr Gregory before asking Ms Minogue to issue the email invitation. In the case of Mr Wells, there was no evidence as to how he was invited to the meeting, but the evidence confirmed his attendance.

Revised Distribution S&C Channel Strategy

697 Late in the evening on 5 September 2013, Mr Hennessy forwarded to Mr Ellis a revised version of the presentation titled “Distribution S&C Channel Strategy” with the message “to discuss tomorrow”. This document has been referred to previously in these reasons. It provided an

overview of the current conditions in the market for the distribution of sheet and coil products and considered potential strategies for CIPA to increase sales revenue going forward. Based on Mr Hennessy's email and the fact that Mr Ellis and Mr Hennessy travelled to Melbourne together on 6 September 2013, Mr Ellis acknowledged that it was likely that Mr Hennessy discussed the presentation with him on his way to Melbourne, and that he probably read the presentation during that discussion. The following statements made in the presentation should be noted.

698 First, the presentation contained a table showing import volumes of different categories of flat steel products by import distributors (including the volumes imported by Selection Steel, Vulcan Steel and Apex Steel) and by aligned distributors (OneSteel, Southern Steel and CMC Steel).

699 Second, the presentation noted the competitiveness of the sheet and coil distribution market environment, the financial weakness of CIPA's aligned distributors (including that Southern Steel was purchasing imports to average down its costs) and that import distributors had grown (referring in that context to Vulcan Steel, Selection Steel, SK Global, East Coast, Total Steel, Apex Steel and CMC Steel).

700 Third, the last page of the presentation was titled "Other factors for consideration". The page commented that CIPA believed that it was entitled to a 2% to 3% premium over the import parity price by reason of its ability to provide a short lead time for orders, smaller minimum order quantities and sales support. However, the page also commented that distributors of imported products were using BlueScope's product as a "price umbrella". The obvious implication is that import distributors were able to set their prices beneath the BlueScope price. The page also stated that it was concerning that aligned distributors were using imports to average down their costs and that they had an ongoing incentive to continue increasing their percentage of imports over time which would lead to a self-perpetuating decrease in CIPA's market share.

Melbourne Airport meeting on 6 September 2013

Before the meeting

701 As noted earlier, Mr Hennessy gave evidence that, on 6 September 2013 on the way to the Melbourne Airport meeting, Mr Ellis said to Mr Hennessy that CIPA needed to do three things: first, increase its price to BSD and SMS; second, tighten the controls around tactical pricing

(with Mr Hennessy to approve all tactical pricing offers); and third, encourage distributors to use CIPA's price lists as a benchmark when setting their prices. Mr Hennessy said that Mr Ellis asked him to contribute to the meeting by talking about price benchmarking and that Mr Ellis also said that the meeting was sensitive and told Mr Hennessy not to put it in their calendars and not to talk to anyone else at BlueScope about it. Mr Hennessy said that he had a level of discomfort going into the meeting but he did not say anything to Mr Ellis or to anyone else at CIPA. Mr Ellis's evidence was substantially consistent with Mr Hennessy's account, although Mr Ellis denied that he told Mr Hennessy not to record the meeting in his calendar or suggest that the meeting was secret. I accept Mr Hennessy's evidence. The conversation he recounted in his evidence was unusual and caused him discomfort. For that reason, it was likely to be memorable for him.

702 Mr Ellis agreed that he said to Mr Hennessy prior to the Melbourne Airport meeting that the discussions at the meeting could be sensitive. However, he gave inconsistent answers in cross-examination of the reason for the sensitivity. In his affidavit, Mr Ellis deposed that he was conscious that, in a discussion amongst four distributors who were competitors, "it was important to be careful about the topics discussed". In cross-examination, it was suggested to Mr Ellis that the obvious topic to be careful about was how these competitors set their prices. Mr Ellis disagreed and said that this was of no interest from a supplier's perspective; Mr Ellis said that the sensitivity was around what the distributors were buying from CIPA. Later, Mr Ellis contradicted that evidence, saying that the sensitivity was ensuring that four competitors did not talk about their own issues as opposed to what CIPA was presenting. By "their issues", Mr Ellis said that he meant the distributors' issues between themselves, because they were competing with each other, including on price.

Mr Hennessy's account of the meeting

703 It is convenient to begin with Mr Hennessy's recollection of the Melbourne Airport meeting.

704 Mr Hennessy said that the Melbourne Airport meeting lasted for approximately one and a half to two hours in a meeting room. The following individuals were present at the meeting:

- (a) Peter Smaller, the owner of Southern Steel;
- (b) Mr Wells, the owner of Vulcan Steel;
- (c) Mr Gregory, the owner of Selection Steel;
- (d) Mr Calleja, the owner of Apex Steel;

- (e) Mr Ellis; and
- (f) Mr Hennessy.

705 Much would have been said in a meeting that lasted one and a half to two hours. However, there is no written record of the discussion at the meeting and the evidence before the Court concerning the topics discussed is abbreviated and generalised. That is, of course, understandable. The meeting occurred many years before the witnesses recorded their recollections in the course of the ACCC investigation or in preparation for the trial. The evidence must therefore be treated with some caution. However, I consider that Mr Hennessy had no reason to be untruthful about his recollection, and Mr Calleja's recollection as recorded in the statement he gave to the ACCC was largely consistent with Mr Hennessy's recollection. None of Messrs Smaller, Wells or Gregory gave evidence.

706 Mr Hennessy said that, at the meeting, Mr Ellis said words to the following effect:

We are interested in selling a lot more volume in the domestic market and believe there is an opportunity to sell more to you. We'd like to understand what you think we need to do to achieve that.

707 Mr Hennessy said that Messrs Smaller and Wells did most of the talking by way of response. Mr Hennessy said that either Mr Smaller or Mr Wells said words to the effect that the distributors were highly unprofitable because BlueScope Distribution and OneSteel were operating as channels for the mill and the prices they were selling at were very low. Mr Hennessy said that, in response to those statements, Mr Ellis said that CIPA would tighten its tactical pricing and that he had instructed Mr Hennessy to approve all tactical pricing and that CIPA would also be increasing its prices to BSD and SMS.

708 Following this, Mr Hennessy said that either he or Mr Ellis introduced the topic of "price benchmarking". Mr Hennessy said he then said words to the effect of:

We will be working on our December price offer and there is an opportunity for you to use this as a pricing benchmark when you are setting your own prices.

709 Mr Hennessy said that, in response, Mr Gregory said words to the effect of "[w]e make our own independent pricing decisions". Mr Hennessy responded by saying that he understood and that, once CIPA had worked on its December price list, it would talk to each of the distributors present individually. Mr Hennessy's response to Mr Gregory is significant. It indicates that Mr Gregory's concern did not relate to the fact that BlueScope was proposing the use of CIPA's price lists as a pricing benchmark, but that the proposal was being discussed amongst a group

of distributors. Mr Hennessy communicated that BlueScope would prepare the December price list and speak with each distributor individually. The evidence showed that that occurred. It appears that that satisfied Mr Gregory's concern.

710 As discussed earlier in these reasons, during cross-examination Mr Hennessy said that he did not remember asking any distributor for any express commitment to use CIPA's price lists as a benchmark. Mr Hennessy also said that he was not seeking for those distributors to be under any obligation to use the price lists as a benchmark. Mr Hennessy agreed that while he and Mr Ellis gave encouragement to distributors to use the price lists as a benchmark, they understood that ultimately distributors would make their own decisions in relation to their pricing. Mr Hennessy said that his hope was that each distributor would see the sense of using the December price lists as a benchmark when making their own decisions in setting their prices. Mr Hennessy agreed that he did not remember giving any of the distributors an assurance that any other distributor would price at the level in the price lists, and that he did not expressly say to distributors that they should feel safe in putting their price up because other distributors would be putting their prices up. He agreed that he could not give distributors that comfort because he did not know whether others would be following the price lists.

711 However, Mr Hennessy expressed the opinion that the success of the "price benchmarking" strategy relied for its success on the overall acceptance by each distributor (otherwise customers would simply choose the distributor which did not increase its price). Mr Hennessy believed that the strategy, if it worked, would ultimately lead to an increase in profitability to all distributors in the market including BSD and SMS. Its success also depended upon distributors taking up the opportunity to raise their prices for all their products, not just CIPA supplied products, to the CIPA list prices (as the "benchmark"). In cross-examination, Mr Hennessy agreed that when he said that the success of the strategy depended on distributors following it, what he meant by this was that the benchmarking was only going to work if people decided, making their own independent decisions about their pricing, that they would follow it. If some distributors followed it and others did not, it might not catch on. During cross-examination, Mr Hennessy commented that CIPA did not put the benchmarking proposal without expecting, or encouraging, people to follow the proposal.

712 I generally accept Mr Hennessy's evidence. I consider it likely that, at the Melbourne Airport meeting, neither Mr Ellis nor Mr Hennessy directly sought a commitment from the distributors at the meeting that they would price in accordance with CIPA's price lists. This was the first

time the proposal had been raised with distributors and the new price lists had not yet been developed. However, Mr Hennessy's evidence indicates that, in conjunction with that initiative, CIPA told the distributors that it intended to address their concerns with respect to low prices in the market, particularly those offered by BSD and SMS, by tightening its tactical pricing (with Mr Hennessy to approve all tactical pricing) and by increasing its prices to BSD and SMS. I consider it probable that Mr Hennessy communicated either expressly or implicitly that BSD and SMS would set their prices in accordance with CIPA's list prices. In my view, that conclusion necessarily flows from the facts that the principal concern of those present at the meeting were the low prices being charged by BSD and SMS and, in response and as a solution, Messrs Ellis and Hennessy said that BlueScope would increase its prices to BSD and SMS and there would be an opportunity for distributors to use the December price offer as a pricing benchmark. That would not have been a solution if BSD and SMS did not adopt the same approach and set their prices in accordance with CIPA's list prices.

Mr Calleja's account of the meeting

713 In relation to Mr Calleja's evidence, and for the reasons set out earlier, I found that Mr Calleja was untruthful when giving oral testimony and I place no reliance on his testimony save in limited respects. Relevantly, in relation to the Melbourne Airport meeting, I place some weight on the following aspects of Mr Calleja's testimony which are materially consistent with the evidence of Mr Hennessy.

714 First, Mr Calleja said that Mr Ellis was trying to get the distributors at the meeting to buy more steel from BlueScope and said words to the effect: "[h]ow can we get you to buy more from BlueScope?".

715 Second, Mr Calleja said that, at some point during the meeting, Mr Ellis (or possibly Mr Hennessy) said that:

- (a) CIPA was going to increase the prices that it charged to BlueScope's own distribution arms, CIPA needed to raise prices, there was an opportunity for all distributors to achieve better profit margins by increasing prices and BlueScope had an initiative to set recommended retail prices for distributors.

(b) CIPA would be sending to distributors a price list around the middle of the month which would include its recommended retail price initiative for December so that distributors could benchmark their prices for all their steel products.

(c) CIPA was going to limit tactical pricing.

716 Third, Mr Calleja said that, towards the end of the meeting, Mr Ellis said words to the effect that the attendees should keep the meeting quiet and amongst themselves.

Mr Ellis's account of the meeting

717 Mr Ellis also gave evidence in respect of his recollection of the Melbourne Airport meeting. Mr Ellis said his recollection was that he did a lot of the talking at the meeting. Mr Ellis recalled that the topics discussed at the meeting were CIPA's performance, the general state of the industry (which was not good) and how CIPA might increase its sales to distributors. I accept that evidence.

718 Mr Ellis said he did not dispute Mr Hennessy's recollection of the discussion that took place during the meeting. Mr Ellis said it was not his intention that distributors would agree to adopt the CIPA recommended resale prices (as they were later termed), or use them as minimum prices, or otherwise raise their prices. Mr Ellis said he did not suggest that distributors should do so during the meeting, and nor did Mr Hennessy. As stated in relation to Mr Hennessy's testimony, I consider it likely that neither Mr Ellis nor Mr Hennessy directly sought a commitment from the distributors at the meeting that they would price in accordance with CIPA's price lists.

719 Mr Ellis also said that, although he does not recall any discussion about tactical pricing at the meeting, it is possible that there was some discussion of this topic. Mr Ellis said that he does not recall stating that CIPA would be increasing its prices to BSD and SMS and he believes it is unlikely that he would have said that as CIPA did not control the price at which BSD and SMS sold flat steel products. In my view, the evidence involved a non-sequitur. Whether or not CIPA controlled the prices offered by BSD and SMS in the market (which topic is addressed further below), CIPA certainly had the freedom to increase the prices charged to BSD and SMS which would have had an impact on the prices offered by BSD and SMS in the market. I accept Mr Hennessy's evidence on this issue.

Immediately following the Melbourne Airport meeting

720 Mr Ellis gave evidence that Mr Hennessy and he had a “debrief” session immediately following the meeting with the distributors at Melbourne Airport. Mr Ellis said that they remained in the room at the ParkRoyal Hotel and discussed some of the actions they could take immediately to develop a better relationship with distributors. These actions included increasing the list prices in the CIPA Distribution Market price lists, and increasing rebate levels, which would give distributors an opportunity to achieve better margins if they were to price by reference to the CIPA price lists. Mr Ellis’s recollection is that Mr Hennessy suggested a margin of 15%.

721 The Melbourne Airport meeting occurred on Friday, 6 September 2013. In the morning of Sunday, 8 September 2013, Mr Wells sent an email to Mr Ellis expressing his appreciation for the Melbourne Airport meeting and thanking Mr Ellis for his “candid assessment of the current situation”. Mr Wells attached a number of internal Vulcan Steel documents concerning the current business environment. Two observations from those documents can be noted. First, the documents express a degree of frustration at the losses that had been sustained by virtue of OneSteel and BlueScope Distribution undermining industry economic viability over the last two and a half years. Second, the documents expressed the opinion that price, in the local market, was set at the distributor/end-user interface. Given the contents of the documents, Mr Wells’s email provides further confirmation that the topics discussed at the Melbourne Airport meeting included the low prices being charged by BlueScope Distribution and the commercial need for prices offered at the distribution level of the market to increase.

722 On the morning of Monday, 9 September 2013, Mr Ellis forwarded Mr Wells’ email to Mr Hennessy for his information. On Wednesday, 11 September 2013, Mr Hennessy forwarded the email to Mr Kelso with the message “FYI – please do not share”. At the time, Mr Kelso was based in Queensland and had responsibility for BlueScope’s customer relationship with Vulcan Steel. Mr Hennessy said that he provided Mr Kelso with the email from Mr Wells because he considered it contained potentially important information and intelligence as to Vulcan Steel’s business position and thoughts on the steel market. The email does not expressly refer to the Melbourne Airport meeting. Mr Hennessy said that, although he forwarded this email to Mr Kelso, he did not inform him that the Melbourne Airport meeting had taken place. Indeed, Mr Hennessy said that he does not recall ever discussing the Melbourne Airport meeting with any BlueScope employee other than Mr Ellis.

723 In the evening of Monday, 9 September 2013, Mr Hennessy sent an email to his direct reports (Messrs Gent, Sparks, Kelso and Bryers) informing them of the change to the approval of tactical pricing. The email stated:

Sorry for the notice via email and without substantial explanation, however Jason has requested that I approve all EUTs / Special Pricing effective immediately.

Main reason is the consistent feedback from Distributors since arriving that the volume & degree of our tactical pricing is driving lower profitability for all in the market, and the quickest way to get a gauge on this is to increase the approval due diligence.

724 Mr Kelso, who received this email, said that he was surprised by the change in procedure because, up until that point, he, Mr Gent and Mr Sparks had had authority to make tactical pricing decisions themselves. Mr Kelso said he did not think it was realistic for Mr Hennessy to be approving all future tactical pricing requests on a national scale. Mr Sparks similarly stated that he was surprised by this change to the tactical pricing approval process because distributors usually needed a quick response. The process would take longer if Mr Hennessy was required to approve all tactical pricing offers.

725 In relation to the change to the approval of tactical pricing, Mr Ellis gave evidence that, by the end of his first week, he had received feedback from a number of distributors that there were concerns that BSD and SMS were able to sell flat steel products at prices with which non-BlueScope owned distributors could not compete. This feedback reinforced in Mr Ellis's mind that CIPA had been providing BSD and SMS with EUTs too frequently relative to CIPA's aligned distributors. Mr Ellis was also aware that EUTs or tactical pricing support was intended to be offered only as an additional discount when necessary to enable a distributor (including BSD or SMS) to compete against distributors who were offering imported steel at prices with which the distributor could not otherwise compete. However, by the end of Mr Ellis's first week, he had formed the view that too often EUTs or tactical pricing support was being offered in relation to competition between distributors selling steel manufactured by CIPA, or in circumstances where there was not a more competitive import offer against which the distributor could not compete. This served only to drive down prices to the detriment of CIPA and the distributors who were selling CIPA steel. Mr Ellis thought that, if CIPA were to limit EUTs or tactical pricing support only to situations where a distributor was genuinely competing against import offers that it otherwise could not compete with, this would:

- (a) demonstrate to distributors that CIPA was not favouring BSD and SMS;
- (b) reduce the level of pricing complexity and administration; and

- (c) provide the opportunity for an increase in the value of CIPA material (ie, less CIPA material would be sold at cheaper prices, particularly for short lead time customers that could not otherwise purchase material from import traders).

726 I generally accept Mr Ellis’s evidence concerning his rationale for “tightening” the approval process for tactical pricing. However, I do not accept the further evidence given by Mr Ellis that this change was an initiative that he decided to implement independently of any other matter and it was not in return for distributors doing anything. In my view, the sequence of events shows that Mr Ellis made the change because of complaints made by distributors about the level of price competition in the market for the distribution of flat steel products. The change to the approval process for tactical pricing was one of a number of actions taken by Mr Ellis in the relevant period to respond to those complaints in an effort to reduce the level of price competition between distributors. Each of the actions taken by Mr Ellis were closely connected with the benchmarking strategy.

Findings

727 I make the following findings about the Melbourne Airport meeting.

728 First, each of Mr Ellis and Mr Hennessy knew that conducting the meeting was “sensitive” because it involved a meeting between competing distributors in which their selling prices were discussed. Mr Ellis took some steps to disguise the meeting (by the use of separate email invitations) and asked the attendees to keep the meeting to themselves; Mr Hennessy never mentioned the meeting to anyone else.

729 Second, in response to distributor complaints that the prices they were selling at were very low, Mr Ellis said that CIPA would tighten its tactical pricing and would also be increasing its prices to BSD and SMS, and Mr Hennessy introduced the benchmarking strategy, by which CIPA proposed to revise the list prices in its December price list and encourage distributors to use those prices as a benchmark when setting their own prices. It is significant that the benchmarking strategy was introduced as part of a “package” of measures being contemplated by BlueScope to assist distributors in increasing their prices and sales margins; the benchmarking strategy was proffered by BlueScope as a response to the distributors’ low profitability, as a means of increasing their prices. I also consider it probable that Mr Hennessy communicated either expressly or implicitly that BSD and SMS would set their prices in accordance with CIPA’s list price.

730 Third, neither Mr Ellis nor Mr Hennessy sought a commitment from the distributors to use CIPA's price lists as a benchmark or base for their pricing. Nevertheless, there was some "pushback" from Mr Gregory who protested that Selection Steel determined its own pricing. The pushback is significant for two reasons. It confirms that Mr Gregory understood that BlueScope's proposal was intended to apply to aligned distributors selling BlueScope flat steel products and to non-aligned distributors selling imported flat steel product. It also confirms that, despite Mr Ellis and Mr Hennessy not expressly seeking any commitment from the distributors, Mr Gregory understood that the proposal was for distributors to adopt a common position of using CIPA's price lists as a benchmark in setting prices.

Australian Steel Institute Conference on 9 to 10 September 2013

731 Each year the Australian Steel Institute holds a national conference for its members. The members of the Australian Steel Institute include distributors of steel products in Australia including BlueScope. In 2013, the conference was held on 9 and 10 September at the Sheraton Mirage on the Gold Coast in Queensland. Each of Messrs Ellis and Hennessy attended the conference and took the opportunity to meet with distributors in the steel industry. Mr Hennessy said that he and Mr Ellis met with the following distributors at the conference:

- (a) Mr Stedman, General Manager of CMC and Mr Simpkin, General Manager of CMC Steel;
- (b) Mr Casey and Mr Gousmett of Vulcan Steel; and
- (c) Mr Lewin of OneSteel.

732 Mr Hennessy said that he and Mr Ellis also met with Mr Bray, General Manager of BlueScope Distribution, Mr Cornelius, National Manager of SMS and Jason Smith, Queensland State Manager of BlueScope Distribution at the conference, but he does not recall what was discussed.

733 In his affidavit, Mr Ellis confirmed that he attended the above meetings. Mr Ellis deposed that he also met with Messrs Calleja and Compagnino of Apex Steel at the conference.

734 In his affidavit, Mr Ellis said that, at around this time, he had a number of conversations with representatives of distributors and developed a fairly standard form of words that he used in his discussions. He said that his standard form of words was typically along the lines of the following key points:

I am back in Australia as GM Sales & Marketing with BlueScope.

We want to win more business from you. How can we do that?

We will be revising our price list and there is an opportunity for you to use that as a benchmark when setting your prices to your customers.

735 I accept Mr Ellis’s evidence that, at meetings with distributors, he introduced himself and conveyed that CIPA wanted to win new business. That evidence is corroborated by other witnesses. I also accept, following the Melbourne Airport meeting, Mr Ellis developed the benchmarking strategy and discussed it with distributors. Again, that evidence is corroborated by other witnesses (and is central to the ACCC’s case). I do not accept, though, that Mr Ellis’s “standard form of words” was the totality of Mr Ellis’s statements to distributors about his benchmarking strategy. First, the evidence is implausible because Mr Ellis attended reasonably lengthy meetings with distributors and Mr Ellis’s “standard form of words” would have taken less than ten seconds to utter. Second, the totality of the evidence described in these reasons satisfies me that Mr Ellis sought to persuade distributors to raise their prices to the level of CIPA’s list prices (described by Mr Ellis as recommended resale prices) to improve their profitability, and part of the persuasion was to inform distributors that Mr Ellis was speaking with other distributors in the market in the same terms, including BlueScope Distribution and NZSA, and would be reducing the availability of tactical pricing.

Meeting with Mr Stedman and Mr Simpkin of CMC Steel

736 Mr Hennessy said that, at the meeting with Mr Stedman and Mr Simpkin (on 9 September 2013), Mr Ellis opened the meeting by saying that BlueScope was looking to substantially increase its domestic sales and believed there was an opportunity to increase sales to CMC Steel. Mr Ellis asked what BlueScope needed to do to achieve that. Mr Hennessy said that Mr Simpkin replied by saying that CMC Steel was under a lot of financial pressure and needed a major increase in volume. CMC Steel wanted BlueScope’s help to win some large customers. Mr Hennessy said that Mr Ellis responded with words to the following effect:

If there are opportunities out there we are keen to work with you. There is another way for you to improve your profitability. We will be substantially tightening our tactical pricing so as to limit the amount of price discounting and we will also be working on our December price list which you can use as a benchmark for when you set your prices.

737 Mr Hennessy said he did not recall how Mr Simpkin responded to Mr Ellis’s statements.

738 Mr Ellis did not dispute Mr Hennessy’s account of the meeting.

Meeting with Mr Casey and Mr Gousmett of Vulcan Steel

739 Mr Hennessy said that, at the meeting with Messrs Casey and Gousmett (on 9 September 2013), Mr Ellis began the discussion with a similar introduction, asking how CIPA could win more of Vulcan Steel's business. Mr Hennessy said that Mr Casey replied to the effect that BlueScope was already winning some of Vulcan Steel's business and that Vulcan Steel had long established import supply channels and would need to think carefully about changing that and buying a lot more from BlueScope. Mr Hennessy said that Mr Ellis replied with words to the following effect:

There is an opportunity for you to use BlueScope's list price as a pricing benchmark for Vulcan Steel when you are setting your prices to your customers. We are working on our December price list.

740 According to Mr Hennessy, Mr Casey replied by saying that an acceptable margin would be 15% from list to net price.

741 Mr Ellis gave evidence that the meeting was with Mr Casey and Mr Jones (rather than Mr Gousmett). Nothing turns on that difference as both Mr Hennessy and Mr Ellis refer to statements made by Mr Casey at the meeting. There is no material difference between Mr Ellis's account of the meeting and that of Mr Hennessy.

Meeting with Mr Lewin of OneSteel

742 Mr Ellis and Mr Hennessy met with Mr Lewin of OneSteel on 10 September 2013. Mr Hennessy said that Mr Ellis started off the discussion using the same introduction, stating that BlueScope was interested in getting more business from OneSteel and asking what it needed to do to achieve that. Mr Hennessy said that Mr Lewin replied by saying that BlueScope was already getting quite a lot of OneSteel's business but OneSteel was also buying direct from (overseas) mills. Mr Lewin said that if BlueScope wanted to win more of OneSteel's business, it would need to have a more competitive price. Mr Hennessy said that Mr Ellis responded with words to the following effect:

There is an opportunity for you to use BlueScope's list price as a pricing benchmark for OneSteel when you are setting your prices to your customers.

743 Mr Hennessy did not recall Mr Lewin's response.

744 Mr Ellis did not dispute Mr Hennessy's account of the meeting.

Meeting with Mr Calleja and Mr Compagnino of Apex Steel

745 Mr Ellis said that he met with Messrs Calleja and Compagnino of Apex Steel during the conference (although, according to Mr Ellis, Mr Calleja came in and out of the meeting and did not really participate). Mr Hennessy did not refer to this meeting in his evidence, but Mr Ellis's evidence concerning the meeting is supported by an email sent by Mr Calleja to Mr Ellis on the morning of 10 September 2013 which referred to a meeting with Mr Ellis and Mr Hennessy. Mr Ellis said that the objective of the meeting was to ask Apex Steel, an "aligned" distributor, why it was purchasing so little of its steel requirements from CIPA. Mr Ellis said that Mr Compagnino replied by saying that the only way BlueScope would win Apex business was for it to be more competitive versus imports and that the premium that BlueScope was trying to earn of 3% to 8% was not going to fly in the post-GFC world.

Mr Kelso's conversation with Mr Hennessy

746 Mr Kelso also attended the Australian Steel Institute conference. Mr Kelso said that he became aware that, during the conference, Mr Ellis and Mr Hennessy were holding meetings with various distributors. At some point, either during the conference or after it, Mr Kelso said that he had a discussion with Mr Hennessy, during which Mr Hennessy said words to the following effect:

Jason and I met with OneSteel, Southern and CMCSA.

During those meetings, we discussed the roll out of the RRP with them.

We spoke to them about the merits of our price list being used as a benchmark to price their products at.

747 Mr Kelso said that, by this time, he was familiar with what he described as the "RRP Strategy". As set out earlier, Mr Kelso understood that the "RRP Strategy" was a strategy by BlueScope to set a recommended resale price in the market which would allow distributors to use CIPA's list prices as a base for their pricing. Mr Kelso understood that Mr Hennessy was informing him of these discussions because he was responsible for the OneSteel account and would be implementing the "RRP Strategy" with them. To the best of Mr Kelso's recollection, he was given this direction multiple times by Mr Hennessy via email and in internal meetings over a period of time. Mr Kelso also said that Mr Ellis was engaged in the process of implementing the "RRP Strategy" by engaging with customers, specifically OneSteel and Vulcan Steel, directly about the strategy.

Mr Ellis's evidence concerning the meetings at the Australian Steel Institute conference

748 Mr Ellis was asked about his meetings with distributors at the Australian Steel Institute conference. He said that he and Mr Hennessy said to distributors that CIPA intended to reissue its price book, with increased list prices, to give distributors an “opportunity” to price by reference to the new price lists. Mr Ellis was asked whether he said anything to distributors about any change to the “net net price”, to which he replied:

Well, remember that a number of the distributors we met were not, at that stage, buying from – well, not buying significant amounts from BlueScope. So that would not have been relevant to them. To the relevant ones, such as CMC, I – again, my best guess is yes, I did. That’s a guess.

749 The first part of the answer is significant. It is a frank acknowledgment that Mr Ellis discussed the strategy with distributors who were not buying significant quantities of steel from BlueScope, and indicated to them that CIPA would be providing them with an “opportunity” to set their prices by reference to BlueScope’s reissued price list with increased list prices.

750 In relation to Mr Ellis’s meetings with BlueScope’s aligned distributors, Mr Ellis’s evidence was inconsistent and somewhat incoherent. Mr Ellis acknowledged that aligned distributors were most interested in knowing what their buying price from CIPA would be. However, Mr Ellis said that, at the meetings with aligned distributors, he told them that BlueScope intended to reissue its price book with increased list prices, but he could not recall whether he told distributors that their discounts and rebates would also be increased to retain the previous “net net price”. It was put to Mr Ellis that the “net net price” paid by distributors to CIPA was calculated by way of discounts and rebates off the list price and that, if the list price increased, the “net net price” would increase. In response, Mr Ellis said:

No. The buy price was calculated off an old list price, not off the new list price. So their buy price would not have changed. I’m sorry, that’s just wrong.

751 When asked to explain how the distributors’ buying price would be calculated off an old list price, Mr Ellis backtracked and said that the distributors’ buying price did not change and he had not indicated to distributors that it would change. But Mr Ellis then confirmed again that he could not recall telling distributors at the conference that their buying price would not change. A little later in the cross-examination, Mr Ellis’s evidence changed again, stating that at the conference he told distributors that their “net rates would not change” and “therefore, the delta between their buy price and their potential sell price would increase”. Later still, his evidence changed again, stating that he did not have a recollection of telling distributors that

their “net net price” would not change, but that he believed, in effect, that that would have been understood by distributors.

752 My impression of this aspect of Mr Ellis’s evidence, like many other aspects of his evidence, is that Mr Ellis was troubled that honest answers to the questions might be problematic for his defence, causing him to give evasive or incoherent answers. From the totality of the evidence, I consider it likely that Mr Ellis explained to distributors at the conference that the benchmarking strategy involved BlueScope increasing its list prices, to establish new “recommended resale prices”, and allowing a corresponding increase in discounts and rebates so that distributors would not pay an increased buying price (beyond movements in underlying costs of supply). The commercial objective of the strategy was to encourage or persuade distributors to use the new list prices as a benchmark or floor for their pricing to customers.

Reporting to Mr Vassella on 11 and 12 September 2013

753 Mr Ellis had a breakfast meeting with Mr Vassella at 6.00 am on 12 September 2013. At about 6.00 pm on 11 September 2013, Mr Ellis sent an email to Mr Vassella containing a summary of notes that Mr Ellis had prepared for discussion with Mr Vassella at their breakfast meeting. Mr Ellis had prepared the notes at about 6.00 am that morning (and included them in an email to himself). The covering email to Mr Vassella stated that the notes were Mr Ellis’s “thoughts from the first two weeks”. The email set out 16 points, which included the following two points:

11/ Distributor Channel structure needs to be challenged600kt of steel will not be sold through existing ‘aligned’ partners (most of whom are already significant importers)

12/ BSL is too cheapstated by many – need to get back to benchmark pricing – ala pre GFC

754 It was put to Mr Ellis in cross-examination that the statement “BSL is too cheap” was a reference to the price at which distributors were selling BlueScope steel in the market. Mr Ellis disagreed. He said that, reflecting on the email, he thought that the statement was an error made by him early in the morning. What he had meant to indicate in this email was that the price at which CIPA was selling to distributors was too expensive. Mr Ellis was asked how the ensuing statement “need to get back to benchmark pricing” could address the first statement, if it should have said that “BSL is too expensive”. Mr Ellis replied that the second statement was a “secondary concept” and it had been included on the end of point 12 in error. Mr Ellis said that this separate point should probably have been point 13.

755 I do not accept Mr Ellis’s explanation of the notes in so far as he suggested that the two statements in note 12 were not connected. The structure of note 12, and the structure of the notes as a whole, indicates that Mr Ellis wrote a series of business propositions followed by a potential response to the proposition. The second statement in note 12 is clear: that Mr Ellis considered that BlueScope needed to “get back to” a benchmark pricing approach. As has been seen, the concept was to encourage or persuade distributors to use CIPA’s price lists as a benchmark for setting their prices. The concept also included increasing CIPA’s list prices while also increasing discounts and rebates to maintain the same net net price to distributors. So understood, it can be accepted that the first statement in note 12 that “BSL is too cheap” is difficult to interpret. One of two explanations of the statement is open. The first explanation is, as Mr Ellis said, that he made an error and the statement should refer to BlueScope being too expensive. Certainly, the evidence shows that a number of distributors said that to Mr Ellis. The benchmarking strategy would address that problem by encouraging or persuading distributors to use CIPA’s increased list prices as a benchmark and thereby move all prices in the distribution market upwards. The alternative explanation is that the statement is referring to the prices charged by BlueScope Distribution being too cheap. Again, the evidence shows that a number of distributors said that to Mr Ellis. The benchmarking strategy would address that problem in so far as CIPA charged higher prices to BlueScope Distribution (and afforded them less tactical pricing relief). It is not necessary to resolve this issue. The significant aspect of the email is that Mr Ellis informed Mr Vassella of the proposed benchmarking strategy at an early stage.

Dinner with Mr Wright (Wright Steel) on 12 September 2013

Arranging the meeting

756 Mr Hennessy said that, on or shortly before 10 September 2013, Mr Ellis said to him that Mr Ellis wanted to understand as much as he could about the market and wanted to meet as many people as he could including traders. Mr Ellis asked whether Mr Hennessy knew any traders and Mr Hennessy said that he had met Griff Wright who owned Wright Steel. Mr Hennessy offered to call Mr Wright and organise a meeting. In cross-examination, Mr Hennessy agreed that, at the time, he understood that the primary reason for the meeting was an information gathering exercise by Mr Ellis to try and understand the market dynamics. Mr Hennessy said that Mr Wright would not usually have any dealings with CIPA because Wright Steel was an import trader. However, Mr Hennessy said that he had previously met Mr Wright in April 2013 at a meeting organised by Mr Larkin of Southern Steel at the Chifley Hotel, Dandenong. Mr

Hennessy said that they had had a general discussion about changes in the market after anti-dumping complaints that BlueScope had made in respect of hot rolled coil and galvanised imports. Mr Wright confirmed that previous meeting.

757 Mr Hennessy said that, as a result of Mr Ellis's request, on or around 10 September 2013 Mr Hennessy gave Mr Wright a call to set up a meeting. In the call, Mr Hennessy explained that Mr Ellis was the new General Manager of Sales Marketing for CIPA and wanted to meet to have a discussion about the industry. Mr Wright's evidence was to the same effect, with Mr Wright suggesting dinner at the Rockpool restaurant in Melbourne. The dinner was arranged for 12 September 2013. Mr Hennessy and Mr Wright subsequently exchanged text messages confirming the dinner arrangement.

758 I generally accept the evidence of Mr Hennessy and Mr Wright concerning the arrangement of the dinner meeting. The documentary evidence indicates, though, that they are likely mistaken about the date on which the meeting was first contemplated or arranged. As stated by Mr Ellis in his affidavit, the initial dinner booking was referred to in an email dated 27 August 2013. The email showed Mr Ellis as the sender, but the message indicates that the email was sent by Ms Minogue (being signed "Al" for Alison). The recipients were Messrs Ellis and Hennessy. The booking was for 8.00 pm on 12 September 2013 at a restaurant called "Number 8" at the Crown Complex to be attended by Mr Wright. In a subsequent Outlook calendar invitation sent by Mr Hennessy to Mr Wright, Mr Hennessy explained that Rockpool was booked out. The significance of the date error is that, at the time the meeting was arranged, I consider it likely that the purpose of the meeting was for Mr Ellis to gather information about the market. However, by the time the meeting occurred, the evidence showed that that purpose had changed.

759 Each of Messrs Ellis, Hennessy and Wright gave an account of the discussion at the dinner on 12 September 2013. Aspects of their evidence were reasonably consistent while certain key aspects were not. It is necessary to consider the evidence of each in turn.

Mr Wright's account

760 Mr Wright said that the dinner lasted between two and two and a half hours. Mr Ellis and Mr Hennessy arrived a bit later than the set time. Mr Wright said that he had met Mr Hennessy before, but Mr Ellis introduced himself as being the head of sales and marketing at BlueScope in Australia. After the introductions, they were shown to their table. Mr Wright said that he and Mr Ellis did most of the talking and Mr Hennessy only contributed occasionally. Mr Wright

said that they had some initial social conversation about people in the industry, but Mr Wright does not recall any details.

761 In his witness statements, Mr Wright said that, over the course of the dinner, Mr Ellis made statements to the following effect (although not necessarily in this order):

When I was at BlueScope in Thailand I found that we were getting knocked about on pricing. BlueScope started anti-dumping enquiries and we complained that imports were hurting us in the marketplace. This approach worked in Thailand in getting pricing up.

I intend putting value back into the steel industry in Australia and I need your help to activate that.

I have to find a market for the tonnes we export at a loss.

I would like you to talk to your mates in the industry to get their numbers up because that's what we're going to do.

I want you to speak to your friends in the import sector and tell them that BlueScope intend to issue a published RRP and we want all importers to move pricing up to the BlueScope level. This strategy worked when I was in Thailand and it was successful in getting pricing up there.

762 In oral testimony, and unaided by his witness statement, Mr Wright said that Mr Ellis talked about being asked back from Thailand, where he had been quite successful. Mr Ellis said that the brief, as he put it, from the board was to find a market for the half a million tonnes that BlueScope could not sell in the domestic market and exported to the global market at a loss. Mr Ellis said that when he was in Thailand the market there was under similar pressure and, therefore, he had come up with a strategy involving an anti-dumping case against countries in the region which were dumping steel into Thailand. They won the case and then he turned that market around. He said it was his intention to add value to the Australian market because the Australian market was possibly the cheapest in the region and globally, and it was his long-term goal to add value back into the industry. He referred to a strategy he had in place which he had activated in Thailand involving other importers who, with the anti-dumping rate, had found it impossible to actually compete against BlueScope Thailand. He then increased the prices and encouraged the Thai steel importers to follow suit and, after some initial pushback, they embraced his strategy.

763 Mr Wright said that Mr Ellis then talked about the value of the steel industry in Australia being low, and that pricing was far too low. Mr Ellis said that he wanted Mr Wright to come on board to assist him to get pricing up and to get value back into the industry. Mr Ellis said that his strategy was to publish a recommended resale price, and Mr Ellis urged Mr Wright to talk to

his friends and peers in the import industry with a view of conveying his strategy to them and getting the prices up. Mr Ellis went on to say that, on previous occasions, BlueScope had tried to get their pricing up. However in the process, they had lost market share because the increases were then too far away from import pricing. Mr Ellis said that by having the importers on board he could still hold market share while getting pricing up. Mr Ellis said that he expected that the same pushback that he had seen in Thailand would initially happen in Australia as well. But once the importers saw that they were all going to be making more money, they would fall into line.

764 Mr Wright said that he was taken aback by Mr Ellis's proposal and that he had never been approached with that sort of proposal previously. Mr Wright said that he thought Mr Ellis's proposal was totally unworkable and he had indicated to him that he would struggle to encourage his friends in the industry to follow his plan or follow suit.

765 Mr Wright said that he commented to Mr Ellis that Mr Ellis was talking to the wrong end of the market and that Mr Ellis should be talking to his own subsidiary, meaning NZSA. Mr Wright said that Mr Ellis made a comment to the effect that the NZSA situation would be rectified in the not-too-distant future. Mr Wright said that Mr Ellis indicated that the general market would see an increase in the price from NZSA to the marketplace in the vicinity of \$150.

766 Mr Wright said that Mr Ellis also said that he had intentions of opening up BlueScope's supply arrangement with their franchised distributors and offering similar payment terms to those offered by importers to the non-franchised distributors.

767 Mr Wright said that he recalled one other matter that was raised by Mr Ellis during the dinner. As Mr Wright was an agent in Australia for China Steel, which Mr Ellis saw as being a tier 1 steel mill, Mr Ellis suggested that Mr Wright could sell to BlueScope his allocation of steel from China Steel, which BlueScope would then distribute to the market. Mr Wright said that he made a comment to Mr Ellis dismissing his proposal.

768 In cross-examination Mr Wright agreed that he did not immediately report the conversation that had happened at the dinner to anyone. For example, he did not immediately call his lawyer to seek advice about what had been said at the meeting. In response to a suggestion that, if he had actually thought Mr Ellis was suggesting a potentially concerning course of conduct, he would have acted differently, Mr Wright stated that at this time he had no idea of the law, and

no idea that Mr Ellis was breaking the law. He said that, at that time, he did not understand what constituted cartel behaviour. Later in the cross-examination, Mr Wright gave inconsistent evidence, stating that he believed that he responded to Mr Ellis's proposals by asking whether the ACCC might have some interest. While Mr Wright maintained that he made a comment to that effect, I do not accept that evidence and consider that it was an exaggeration made in the course of cross-examination. Neither Mr Wright's written statements nor his oral testimony in chief included evidence to that effect. The evidence is also inconsistent with Mr Wright's evidence that he was not familiar with competition law.

769 During cross-examination, Mr Wright's credibility and reliability were challenged in four principal ways.

770 First, Mr Wright was challenged on his ability to remember a conversation that had occurred many years earlier. Mr Wright maintained that he had a clear recollection of the matters raised by Mr Ellis at the dinner. Mr Wright was also challenged on inconsistencies between his oral testimony and his written statements. For example, it was put to Mr Wright that the notion of importers "pushing back" did not appear in his first statement. Further, in his third statement, Mr Wright amended that part of his first statement that set out the matters stated by Mr Ellis at the dinner to say that, while those things were said by Mr Ellis, Mr Wright could not recall the order in which the things were said. In my view, the inconsistencies between Mr Wright's written statements and his oral testimony, and the amendment to his first written statement, were relatively minor and did not reflect adversely on Mr Wright's reliability or credibility.

771 Second, Mr Wright was challenged on his ability to remember the conversation, having regard to the quantity of alcohol that was consumed during the dinner. It was put to Mr Wright that his recollection would have been affected by the drinks consumed. The invoice for the dinner was tendered and Mr Wright agreed that he consumed two mixed drinks before dinner, shared a bottle of wine during dinner and had a glass of scotch whiskey after dinner. It was also put to Mr Wright that Mr Ellis did not consume any alcohol, but Mr Wright said that that was not his recollection. Mr Ellis subsequently gave evidence that he did not drink alcohol. Mr Wright maintained that the amount of alcohol consumed did not affect his recollection of the conversation of the dinner. I am not persuaded that the amount of alcohol consumed was likely to have materially impaired Mr Wright's recollection of the discussion at the dinner.

772 Third, Mr Wright was taken to an exchange of emails with Mr Ellis that occurred after the meeting. On 26 September 2013, Mr Wright received an email from Ms Minogue sent on behalf

of Mr Ellis with the message: “[j]ust a follow up to say it was great to meet you the other week and I appreciate you taking the time to meet me”. Mr Wright said he was in New York City at the time the email was sent, and he did not reply until 7 October 2013. The reply email contained the statement: “Catch up was great and yes I look forward to more contact”. It was suggested to Mr Wright that the foregoing statement was inconsistent with his evidence that he was taken aback by Mr Ellis’s proposals at the meeting. Mr Wright rejected that and said the email was merely being courteous. I accept Mr Wright’s evidence in that regard. It is apparent from the evidence of both Mr Hennessy and Mr Ellis, set out below, that both understood that Mr Wright was not receptive to Mr Ellis’s proposal. There was no further relevant contact after the meeting.

773 Fourth, it was put to Mr Wright that he had a commercial motive to harm the interests of BlueScope by making a complaint to the ACCC because BlueScope had harmed his business through anti-dumping complaints and supplying non-aligned distributors who had previously acquired imported steel through Wright Steel. Ultimately, the suggestion was that Mr Wright had reconstructed his evidence concerning the statements made by Mr Ellis at the dinner by reason of Mr Wright’s desire to make a complaint to the ACCC about BlueScope.

774 Mr Wright’s evidence confirmed that, following September 2013, Wright Steel’s business was harmed by the competitive activities of BlueScope. Mr Wright’s written statements refer to the fact that, after September 2013, BlueScope began to undercut Wright Steel to win supply contracts from Wright Steel’s customers. As a result, many of Wright Steel’s previous customers shifted over to BlueScope and Wright Steel suffered a considerable decline in the volume of steel it was importing to fulfil firm customer orders. Mr Wright gave as an example the decline in trade with Stratco. Wright Steel first began supplying flat steel products to Stratco in 2006. Before about February 2014, Wright Steel had been receiving orders from Stratco in the vicinity of 5,000 to 7,000 tonnes of steel per month. From around April 2014 onwards, Stratco reduced its forward orders from Wright Steel to approximately 500 tonnes per month. Mr Wright said that, from market intelligence he gathered around that time, he understood that BlueScope had reached a deal with Stratco that it would supply its steel at lower costs on the condition that Stratco reduced its purchases of imported steel. Another example referred to by Mr Wright was Selection Steel, which had been a customer of Wright Steel since 1985. Until 2014, Selection Steel imported most of its steel. In 2014, Selection Steel began to purchase a majority of its steel requirements from BlueScope.

775 In cross-examination, Mr Wright was also asked about the effect of BlueScope’s anti-dumping applications in respect of flat steel products that had been made in 2012. As noted earlier, Mr Wright’s evidence was that anti-dumping applications, in themselves, caused disruption for import traders because customers do not like the uncertainty that an anti-dumping investigation creates. Mr Wright said that, in response to anti-dumping applications, import traders inserted “dumping clauses” into sales contracts to protect against the imposition of duties. This caused concern to customers because they would not have certainty in respect of the ultimate purchase price. However, Mr Wright also explained that anti-dumping applications may not disrupt imports entirely, as some anti-dumping duties were at a level that could be accommodated within prices and some imported materials were not manufactured domestically.

776 Mr Wright confirmed in cross-examination that, in February or March 2015, he sought legal advice from Arnold Bloch Leibler about BlueScope’s commercial activities. His approach to Arnold Bloch Leibler was prompted (at least in part) because BlueScope had recently approached a customer in respect of which Wright Steel was the exclusive supplier. Mr Wright sought advice from Arnold Bloch Leibler in respect of “whether the activities of BlueScope could have been seen to be against the anti-competitive law”. As a consequence of the meeting with Arnold Bloch Leibler, Mr Wright made a complaint to the ACCC about BlueScope on 6 August 2015. One aspect of the complaint was the dinner with Messrs Ellis and Hennessy. It was put to Mr Wright that he was aware that the ACCC would not be interested in protecting the commercial interests of Wright Steel, but would be interested in evidence of cartel conduct by BlueScope. Mr Wright maintained that, prior to going to Arnold Bloch Leibler for advice, he had not known how cartel conduct worked. Mr Wright said that, with the assistance of Arnold Bloch Leibler and in preparation for making his complaint to the ACCC, Mr Wright reflected on the dinner he had had with Messrs Ellis and Hennessy. It was put to Mr Wright that, when he reflected on the dinner in mid-2015, he had in mind that he would like to make a complaint against BlueScope if he could, and this caused him to reconstruct his recollection in a way that overstated what Mr Ellis had actually said. Mr Wright strongly disagreed.

777 My overall impression was that Mr Wright was a truthful witness. While memory is fallible, I do not accept the respondents’ contention that Mr Wright reconstructed his version of the conversation at the dinner on 12 September 2013 by reason of a desire to cast BlueScope in an unfavourable light. I accept that BlueScope’s commercial activities vis a vis Wright Steel and import traders generally were the catalyst for Mr Wright seeking legal advice and ultimately approaching the ACCC, but that is not a sufficient reason to conclude that Mr Wright has

concocted his evidence. Indeed, Mr Hennessy's evidence is corroborative of Mr Wright's evidence on some key aspects. I formed the view that Mr Wright had a good recollection of the details of his business and business activities. Mr Wright's evidence was not always fluent and contained a number of stumbles; but, as Mr Wright said in cross-examination: "I'm in the steel industry, I'm not in the law industry". Overall, I consider it probable that Mr Wright's account is a reasonably accurate reflection of matters proposed by Mr Ellis at the dinner.

Mr Hennessy's account

778 Mr Hennessy said that the dinner went for a few hours. Mr Hennessy said that he cannot now recall everything that was discussed, but he said that Mr Ellis spoke most during the dinner.

779 Mr Hennessy said that, on arrival, he introduced Mr Ellis to Mr Wright. Following the introductions, Mr Ellis talked generally about his background and work experience. Mr Hennessy said that he cannot recollect the detail of what Mr Ellis said. The discussion then moved to the state of the market and steel pricing in the market. Mr Hennessy said that either he or Mr Ellis said words to the effect of "distributors are hurting", meaning hurting financially.

780 Mr Hennessy said that they also discussed steel pricing. Either he or Mr Ellis talked about CIPA working on its December price list, and that they had been talking to distributors about the opportunity to use that price list as a benchmark to raise their prices. After discussing the December price list, Mr Ellis then said:

Matt [Hennessy] will send you a copy of the December price list, and we need traders to do their part, and increase their prices.

781 Mr Hennessy said that his memory was that Mr Wright was a bit taken aback by the comment. Mr Hennessy recalled that Mr Wright's facial expression was one of concern.

782 In cross-examination, Mr Hennessy agreed that when Mr Ellis spoke of distributors having the opportunity to use CIPA's price list as a benchmark, Mr Hennessy understood that Mr Ellis was describing the use of the price list in the same way as during the Melbourne Airport meeting; ie, Mr Hennessy did not understand Mr Ellis to be intending to seek a commitment from distributors, nor give distributors an assurance that other distributors would price at the list prices. Mr Hennessy also agreed that the December price list would be a set of list prices which could serve as recommended resale prices for distributors, but it was not a set of prices which would be appropriate to be charged by an import trader (as import traders supply to distributors).

783 In respect of the comment about “traders doing their part”, it was put to Mr Hennessy that Mr Ellis meant to convey that he wanted Mr Wright to publish the list prices into the marketplace so that people were aware of the recommended resale prices that BlueScope was suggesting. Mr Hennessy said that that was not his understanding of what Mr Ellis said. It was also put to Mr Hennessy that what Mr Ellis was referring to was the use of the price list by distributors. Mr Hennessy disagreed with that suggestion. Mr Hennessy did agree, however, that Mr Ellis did not give any explanation to Mr Wright as to how Mr Wright could use the December price list. Mr Hennessy accepted that the reference to “traders doing their part” was a very quick reference spoken in just a few words, but added that the statement was made “in the same sentence” as the phrase “to lift their prices”. Mr Hennessy agreed that Mr Ellis did not ask Mr Wright for any response to this statement, and nor did Mr Wright give a response. Mr Hennessy said that he did not remember Mr Ellis offering Mr Wright anything in return. Mr Hennessy did not recall any detail about what Mr Ellis meant by “increase your prices” and Mr Ellis did not specify any price or pricing level or any mechanism by which Mr Wright could understand what he was being asked to do. Mr Hennessy said that he did not have a recollection of sending the CIPA price list to Mr Wright after the dinner and that, as far as Mr Hennessy was aware, there was no follow up to the discussion at the dinner.

784 In cross-examination, it was suggested to Mr Hennessy that his recollection of the words used by Mr Ellis at the dinner was not entirely accurate. Mr Hennessy disagreed, stating that he was confident in his memory of what was discussed at the meeting.

785 In cross-examination, it was also suggested to Mr Hennessy that he had not seen Mr Ellis with an alcoholic drink since he returned from Thailand (where it was suggested that he had given up drinking). Mr Hennessy disagreed and said that his memory was that, while Mr Ellis was not a big drinker, he had seen him with a drink since 2009.

Mr Ellis’s account

786 Mr Ellis said that he had not met Mr Wright before the dinner. At the time of the dinner, however, Mr Ellis was aware that Wright Steel was the exclusive import trader in Australia for Yieh Phui steel products and also supplied hot rolled coil obtained from China Steel.

787 In his affidavit, Mr Ellis deposed that his main reason for wanting to meet with Mr Wright was because he wanted to meet with as many industry participants as possible to understand the challenges facing the steel industry in general and Mr Wright’s perception of CIPA. In apparent support for that statement, Mr Ellis deposed that he had also met with other import traders in

around September 2013, including David Buchanan of Toyota Tsusho, Mr Stedman of CMC Trading and Jon Carter of Kenna International. Mr Ellis then deposed that his other reasons for meeting with Mr Wright and the other import traders were to explore:

- (a) using import traders as a channel to supplement CIPA's sales (that is, using import traders as a form of security of supply and to source products outside CIPA's existing range);
- (b) using trader finance to extend payment terms to distribution;
- (c) the possibility of Wright Steel providing the CIPA price list to its distributor customers as "an opportunity to earn a reasonable margin if they were to price by reference to it";
- (d) the possibility of selling CIPA products to Mr Wright's customers; and
- (e) whether Mr Ellis could gain any general market intelligence.

788 In cross-examination, the above evidence was shown to be materially inaccurate, particularly in so far as Mr Ellis sought to portray his dinner meeting with Mr Wright as merely one of a number of meetings he held with import traders at about that time.

789 First, Mr Ellis acknowledged that, while he met with Mr Stedman in around September 2013, he met with Mr Buchanan in about February 2014 and with Mr Carter in early to mid-2014.

790 Second, Mr Ellis said that he did not raise with Mr Buchanan or Mr Carter the prospect of them providing the CIPA price list to their distribution customers (ie, topic (c) above).

791 Third, Mr Ellis acknowledged that Mr Stedman represented both CMC Trading (an import trader) and CMC Sheet and Coil (a distributor of flat steel products) and Mr Ellis did not ask Mr Stedman to provide the CIPA price list to his distribution customers in his capacity as an import trader; he only provided the CIPA price list to Mr Stedman in his capacity as a distributor of flat steel products. Mr Ellis ultimately conceded that the only import trader that he spoke to about the CIPA price list was Mr Wright. Mr Ellis also conceded that he was aware that Wright Steel was one of the largest import traders.

792 Fourth, in respect of topic (a) above, Mr Ellis's affidavit did not refer to the topic being discussed at the dinner. In cross-examination, Mr Ellis maintained that the topic was discussed, but he conceded that he never put any proposal to Mr Wright about some ongoing relationship by which CIPA would buy steel from Wright Steel.

793 Fifth, in respect of topic (b), Mr Ellis conceded that he did not recall raising the topic with Mr Wright at the dinner.

794 Later in cross-examination, Mr Ellis stated that the points (a) to (e) above were not a list of reasons that he was meeting with Mr Wright; rather, they were the concepts or ideas that the CIPA business wanted to explore with traders.

795 Like many aspects of Mr Ellis's evidence, I consider his evidence concerning the reasons for meeting with Mr Wright at dinner was shown to be materially inaccurate and I place no weight on that aspect of Mr Ellis's evidence.

796 In his affidavit, Mr Ellis deposed that, on the topic of the CIPA price list, Mr Ellis said words to the effect that CIPA was looking at introducing a price list that would allow distributors an opportunity to use it as a benchmark when considering their prices and to earn better margins, and that this price list could be supplied by Wright Steel to its distribution customers (who were predominantly different to CIPA customers), and Wright Steel could suggest the use of that price list as a reference point when its customers were making their own pricing decisions. It was Mr Ellis's view that the more widely available the price list was, the more useful it could be as a reference tool. Mr Ellis said he believed that he explained the benchmark pricing concept by reference to his experience as President of BSL Thailand. However, Mr Ellis does not believe he said words to the effect that initially there had been "pushback" in Thailand from importers in relation to using the Retail Price Book.

797 In cross-examination, Mr Ellis acknowledged that he raised the topic of the CIPA price list with Mr Wright. The following exchange occurred:

Let me clarify that, Mr Ellis. You understood that Wright Steel was selling steel in competition with CIPA? --- Yes, I did.

And you acknowledge in your affidavit that you wanted Mr Wright to provide the BlueScope price list to his customers? --- His distributor customers, yes.

And you acknowledge, as I understand it, that you raised that topic with him at the dinner? --- Yes.

And, as I understand it, your understanding was that his customers could also apply the benchmark prices, if they chose, when they sold imported products? --- Yes, that didn't – they would be purchasing either BlueScope material or imported material. Yes, correct.

And the list prices in the BlueScope price list could apply either to the imported material or to the BlueScope material? --- Potentially. That was up to the individual distributor at their own discretion.

Yes. And you wanted him to provide the price list to his distributor customers so that they could apply the list prices in that way? --- If they so choose to. Chose to.

798 While I do not accept the entirety of that evidence (or Mr Ellis's affidavit evidence), it contains the significant admission that Mr Ellis discussed the use of the CIPA price list by Wright Steel's distribution customers when determining their prices for the resale of imported steel. The proposal necessarily contemplated Wright Steel being involved in proposing the recommended resale prices to its distribution customers (in respect of the resale of imported steel purchased from Wright Steel), in circumstances where the recommended resale prices would originate from Wright Steel's competitor, CIPA, and would be published by CIPA to its own distribution customers. In my view, that admission lends credibility to the evidence given by Messrs Wright and Hennessy.

799 In his affidavit, Mr Ellis denied saying that Mr Wright should get his mates in the industry to get their prices up, or that Mr Wright should increase his prices, or that any trader should use the prices in the CIPA price list as a benchmark for them to price to their distributor customers. He believed that it was possible that Mr Wright and Mr Hennessy may have misunderstood what he said. In cross-examination, Mr Ellis said that it would not have made commercial sense to suggest to Mr Wright that he could raise his prices to distributors based on the benchmark list prices in CIPA's price list.

800 Mr Ellis did not deny that NZSA was raised as a topic at the dinner, but Mr Ellis said he could not recall any discussion in relation to that topic. Mr Ellis said he did not recall saying that CIPA would buy Wright Steel's coil allocation from Yieh Phui or China Steel. Mr Ellis said he did not believe that he said this because Wright Steel's coil allocation from Yieh Phui or China Steel would have been too large for CIPA to purchase.

801 Mr Ellis said that, at the end of dinner, he concluded that it was unlikely that he would be able to achieve any of his objectives with Wright Steel.

802 Mr Ellis said that, during the course of the dinner, he did not consume any alcohol. He said that a glass of wine was poured for him and a glass of scotch was brought for him, but he did not drink either. Mr Ellis said that he has not consumed any alcohol since November 2010 because of an accident that occurred after he consumed alcohol. Mr Ellis said he does not make a big deal about this when he is at social events. If the people Mr Ellis is with are not aware that he does not drink, then he also usually has a glass of wine or other alcoholic beverage poured for

him to carry, or to sit on the table in front of him, so as not to draw attention to the fact that he does not drink.

After the dinner

803 As far as the evidence goes, there was no relevant follow up between BlueScope and Mr Wright after the dinner in respect of the matters discussed at the dinner. The evidence of all three attendees is that the proposal put by Mr Ellis was dismissed by Mr Wright. The evidence disclosed some subsequent inconsequential communications between Messrs Hennessy and Wright.

Findings

804 Taking the evidence as a whole, I find it probable that, at the dinner, Mr Ellis made statements to Mr Wright as recounted in Mr Wright's evidence. Mr Wright's account is largely consistent with what can be inferred from the evidence overall and is corroborated in part by Mr Hennessy's evidence and in part by Mr Ellis's evidence. By way of summary, the statements made by Mr Ellis were to the effect that: Mr Ellis had been successful in BlueScope's Thailand business and had returned to Australia intending to implement similar strategies; Mr Ellis considered that the prices of flat steel products were undervalued in Australia and he wanted to restore value (in other words, increase prices); Mr Ellis considered that imports were driving prices down and BlueScope intended to use anti-dumping complaints to diminish the effect of imports; and part of Mr Ellis's strategy to raise prices was to publish a recommended resale price list for distributors to adopt, but he needed importers to support the price increase. Mr Ellis proposed that Wright Steel could encourage its distribution customers to use CIPA's price lists as a benchmark for their prices; in that way market prices could be increased without loss of market shares and the market would see an increase in prices from NZSA in the not-too-distant future.

805 There is an obvious connection between Mr Ellis's statements concerning anti-dumping and importers increasing their prices. To the extent that import prices increased, the prospect of successful anti-dumping applications would reduce.

Conversation with Mr Bolzan (OneSteel) on 12 September 2013

806 Mr Kelso gave evidence that he had a conversation with Mr Bolzan of OneSteel on 12 September 2013 in relation to the benchmarking strategy. As noted earlier, Mr Kelso was the CIPA Sales Manager responsible for OneSteel. Mr Bolzan was the National Procurement

Manager for OneSteel Metalcentre. Mr Kelso regularly communicated with Mr Bolzan about plate products.

807 Mr Kelso's conversation with Mr Bolzan was summarised in an email he sent to Mr Hennessy on the same day, on 12 September 2013. Relevantly, the email stated (errors in original):

Long talk with David

1. He has not had the opportunity to be briefed by Mark yet.
2. In principal he agrees the BSL market offer should be the base line that they work to.
3. Sceptical about the market discipline explained clearly he needs to take a leap of faith.

....

6. He agrees if Mark is comfortable with the principals he is to, but it will take two to three months for him to gain complete confidence the market is moving from the "move the tons" mentality.

808 Mr Kelso confirmed that the reference to "David" was a reference to David Bolzan and the reference to "Mark" was a reference to Mark Lewin who was the General Manager of OneSteel Metalcentre.

809 In his written statements, Mr Kelso said that points 1, 2, 3 and 6 in his email, extracted above, related to the RRP strategy. Mr Kelso stated that his email to Mr Hennessy was communicating that, whilst Mr Hennessy had had a discussion with Mr Lewin about the RRP strategy, it appeared that "Mr Lewin was yet to filter this information further down the chain to his subordinate, Mr Bolzan".

810 Mr Kelso said that points 1 and 2 referred to his conversation with Mr Bolzan in which Mr Kelso referred to the fact that Mr Hennessy had spoken to Mr Lewin about the RRP strategy and Mr Bolzan had replied that Mr Lewin had not spoken to him about it. Mr Kelso then explained the strategy in words to the following effect:

We are looking to re-jig our price lists so it is easier to use, we are going to increase the upfront list price so that the gap between IPP and the list price is increased. This list price is set at a level which we understand will allow you to achieve sufficient margins, if you sell to that.

811 Mr Kelso said that Mr Bolzan indicated that he agreed that if the OneSteel business could use the list price as the rock bottom price that they would sell at, that their business health would be significantly better going forward, but Mr Bolzan needed to chat to Mr Lewin about the idea. Mr Kelso said that at some point, either during this conversation or a later conversation

with Mr Bolzan, Mr Kelso explained to him that the list price was a baseline or benchmark that OneSteel could use when pricing their products to their end customers.

812 Mr Kelso said that point 3 referred to feedback he had received from Mr Bolzan about the strategy. Mr Kelso said the conversation continued in words to the following effect:

Mr Bolzan: How can I be sure that the other distributors will do the same?

Mr Kelso: Until now, distributors are continuing to sell based on price alone and undercut the value of their steel by pricing to the levels of import offers in order to secure sales. You can either continue to go down that path or try this and use the RRP as a baseline. Think about how following and lowering your prices to import prices is working out for you?

Mr Bolzan: It will take me a while to believe that it is going to work.

813 Mr Bolzan's question, whether other distributors would do the same, confirms that Mr Bolzan understood that, to be successful, the benchmarking strategy required other distributors to use CIPA's list prices as a base or floor price when setting their prices. Mr Kelso said he understood Mr Bolzan to be saying that he did not think the market was disciplined enough to make the RRP strategy work and that OneSteel's competitors would continue to use price as a lever to capture sales rather than use the recommended resale price as a baseline or benchmark.

814 Mr Kelso said that point 6 referred to Mr Bolzan's concluding remarks on the recommended resale price, in which Mr Bolzan said words to the following effect:

If Mark is comfortable with the principles of the RRP strategy then I am too. It will take me two to three months to be completely confident that the market has adopted the RRP strategy and moved away from the move the tons mentality.

815 By "move the tons mentality", Mr Kelso understood Mr Bolzan was referring to the sale of high volumes of steel at low prices. Mr Kelso understood that Mr Bolzan was sceptical that distributors would in fact sell steel at BlueScope's base-line recommended resale price (which was much higher than the import price).

816 The evidence of Mr Kelso's discussion with Mr Bolzan is significant. It provides evidentiary support for two conclusions. First, Mr Bolzan understood from the discussion that the concept of the RRP strategy was that distributors would use the prices in CIPA's price lists as the "rock bottom price" or "baseline". Second, Mr Bolzan understood that the concept of the RRP strategy required other distributors to adopt the strategy, but he was sceptical that that would occur.

Meeting with Messrs Gregory and Collis (Selection Steel) on 13 September 2013

How many meetings and when did they occur?

817 As noted earlier, Mr Gregory attended the Melbourne Airport meeting on 6 September 2013. The evidence also established that a breakfast meeting was held at the Grand Hyatt Hotel in Melbourne on the morning of 13 September 2013 between Messrs Ellis, Hennessy, Gregory and Collis. That meeting was arranged by Ms Minogue on behalf of Mr Ellis. According to Mr Hennessy, he accepted an invitation to that meeting on 3 September 2013. The meeting invitation indicated that the meeting was scheduled for one and a half hours between 7 am and 8.30 am.

818 Mr Collis gave evidence that, shortly after Mr Ellis was appointed General Manager of Sales and Marketing at CIPA (and prior to the meeting on 13 September 2013), Mr Collis and Mr Gregory met with Messrs Ellis and Hennessy at BlueScope's head office in Mount Waverley. There is no documentary evidence concerning such a meeting. Neither Mr Ellis nor Mr Hennessy recall it (and Mr Gregory did not give evidence). The evidence established that Mr Gregory and Mr Collis attended a meeting at BlueScope's head office in Mount Waverley on 3 February 2014, with Mr Hennessy attending in person but Mr Ellis attending by video from BlueScope's Alexandria office in Sydney.

819 Taking the evidence as a whole, I consider that Mr Collis was mistaken in his recollection that a meeting occurred between he and Messrs Ellis, Hennessy and Gregory prior to the meeting on 13 September 2013. However, I consider it probable that Mr Collis had a meeting or conversation with either Mr Ellis or Mr Hennessy in which statements to the effect recounted by Mr Collis were made. The evidence suggests two possible occasions on which the statements were made. The first is at the breakfast meeting at the Grand Hyatt Hotel on 13 September 2013. In my view, that is the most likely having regard to the content of an email sent on 17 September 2013 after the meeting (set out below). The second is in the course of a phone call that Mr Hennessy made to Mr Collis after sending an email on 17 September 2013 (referred to below). As I consider it more likely that the statements were made at the breakfast meeting on 13 September 2013, I will consider the evidence in that context.

Mr Collis's account

820 Mr Collis said that, prior to the meeting, he had not met Mr Ellis and he had not had any previous dealings with Mr Hennessy and/or other representatives of BlueScope as Selection Steel was not sourcing steel from BlueScope at this time. The meeting was organised by

BlueScope. Mr Collis understood the purpose of the meeting was to discuss what BlueScope could do to convince Selection Steel to source steel from BlueScope rather than through imports. At the time, Mr Collis believed that Selection Steel was the largest distributor of flat steel products which was not sourcing steel from BlueScope.

821 Mr Collis said that, during the meeting, Mr Ellis said words to the following effect:

Our distributors have been selling too low into the market. The current margins in the industry are not sustainable.

822 Mr Collis understood that Mr Ellis was saying that BlueScope's distribution businesses and its aligned distributors had been selling to end customers at prices that were too low to sustain decent margins. Mr Collis said that Mr Ellis also said words to the following effect:

We are proposing to provide all distributors with a suggested retail price which they can use as an industry guide to price their products to their customers. If they sell at these prices we will be able to give them a 13-15 percent margin. Our distributors will also use this guide price – we'll get them up to that level. These prices will enable all distributors to get a better margin.

823 Mr Collis said that the figure of 13% to 15% was his best recollection. The margin figure has some relevance to the date of the communication. The evidence indicates that Messrs Ellis and Hennessy did not turn their mind to the notional margin, being the difference between the list price (renamed as the recommended resale price) and the net net price (which distributors paid to purchase products from BlueScope), until after the Melbourne Airport meeting. That supports the conclusion that the communication occurred after the Melbourne Airport meeting and not before as Mr Collis believed.

824 Mr Collis said that the margin that Mr Ellis was suggesting distributors could achieve using BlueScope's suggested resale prices was higher than what was currently being achieved in the market. To the best of Mr Collis's knowledge, the margins being achieved by some other distributors for flat steel products were in the single digits.

825 In his second written statement, Mr Collis stated that his recollection was that Mr Ellis was referring to BlueScope's aligned distributors and not other distributors; in other words, BlueScope was proposing that its aligned distributors could use the suggested retail price as a guide. As Selection Steel was not an aligned distributor, Mr Collis understood that Mr Ellis's statements were for the information of Selection Steel. In cross-examination, Mr Collis was asked about that evidence and he maintained this view. I have no doubt that Mr Collis's evidence reflected his understanding of what Mr Ellis said. However, I am not persuaded that

Mr Collis's understanding reflected what Mr Ellis sought to communicate. Mr Ellis acknowledged on many occasions during the course of cross-examination that it was his hope that CIPA's price lists would be widely used by all distributors of flat steel products in setting their prices and not used just by BlueScope's aligned distributors.

826 In cross-examination, Mr Collis agreed that he did not understand anyone from BlueScope to be seeking any commitment from him about pricing, and he did not understand them to be asking him to undertake any obligation in relation to pricing.

827 As already mentioned, Mr Collis believed that the meeting on 13 September 2013 was a separate meeting, but I think it is probable that there was only one meeting. In respect of the meeting on 13 September 2103, Mr Collis said that he recalled a conversation in which Mr Ellis or Mr Hennessy said words to the effect of "[h]ow can we get more of your business?" and Mr Collis replied "I buy on price and I will firm bid you". Mr Collis stated that by "firm bid" he was referring to a practice whereby he would make an offer to BlueScope to buy a specified quantity of steel at a particular price and, if they accepted that offer, then Selection Steel would be committed to buying that quantity at that price. Mr Collis confirmed that Selection Steel had, since that time in 2013, made firm bids and purchased BlueScope steel.

Mr Hennessy's account

828 Mr Hennessy also gave evidence about the meeting that occurred on 13 September 2013. In his evidence, Mr Hennessy did not refer to Mr Collis's attendance at the meeting. However, Mr Hennessy sent an email to Messrs Gregory and Collis on 17 September 2013 (referred to below) which indicates that both Mr Gregory and Mr Collis attended the meeting.

829 Mr Hennessy said he recalled that Mr Ellis began the discussion by saying words to the effect of "[w]e want to increase our sales to Selection Steel. What do we need to do to achieve that?". According to Mr Hennessy, the conversation proceeded to the following effect:

- Mr Gregory: We have been well served by our import supply channels.
- I don't see that buying more from you and changing my current purchasing strategy would have any strategic value for me.
- If you want to price some spot purchases and things we need with short lead times there might be some potential for that.
- Mr Ellis: I know you are buying from New Zealand Steel and we would like the opportunity to supply you rather than New Zealand Steel.
- Mr Gregory: Okay. If your price is right, we will look at that.

830 Mr Hennessy said that, at this meeting, Mr Gregory also made a comment in words to the following effect:

There was a lot of criticism of BlueScope Distribution and SMS's pricing in the market at that group meeting at Melbourne Airport.

In Victoria, Southern Steel are also a major contributor to very low prices so the low prices aren't all attributable to BlueScope Distribution and SMS.

831 Mr Hennessy said he did not recall Mr Ellis's response.

Mr Ellis's account

832 Mr Ellis said he recalled attending a breakfast meeting on Friday, 13 September 2013 with Mr Collis and Mr Gregory of Selection Steel at the Grand Hyatt Hotel. Mr Ellis did not recall any discussion of the recommended resale prices or list prices during that meeting. However, Mr Ellis said he did recall Mr Collis saying words to the effect that they would offer "firm bids" to CIPA.

833 In cross-examination, Mr Ellis agreed that, as at September 2013, he was making statements to distributors to the effect that BlueScope was proposing to provide distributors with a suggested retail price which they could use as an industry guide to price their products to their customers (as recounted by Mr Collis). Mr Ellis also agreed that, at that time, he was saying to distributors that the list price would be 13% to 15% higher than the net net price. Otherwise, Mr Ellis denied that he made the statements attributed to him by Mr Collis. My impression of this aspect of Mr Ellis's evidence was that his denial related to the form of words used by Mr Collis rather than their substance. That is illustrated by Mr Ellis's denial that he ever said: "[t]hese prices will enable all distributors to get a better margin". After that denial, the cross-examination continued as follows:

It was, though, your intention, wasn't it, that the adoption of the benchmark strategy would lead to distributors improving their margin? --- There was a hope that the distributors would be in a position to earn better margins. That was a hope as a supplier and certainly a hope of the use of the RRP as a benchmark.

That was, as I understand it, the principle purpose of the RRP strategy, or benchmarking strategy, from the perspective of why the distributors would take it up, that it would improve their margins? --- That was a hope for CIPA that that would occur.

And do you say, though, it was not your practice to ever say to a distributor that adopting the benchmarking strategy will enable them to get a better margin? --- No, I don't think I did. That was – that was an internal hope of ours. Our communication to the distributors was, "Here is an opportunity for you, if you so choose, to use the reference price of the CIPA price list as a benchmark price when creating your price

list for your customers.”

834 I do not accept the last answer given by Mr Ellis. As discussed earlier, I consider that Mr Ellis’s dogged insistence on using the word “hope” in this context was contrived. It is clear from the evidence that the purpose of the benchmarking strategy was to encourage distributors to price in accordance with CIPA’s price lists and thereby improve their margins. I consider it probable that that commercial purpose was communicated plainly by Mr Ellis in discussions with distributors, as recounted by Mr Collis.

After the meeting

835 On 17 September 2013, Mr Hennessy sent an email to Messrs Gregory and Collis which attached an excel spreadsheet titled “BSL Price Summary December 2013” (the December 2013 Benchmark spreadsheet). That spreadsheet contained calculations showing proposed increases in CIPA’s list prices for December 2013 and how they had been calculated. The spreadsheet is considered in more detail below. The email stated:

Hi Gary and Rod.

Further to our recent discussions, please find attached a summary of our proposed December prices, that we intend to release to the market tomorrow.

Gary – I will call to discuss.

Thank you for your support.

Best regards,

Matt.

836 Mr Hennessy gave evidence that he then had a conversation with Mr Collis in words to the following effect:

I have sent you our December pricing summary.

It contains changes that we are making including an increase to the list price and there is an opportunity for you to use our list price as a benchmark when you set your prices.

837 In cross-examination, it was put to Mr Collis that his evidence concerning a meeting in which Mr Ellis made statements about suggested or recommended resale prices was mistaken and that what Mr Collis was in fact remembering was the above conversation with Mr Hennessy. Mr Collis disagreed with that suggestion. As noted above, I consider it possible that the statements recounted by Mr Collis in his evidence were made by Mr Hennessy in the above conversation. However, I consider it more likely that the statements were made at the 13 September 2013 meeting. It is apparent from Mr Hennessy’s email, which references “recent discussions”, that

the email and price list had been foreshadowed at the 13 September 2013 meeting. Mr Hennessy's email also stated that Mr Hennessy would call Mr Collis to discuss, being a separate discussion.

Findings

838 Having regard to the foregoing evidence, I find it probable that, at the 13 September 2013 meeting, Mr Ellis made statements to the effect that margins in the industry were not sustainable; that BlueScope was proposing to provide all distributors with recommended resale prices which they could use as a guide or benchmark in setting their own prices to customers; and that if distributors sold at those prices they would be able to earn a 13% to 15% margin.

Meeting with Mr O'Brien (NZSA) on 13 September 2013

839 Mr Ellis and Mr Hennessy also met with Mr O'Brien of NZSA at the Grand Hyatt Hotel on 13 September 2013. The meeting was initiated by Mr O'Brien. On 2 September 2013, Mr O'Brien sent an email to Mr Ellis welcoming him back to Australia and stating:

Once you are settled in I was wondering if you could find some time to catch up for a quick discussion re the market and the NZSA/CIPA relationship. From my perspective it is one that could be improved on significantly for the overall benefit of BANZ and BSL – currently my perception is far more adversarial than should be the case.

840 Mr Ellis responded the same day and suggested that Mr O'Brien speak with Mr Hennessy about arranging a meeting the following week in Melbourne. Mr Hennessy proposed 8.30 am on 13 September 2013 (immediately after the scheduled meeting with Messrs Gregory and Collis).

841 Each of Messrs O'Brien, Hennessy and Ellis gave an account of the statements made at the meeting.

Mr O'Brien's account

842 Mr O'Brien said that, when Mr Ellis commenced at BlueScope, Mr O'Brien requested a meeting with him because he thought he could speak with him about where NZSA sat in the market and its service offer and the pressure that was being placed on him by Mr Hennessy to raise the price of NZSA steel to its customers. Mr O'Brien hoped to persuade Mr Ellis to take a different position to Mr Hennessy. Mr O'Brien said that he was surprised and disappointed when Mr Hennessy attended the meeting along with Mr Ellis. Mr O'Brien said he did not think he would be able to speak freely to Mr Ellis about his concerns in relation to the increasing pressure being placed on NZSA to increase its prices and the fact that he felt NZSA's independence from BlueScope was being eroded.

843 Mr O'Brien said that they had a conversation in words to the following effect:

Mr Ellis: I don't understand why New Zealand Steel [Australia] is separately operating in the domestic market and has its own brand and pricing.

I think New Zealand Steel [Australia] should be selling under the BSL brand and report to BSL.

New Zealand Steel should be rebranded "BSL Importing" and should report directly to BSL. There is a role for you heading up that import business. We'd look to move that role to Wollongong in due course.

Mr O'Brien: Okay. There is a lot to think about.

844 Mr O'Brien said that, when Mr Ellis said this, he was taken completely by surprise. The suggestion made by Mr Ellis to rebrand NZSA and to report directly to CIPA went further than the discussions Mr O'Brien had previously had with Mr Hennessy.

845 Mr O'Brien said that during that meeting, Mr Ellis also stated words to the following effect:

You need to work a lot more closely with Matt and align your prices with CIPA prices.

846 Mr O'Brien recalled thinking that there would be much more direction from CIPA in relation to NZSA pricing from that point on.

Mr Hennessy's account

847 Mr Hennessy said that, prior to meeting with Mr O'Brien on 13 September 2013, there were already tensions between NZSA and CIPA and that Mr O'Brien wanted to meet with Mr Ellis. Mr Hennessy said that he told Mr O'Brien that CIPA wanted a closer alignment of CIPA and NZSA net prices in Australia because CIPA did not want NZSA cannibalising CIPA sales due to the margin differential. Mr Hennessy said he did not recall what Mr O'Brien said in response. However, as a consequence of the meeting, they agreed that there would be more frank and open discussions about prices each month between CIPA and NZSA. In cross-examination, Mr Hennessy agreed that the issue about the alignment of NZSA and CIPA prices had been "bubbling away for a while before Mr Ellis came along".

Mr Ellis's account

848 In his affidavit, Mr Ellis deposed that, before the meeting, Mr Hennessy had told him that Mr Hennessy and Mr O'Brien did not have a good working relationship, and that this was in part the result of NZSA actively undercutting prices offered by CIPA rather than focussing its attention on sales in competition with imported products. Mr Ellis further deposed that, based on conversations he had had with Mr Hennessy, he was aware that NZSA had been winning

business from distributors at the expense of other domestic distributors selling CIPA manufactured steel (rather than at the expense of imported steel products). This had the effect of reducing the margins that could be earned by CIPA's domestic distributors which made sales of CIPA products less attractive for those distributors. It also meant that CIPA had to export the steel (at a loss) which would have otherwise been sold domestically. It was Mr Ellis's view that it would be preferable for NZSA to sell steel at or around the CIPA net prices. However, Mr Ellis stated that he did not have the ability to control the price set by NZSA. In cross-examination, Mr Ellis qualified that statement. He said that he only meant that, at that point in time, he did not have the ability to control the net price set by NZSA. He acknowledged that, subsequently, he did have control over NZSA's minimum net price. The people eventually responsible for this were Mr Hennessy and Mr Palermo, but Mr Ellis accepted that they reported to him by organisational structure and, accordingly, that he eventually had the ability to control NZSA's minimum net price.

849 In his affidavit, Mr Ellis deposed that he did not recall having any discussion of CIPA's list prices with Mr O'Brien in this meeting, and he denied making any suggestion to Mr O'Brien that NZSA should price at or above the level of the recommended resale prices or list prices. The denial was not truly responsive to the evidence of either Mr O'Brien or Mr Hennessy. Mr Ellis also deposed that he did not recall saying words to the effect that NZSA should be rebranded BSL Importing and that Mr O'Brien should move to Wollongong to lead that company. However, he acknowledged that it may have come up as a potential solution to the problem of NZSA actively undercutting prices offered by CIPA.

850 Mr Ellis stated that he expressed the view to Mr O'Brien during the meeting that it did not make sense for NZSA to be selling steel manufactured by NZ Steel in competition with steel manufactured by CIPA given that both entities were owned by BlueScope. Mr Ellis also expressed the view that it did not make sense for NZSA pricing to be substantially different to that offered by CIPA. Mr Ellis also recalled saying words to Mr O'Brien to the effect that he wanted to increase profitability for distributors and CIPA.

Following the meeting

851 Mr O'Brien said that, after the meeting and in a separate phone call with Mr Hennessy, he and Mr Hennessy had a conversation in words to the following effect:

Mr Hennessy: NZSA should be pricing at the level of BSL's prices.

Mr O'Brien: That's great mate but we don't sell to your customers. We sell to

customers who want imported product, who don't always want or often can't buy your product.

Those customers will go to other import traders if we price at BSL's prices and our volumes will drop.

Findings

852 There is a reasonable degree of consistency in the evidence concerning the meeting. The background to the meeting was the ongoing tension between CIPA and NZSA concerning the prices at which NZSA was selling flat steel products manufactured by NZ Steel in the Australian market. CIPA believed that NZSA's prices were too low and that NZSA was making sales to distributors who would otherwise buy from CIPA and driving the market price lower. NZSA disagreed, believing that it was selling to distributors who would otherwise buy steel imported from other countries. At the meeting, Mr O'Brien raised his concerns with Mr Ellis, but did not receive the response he wanted. Instead, Mr Ellis maintained the view that had previously been expressed by CIPA, that NZSA's net or sale prices should be aligned with CIPA's net prices. I consider it likely that Mr Ellis floated the possibility of NZSA being rebranded "BSL Importing", although he may not have been serious about that prospect. It was another way of conveying Mr Ellis's view that NZSA's position in the Australian market should be subservient to CIPA's commercial interests.

Meeting with Messrs Lambourne and Birchall (OneSteel) on 13 September 2013

853 Mr Hennessy gave evidence that, on 13 September 2013, he and Mr Ellis met with Messrs Lambourne and Birchall who were the General Manager and National Manager respectively of OneSteel. The meeting occurred at the Qantas meeting rooms at Sydney Airport. Mr Hennessy said that Mr Ellis began the discussion with a statement to the effect: "[w]e want to increase our sales to you. What can we do to make that happen?"

854 Mr Hennessy said that the conversation continued to the following effect:

Mr Birchall: We are purchasing a lot direct from mills. You need to lower your price in order to win more business.

Mr Ellis: There is an opportunity for you to raise your prices by using our list price as a benchmark. We are currently working on our December price list.

Mr Birchall: Okay. Come and talk to Glen Szecsodi and me when you have the price list ready.

855 Mr Hennessy's evidence was not challenged in cross-examination and Mr Ellis did not address that meeting in his evidence. I accept Mr Hennessy's evidence. Again, the benchmarking

strategy was being proposed as a means for OneSteel to increase its prices for the supply of flat steel products.

Mr Ellis travels to Thailand between 16 and 25 September 2013

856 Mr Ellis said that on Monday, 16 September 2013 he flew to Thailand to attend his final management meeting with BSL Thailand. Mr Ellis returned to Australia nine days later on 25 September 2013. Mr Ellis said that, although he did not recall any specific conversation with Mr Hennessy while he was in Thailand, he expected that he would have spoken with him a number of times.

CIPA Pricing Meeting on 16 September 2013

Prior to the meeting

857 Mr Hennessy gave evidence that, at some point after their discussion with distributors, Mr Ellis said to Mr Hennessy words to the following effect:

Let's proceed with what we've discussed with the distributors.

Let's release the price list.

For the benchmarking to be effective, BlueScope Distribution Business will have to follow this. I will talk to Andrew Bray. Can you have conversations with all the other distributors?

858 Mr Ellis said he does not specifically recall saying to Mr Hennessy that “[f]or the benchmarking to be effective, BlueScope Distribution will need to follow this”, but he may have said something to that effect at around this time. Mr Ellis said he does not recall ever having a conversation with Mr Bray, who was responsible for setting BlueScope Distribution’s pricing, in relation to benchmark pricing.

859 I accept Mr Hennessy’s evidence.

Pricing meeting on 16 September 2013

860 Mr Hennessy said that, each month, CIPA’s Distribution Team together with the Pricing Team held a pricing meeting where they would go through the import offers that they were aware of for deliveries that were to occur three months later, in order to determine the monthly Distribution pricing offer. Mr Hennessy said that, on 16 September 2013, an internal meeting took place. The meeting was held at the BlueScope Port Kembla office and lasted between around one to one and a half hours. In attendance were Messrs Palermo, Unicomb, Gent, Kelso

and Sparks. The meeting was also referred to in the written statements of Messrs Kelso and Sparks and the transcripts of the s 155 examinations of Messrs Unicomb and Palermo.

861 In his written statements, Mr Hennessy said that he made statements to the following effect at the meeting:

Jason and I have spoken to distributors. We have told them there is an opportunity to use our price list as a benchmark when they are setting their prices to help the distributors to increase their prices and therefore improve their profitability.

We have had feedback from Vulcan Steel who said that there should be a 15% margin between the list price and the net price.

As a part of implementing this, we will change the early order offer to a distributor discount.

862 In cross-examination, Mr Hennessy agreed that, by those statements, he was intending to convey to the team that BlueScope would be putting out a set of recommended prices “in the hope” that distributors would follow those prices when pricing their steel in the market. Mr Hennessy also agreed that, in determining the prices for the December 2013 price list, not every price was set at a 15% margin to the net price, but that was the general aim.

863 In his written statements, Mr Hennessy said that, during the meeting, Mr Unicomb took them through a spreadsheet of the net price, distributor discount and list price for each product and the differential between the list price, net price and import parity price. There was general discussion amongst the team, which involved working through a process to allow for the (targeted) margin between list price and net price. For example, if previously there had been a \$40 dollar early order offer rebate (which was to be removed), the list price was increased by \$20 and the distributor discount became \$60. Mr Hennessy said that the outcome of the meeting was that, across the board, the list prices were increased by more than the net price to allow for a margin of 13% to 15%. Mr Hennessy said that this was to allow distributors to increase their margin and to give them an incentive to buy more from CIPA. In cross-examination, Mr Hennessy agreed that his hope was that distributors would see the sense of using the price list as a benchmark when making their own decisions in setting their prices, but that he was not trying to bind distributors to price at that level or asking them to give up their “pricing independence”.

The December 2013 Benchmark spreadsheet

864 At 4.04 pm on 16 September 2013, following the meeting, Mr Unicomb sent an email to Messrs Hennessy, Gent, Sparks and Kelso and Ms Pilkadaris, copying Mr Palermo, which attached an excel spreadsheet labelled “BANZ Benchmark Premiums December 2013”. The email stated:

Attached is the updated MI benchmark report based on our discussions today. I’ll send a summary version out shortly.

865 It is unnecessary to refer to the spreadsheet in any length. I infer that “MI” is an abbreviation of “market intelligence”. The spreadsheet contained data and calculations for the purpose of CIPA determining its list prices for December 2013. As discussed earlier in these reasons, CIPA sought to price each of its flat steel products at a premium to its assessment of the prevailing import parity price. The integers to the assessment of the import parity price included exchange rates, a survey of current import offers, and an assessment of the impact of dumping duties. The integers for the calculation of the proposed list prices included the movement in the import parity price from the previous month, the proposed premium over the import parity price, the proposed removal of the early order offer rebate and the targeted margin.

866 At 5.46 pm on 16 September 2013, Mr Unicomb sent a further email to the same people, plus Mr Bryers, attaching an excel spreadsheet titled “Pricing Summary December 2013”. The email stated as follows:

See attached summary table from our discussion early [sic].

Notes:

- BSL Distribution strategy is to set a Recommended Retail Price (RRP) in the market allowing distributors to use this as a base for their pricing. This will hopefully increase margins in the channel.
- Costs of a large distributor are around 13% of sales.
- EEO [sic] & XTS will discontinue from November.
- Distribution support mechanism will start from December 2013 with a \$60/t discount/rebate applicable across all products (excluding Prepainted) sold through distribution channel. No cut-off date will apply to this rebate/discount. It is expected that this mechanism will cut down on the level of EUTs paid.

Products:

Hot Rolled: IPP reduced by \$10 - \$20/t increase in Price - Rebate level up by \$20/t

HR Pickled: IPP no change - \$20/t increase in Price - Rebate level up by \$20/t

CRS: IPP increased by \$70 - \$90/t increase in Price - Rebate level up by \$20/t – Large increase in IPP is based on the Angang December offer.

GAL: IPP no change - \$20/t increase in Price - Rebate level up by \$20/t

SZF: IPP increased by \$55 - \$75/t increase in Price - Rebate level up by \$20/t – IPP benchmarked against the POSCO Indian at \$1145/t

ZAL: IPP increased by \$20 - \$80/t increase in Price - Rebate level up by \$60/t – IPP based on Union steel Korea FX 0.92

GALVSPAN: IPP increased by \$35 - \$95/t increase in Price - Rebate level up by \$60/t – IPP based on Taiwan Yieh Phui \$1075/t

XLERPLATE: IPP increased by \$35 - \$35/t increase in Price - Rebate level unchanged.

LITE: IPP increased by \$25 - \$35/t increase in Price - Rebate level increased by \$30/t

Floorplate in Coil: IPP no change - \$20/t increase in price - Rebate level increased by \$20/t

Floorplate Cut: IPP up \$35/t - \$30/t increase in price - Rebate level increased by \$30/t

I hope this accurately reflects our discussions.

867 In relation to the email, in cross-examination Mr Hennessy said that he understood that Mr Unicomb’s reference to “allowing distributors to use this as a base for their pricing” was a reference to the benchmarking strategy, which involved encouraging distributors to use CIPA’s list price as a benchmark when setting their prices. In his written statement, Mr Kelso referred to this email and confirmed that his understanding at the time was that BlueScope was implementing a strategy to set a recommended resale price in the market which allowed distributors to use CIPA’s list price as a base for their pricing. In cross-examination, Mr Ellis disagreed that Mr Unicomb’s description of the benchmarking strategy was accurate. I accept the evidence of Messrs Hennessy and Kelso.

868 The spreadsheet attached to Mr Unicomb’s 5.46 pm email contained a single tab titled “BSL CIPA Benchmarks and Premiums – December 2013” (the “December 2013 Benchmark spreadsheet” referred to earlier) which contained the following columns:

- (a) a product column listing CIPA’s flat steel and plate products, most with a single standard dimension (HRC, Brightform, CRC, Galvabond, Zincanneal, Zinalume – in three varieties; Galvaspan, Xlerplate – in two varieties; and floorplate – in two varieties), being thirteen rows in total;
- (b) a column showing the import parity price for each product;
- (c) a column showing the CIPA list price change for each product (which varied between \$20 and \$95);
- (d) a column showing the CIPA list price for each product;

- (e) a column titled “distributor support” for each product (which was a standard \$60);
- (f) a column titled “Net Price (BSD)” (which the evidence showed was the net price payable by BlueScope Distribution for each product after discounts);
- (g) a column titled “Net Price Change (BSD)” (which the evidence showed was the difference in the net price payable by BlueScope Distribution for each product from the previous month);
- (h) a column titled “IPP Competitive Premium (BSD)” (which the evidence showed was the percentage difference between the import parity price and the net price payable by BlueScope Distribution for each product, and which varied between products from 0.9% to 5.9%);
- (i) a column titled “List to BSL Net Price Variance \$/t” (which the evidence showed was the difference between the CIPA list price and the net price payable by BlueScope Distribution for each product);
- (j) a column titled “List to BSL Net Price Variance %” (which the evidence showed was the percentage difference between the CIPA list price and the net price payable by BlueScope Distribution for each product, and which varied between products from 13.7% to 15.5%);
- (k) a column titled “List to IPP Price Variance \$/t” (which the evidence showed was the difference between the CIPA list price and the import parity price for each product); and
- (l) a column titled “List to IPP Price Variance %” (which the evidence showed was the percentage difference between the CIPA list price and the import parity price for each product, and which varied between products from 15.0% to 21.9%).

869 Mr Hennessy explained that certain columns in the December 2013 Benchmark spreadsheet were highlighted in green (list price to IPP variance) and yellow (list price to net price variance) and were intended to provide the distributors with an easy ready reckoner to calculate the profit margins that distributors could make if they purchased imported or CIPA steel and sold at the CIPA list price as part of implementing Mr Ellis’s price benchmarking strategy. Mr Hennessy said that he included those columns because he wanted to convey to distributors the margins able to be earned from selling at the list price. Mr Hennessy said further that he included these columns to encourage distributors, both aligned and non-aligned, to agree with the proposal that Mr Ellis and he made to each of

them to price all of their products (both CIPA and imported) at the CIPA list price. According to Mr Hennessy, the key focus of the price benchmarking strategy, as Mr Ellis outlined it to Mr Hennessy and the distributors, was that it provided distributors with the ability to make more profits and in turn to buy more steel from CIPA (which would increase BlueScope's profits). Mr Hennessy said that he intended to encourage the distributors to increase their prices across all their products, not just CIPA products. The price benchmarking strategy would not have made commercial sense for BlueScope unless the distributors priced both their CIPA and imported products at the CIPA list price. Mr Hennessy said that he considered that the profit margins that he conveyed in these columns of the December 2013 Benchmark spreadsheet would be an incentive to distributors to agree to price at the CIPA list price. In cross-examination, Mr Hennessy accepted that when he used the word "agree" in this context, he was using it in the sense that he was hoping that distributors would use the price list, but was not asking them to commit to using the prices.

Approval by Mr Ellis

870 Mr Hennessy said that, whilst he worked with Mr Ellis, Mr Ellis had to approve monthly pricing to distributors before the pricing was released. In the usual course, Mr Palermo would seek this approval directly from Mr Ellis and Mr Hennessy was not involved in this process. Nevertheless, Mr Hennessy forwarded Mr Unicomb's email of 16 September 2013 (with the attached December 2013 Benchmark spreadsheet) to Mr Ellis the same day with the message: "I'll call to discuss". Mr Hennessy said that he does not recall either sending the email or having any subsequent conversation with Mr Ellis regarding the email. However, Mr Hennessy said that he would not have sent the December 2013 Benchmark spreadsheet to distributors (including non-aligned distributors) without Mr Ellis's approval. Mr Hennessy also copied Mr Ellis or forwarded to him all of the emails that he sent to distributors attaching the December 2013 Benchmark spreadsheet (which are referred to below).

871 Mr Ellis did not dispute that he received a copy of Mr Unicomb's email and the December 2013 Benchmark spreadsheet, nor that he approved it. In cross-examination, Mr Ellis was asked whether he considered that Mr Unicomb's description of the benchmarking strategy in the email was accurate. Mr Ellis disagreed with Mr Unicomb's use of the word "base" in that context, unless by "base" Mr Unicomb meant "starting point". I place no weight on Mr Ellis's evidence that the benchmarking strategy was merely to provide distributors with

a “starting point” for setting their prices. In my view, the evidence given by Mr Hennessy – that the benchmarking strategy was to encourage distributors to use CIPA’s list prices as a base or floor for their pricing in order to restore profitability to the distribution market – is more plausible, particularly in light of the December 2013 Benchmark spreadsheet.

Instructions for communicating the December 2013 list prices

872 In his written statements, Mr Hennessy said that members of his team usually managed the monthly pricing discussions with particular customers (distributors). For example, Mr Sparks usually spoke with Southern Steel; Mr Kelso usually spoke with OneSteel; and Mr Gent usually spoke with CMC Steel and BlueScope Distribution. Mr Hennessy said that, during the 16 September 2013 meeting, he gave instructions to his team in relation to how to communicate the increased list prices to distributors. Mr Hennessy said that he made statements to the following effect:

Graham will summarise the changes, and send them to you for you to have conversations with your customers about the IPP changes, the change from the early order offer to the distributor discount, the list price changes and the opportunity to use the list price as a pricing benchmark.

Let them know that there is no cut-off date to get the distributor discount anymore.

873 Mr Hennessy does not recall providing any specific instructions on the price benchmarking strategy to the CIPA Distribution Markets sales team who reported to Messrs Gent, Kelso and Sparks. Mr Hennessy’s expectation was that their direct supervisors would inform them of the price benchmarking strategy and provide them with instructions relevant to their role as account managers for the purpose of implementing the price benchmarking strategy. Mr Hennessy also said that he expected his subordinates to report to him in relation to significant issues or problems with implementing the benchmarking strategy (including where distributors were not aligned with the benchmarking strategy). He also said that he expected that his subordinates would seek approvals from him for all future tactical pricing following the change to the approval process for tactical pricing.

874 In his written statement, Mr Sparks said that, at the 16 September 2013 meeting, Mr Hennessy said words to the effect:

We are going to provide the distributors with an RRP. You should communicate to your customers that they should have confidence to sell at the RRP because we are also reducing tactical pricing.

875 Mr Sparks stated that, based on Mr Unicomb’s email sent at 5.46 pm on 16 September 2013 and Mr Sparks’s involvement in the pricing meeting, he understood that BlueScope wanted to ensure there was a sufficient differential between the net price and the recommended resale price so that distributors could obtain a higher margin than what they were currently achieving. Mr Sparks said that, from this time, he worked to implement the strategy to introduce the recommended resale price and communicated this to distributors as instructed. Mr Sparks said that he never personally sent the December 2013 Benchmark spreadsheet to any distributor of BlueScope (other than BlueScope Distribution). Nevertheless, following the 16 September 2013 meeting, in accordance with the instructions he received from Mr Hennessy and his usual practice, Mr Sparks contacted Southern Steel representatives to discuss the monthly pricing offer, including the introduction of the recommended resale price. Mr Sparks said that, at the time of his conversations with Southern Steel representatives, they already appeared to be familiar with the recommended resale price concept before he raised it because they did not seek any elaboration on how the recommended resale price would work.

876 In his written statement, Mr Kelso said that, in accordance with the instructions he received from Mr Hennessy, he communicated the RRP strategy to his customers as an opportunity to make a better profit margin, if they sold their flat steel products to their end customers at CIPA’s list price. Mr Kelso said that, in communicating the strategy to OneSteel and Vulcan Steel representatives, he said words to the effect: “[t]he RRP is the price point where a desirable distributor margin is achievable”. During Mr Kelso’s conversations with OneSteel and Vulcan Steel representatives, the topic of how they should price their imported steel came up on occasion. When this topic was discussed, Mr Kelso regularly tried to push them to price their imported products higher, by saying words to the following effect:

If you are selling the value of the domestic offer and you are pushing for that value, why wouldn’t you push for more value with the imported product and get prices up in general.

877 Mr Kelso said that, in conversations with the OneSteel and Vulcan Steel representatives, he was explaining to them that the recommended resale price was a tool that would enable them to make more money and would benefit everyone, including BlueScope. In cross-examination, Mr Kelso agreed that, in respect of the above communications, he was not intending to communicate that OneSteel could benchmark their prices based on the recommended resale price without losing volume because other distributors would be doing the same thing. Mr Kelso agreed that he did not communicate anything about what other distributors would be

doing, and that he made no assurances to OneSteel in that regard. Nevertheless, Mr Kelso reiterated in cross-examination, in respect of his conversations with OneSteel, that he “was constantly encouraging them to get their prices up”.

Findings

878 I make the following findings about the CIPA pricing meeting on 16 September 2013.

879 First, the creation of the December 2013 Benchmark spreadsheet was an important step in the implementation of the benchmarking strategy. The document explained the derivation of CIPA’s list prices for products to be delivered in December 2013, and calculated the sales margins that would be earned if BlueScope products were sold at the list prices and if imported products were bought at the stated IPPs and sold at the list prices. It was not a document that had been previously created for use by distributors.

880 Second, in the course of creating and circulating the December 2013 Benchmark spreadsheet, Mr Hennessy informed the senior sales managers present that Mr Ellis and he had spoken to distributors about the benchmarking strategy, which involved distributors using CIPA’s price lists as a benchmark when setting their prices to help them increase their prices and therefore improve their profitability. Mr Unicomb’s email on 16 September 2013 reinforced that message by stating that: “BSL Distribution strategy is to set a Recommended Retail Price (RRP) in the market allowing distributors to use this as a base for their pricing. This will hopefully increase margins in the channel”. This occurred with Mr Ellis’s tacit approval.

881 Third, the evidence of Messrs Kelso and Sparks confirms that the senior sales managers understood that they were to communicate the benchmarking strategy in those terms. I also accept Mr Sparks’s evidence that Mr Hennessy encouraged the senior sales managers to inform distribution customers that they should have confidence to sell at the list prices because BlueScope was also reducing tactical pricing.

Call with Mr Lander (Southern Steel) on 16 September 2013

882 Mr Spark’s statement refers to a business record from BlueScope’s Salesforce system which recorded a telephone call between Mr Sparks and Mr Lander of Brice Metals on 16 September 2013. Brice Metals was a subsidiary of Southern Steel. The business record identifies that the record was created on 17 September 2013 and the author of the record was Mr Sparks. It included the following note of the telephone call:

- Discussed our December pricing position. Dave supportive of an increase in List

price and the inclusion of a Distributor Support rebate, meaning removal of the EOO.

- Concerned that CMC pass on all of the rebates into the market.
- Our tactical pricing in SA has been significantly less than in other markets and hasn't driven the same lack of clarity on our market offer.
- Believes a \$35/t increase on plate is justified based on the offer he has seen. \$925/t East Coast (\$15/t Adelaide and \$35/t Perth)

883 The following handwritten note with the following (approximate) format (with words or figures that are unclear placed in square brackets) was received as evidence in the case against BlueScope (see *BlueScope (No 3)* at [107]):

B/S – Luke Sparks *16/9/13*

Matt & Jason Ellis: Due to project pricing eroded confidence & driving down margin, to B/S & distributors

- *Provide a price list – provide distribution with RRP*
- *Differential between net net price & list price*
- *Give everybody in the market confidence to sell above the price list.*
- *December – removing EOO rebate \$40T – list price up \$60 (ZA, GS) Competitive rebates only \$*
Putting the list price up by \$20/t & and a tactical rebate = \$60/T – HRC. + Zinc Allume/Galvaspan/
Open up until lead time closes.

** List price is a RRP & expect distributors to capture some increased price.*

Galva bond & HRC - As per Nov - Net level

<i>Zinc [Anneal]</i>	<i>- Up \$55/T.</i>		
<i>Cold Rolled</i>	<i>- Up \$70/T</i>	<i>-> List</i>	
		<i>\$90</i>	<i>+ \$20/T rebate</i>
			<i>-> [ie] \$60 rebate</i>
			<i>[] of \$40 [EOO]</i>

** Plate: Up \$35/T Dec*

884 In *BlueScope (No 3)*, I found it probable that this note was authored by Mr Lander and accepted that the note recorded statements made during a telephone call between Mr Sparks and Mr Lander made on 16 September 2013. I also accepted that, for the most part, the note records matters communicated by Mr Sparks to Mr Lander, being BlueScope's proposed price list in respect of flat steel products and matters related to the price list.

885 In light of the evidence concerning the pricing meeting on 16 September 2013 and the December 2013 Benchmark spreadsheet, the statements made in the handwritten note are

intelligible. The note records Mr Lander's understanding of what was communicated to him about the RRP strategy and BlueScope's December 2013 list prices. Significant statements recorded in the note are:

- (a) a price list would be provided which would provide distributors with an RRP (recommended resale price);
- (b) that would give everybody in the market confidence to sell above the price list; and
- (c) the list price is a RRP (recommended resale price) and BlueScope expects distributors to capture some increased price.

886 The note is significant because it provides evidence that, in communicating the benchmarking strategy in conjunction with the December 2013 list prices, BlueScope (through Mr Sparks) conveyed that distributors could have confidence to sell "above the price list".

887 As noted earlier, the ACCC did not call either Mr Sparks or Mr Lander as a witness in the proceeding. In respect of Mr Sparks, the ACCC tendered parts of his statements as admissions against BlueScope. I do not infer that the ACCC declined to call Mr Sparks because his evidence would have been unhelpful to the ACCC. The ACCC tendered Mr Sparks's statement and it was equally open to BlueScope to call Mr Sparks as a witness (as Mr Sparks remained an employee of BlueScope at the time of trial). I also do not infer that the ACCC declined to call Mr Lander because his evidence would have been unhelpful to the ACCC. BlueScope did not identify any factual inference that arose from the records of communications between Mr Sparks and Mr Lander that supported BlueScope's case, and which should be more readily drawn because of the ACCC's failure to call Mr Lander. There was nothing, arising on the documentary evidence, for the ACCC to explain or contradict. To the contrary, the evidentiary burden lay with BlueScope to explain or contradict the documentary evidence.

Email to Mr Cornelius on 16 September 2013 – EUT pool for SMS

888 As discussed earlier in these reasons, CIPA provided SMS with an EUT "pool" to draw on for tactical pricing purposes. SMS did not need to make a specific request for EUT support from CIPA but instead could allocate or access EUT support from the "pool" of designated funds as it saw fit each month.

889 At 12.26 pm on 16 September 2013, Mr Gent sent an email to Mr Cornelius (SMS), copied to Mr Hennessy, in which he stated:

As per discussions with Matt and Jason last week BSL are pulling back on the level of EUT support ... As a result Novembers Offset Rebate Calculation has become redundant. That being said if on the odd occasion we do implement an EUT's SMS will have access to it as per all distribution customer, however we expect this to be minimal.

890 I infer that the reference to the discussions with Messrs Ellis and Hennessy the previous week is a reference to the meeting that occurred at the Australian Steel Institute conference (which occurred on 9 and 10 September 2013). By reply email the next day, Mr Cornelius said that he was opposed to the changes to the EUT (tactical pricing) pool for SMS and proposed a telephone call to discuss.

Discussion between Mr Ellis and Mr Lobb (CMC Steel) in mid-September 2013

Evidence given by Mr Lobb

891 In his written statement, Mr Lobb said that he became the NSW State Manager of CMC Steel in around 2012 and reported to Mr Simpkin who was the General Manager of CMC Steel. In that role, Mr Lobb was responsible for determining the prices which CMC Steel charged its customers within New South Wales. In May 2014, Mr Lobb became General Manager of the Sheet and Coil division of CMC Steel. Mr Lobb said that CMC Steel was an aligned distributor of BlueScope and sourced the majority of its flat steel products from BlueScope. However, CMC Steel also sourced imported flat steel products. Mr Lobb said that the flat steel products it imported were comparable to BlueScope products, in that the imported products met Australian standards and were similar in quality. The imported flat steel products were generally cheaper in price when compared to BlueScope products and CMC Steel made greater margins on the sale of imported flat steel than it did from the sale of BlueScope steel. Mr Lobb said that, prior to September 2013, CMC Steel had single figure profit margins and it desperately needed to increase its profitability.

892 Mr Lobb said that he knew Mr Ellis from when they both worked at BHP Steel in the mid-1990s. When Mr Lobb joined CMC Steel in 2007, Mr Ellis joined shortly afterwards and Mr Lobb reported to him.

893 Mr Lobb said that, in his role as General Manager of BlueScope Sales & Marketing, Mr Ellis called Mr Lobb to discuss various matters, including changes to BlueScope's market offer and a general catch up in relation to industry information. Mr Lobb said that he believed that Mr Ellis spoke to him about prices for CMC Steel on a national basis because Mr Ellis had a broad network of people he talked to on a regular basis, Mr Lobb and Mr Ellis had a pre-existing

relationship and Mr Lobb had more experience in relation to the sheet and coil distribution business than his managers at CMC Steel.

894 In oral testimony, Mr Lobb said that, shortly after Mr Ellis had commenced his role at BlueScope, Mr Ellis telephoned him and they had a conversation. Mr Lobb did not recall when exactly this conversation occurred, but the change discussed in the call was effected in December 2013. Mr Lobb believed that the discussion occurred when the December 2013 offer was being communicated to distributors (which, as discussed below, occurred on 18 September 2013). He said that the discussion took place over more than one phone call, possibly two or three. Mr Lobb said that Mr Ellis told him that there would be an increase in the recommended retail price, or the list price as it was commonly referred to, for BlueScope flat steel products and Mr Ellis suggested that distributors such as CMC Steel could price to that level to their customers in the market. The increase in the list price would be offset by other rebates and discounts. Mr Ellis stated that he had spoken to other distributors in the market and they were in agreement with such a process. In that regard, Mr Ellis mentioned that he had spoken to Southern Sheet & Coil specifically, and mentioned the name of Mr Larkin, the General Manager of Southern Steel. Mr Ellis said that a similar proposal had been put to Mr Larkin, and Mr Larkin had agreed that his business would price to the recommended resale price levels. Mr Lobb said that Mr Ellis also mentioned BlueScope's subsidiary SMS, and said words to the effect of "they will follow". Mr Lobb said that Mr Ellis also mentioned that other traditional import distributors, which BlueScope had started to supply, had also agreed to price to those levels.

895 Mr Lobb said that it was his understanding that the changes to the price list that Mr Ellis outlined to him effectively created a headline price that distributors could price to, to increase their profitability. This applied to both BlueScope aligned distributors and the import distributors. As Mr Lobb understood the proposal, it was effectively to raise the market price and allow distributors the opportunity to make more margin and operate more profitably. Mr Lobb believed that Mr Ellis told him that Mr Larkin, SMS and import distributors would price at the recommended resale price level to give Mr Lobb some comfort that, if CMC Steel were to increase its prices in that fashion, it would not lose business because other competitors would be pricing similarly. Mr Lobb said that he knew Mr Larkin and he did not think that Southern Steel would price at the recommended resale price, because at the time, they were known as a lower priced supplier in the market.

896 In his written statement, Mr Lobb said that he did not discuss the conversation with Mr Ellis with anyone else at CMC Steel, including his managers, because he did not think it was a viable or practical idea. Mr Lobb said that he was uncomfortable with Mr Ellis's proposal because he thought there were some potential legal issues with it in the context of the Trade Practices Act.

897 In cross-examination, Mr Lobb agreed that he had not been sent the December 2013 Benchmark spreadsheet. Mr Lobb also agreed that Mr Ellis did not seek any commitment from him to price in accordance with the price list. It was suggested to Mr Lobb that CMC Steel could never have agreed or committed to price in accordance with the price list. Mr Lobb said that he would not have agreed to do so but, as a broad concept, a minimum recommended resale price was something that could have been followed. Mr Lobb said he would never have agreed or committed to following the price list because it would have been inconsistent with his desire to have pricing flexibility to meet competition in the market and to compete effectively. Mr Lobb said he was sceptical of Mr Ellis's statement that other competing parties were agreeing to such a process and he did not believe that other companies would follow it.

898 In cross-examination, it was also suggested to Mr Lobb that it would not have been possible for CMC Steel to set its prices in accordance with the recommended resale price because CMC Steel would need to add its processing costs to that price. Mr Lobb stated that, while he did not have the price information in front of him, he recalled that the prices in the price list were notably higher than what CMC Steel was then achieving in the market and, therefore, there was the opportunity, if one were to follow the recommended resale prices, of increasing prices to the market.

899 In cross-examination, Mr Lobb was taken to the transcript of his s 155 examination (by the ACCC, which occurred on 23 May 2018) and asked about certain discrepancies between statements he made on that occasion and his evidence given in oral testimony. For example, in his s 155 examination, Mr Lobb said that he was uncertain of the date when the conversation with Mr Ellis occurred, but thought it was probably later than one month after Mr Ellis started at CIPA. Mr Lobb explained that, at the time of the s 155 examination, he did not have access to relevant documents, such as the December 2013 distribution price list, to assist him in placing an approximate date on the conversation. I accept that explanation. In the s 155 examination, Mr Lobb was also asked whether Mr Ellis had mentioned anyone other than Mr Larkin and SMS, and Mr Lobb had answered in the negative. Mr Lobb maintained that answer was incorrect and his oral testimony was correct. As to why he gave an incorrect answer, Mr

Lobb explained that he found the process of the s 155 examination overwhelming, with a large number of questions put to him which were new to him and he did not have time to reflect on the matters asked. Again, I accept that explanation. A person who, in a formal environment and with no prior notice, is asked questions about events which occurred some years prior may not have an accurate recall immediately, but the recollection may be improved with considered reflection. Mr Lobb explained that, since the s 155 examination, he had been able to reflect on the conversation, and said that he was confident in his recollection as recounted in his oral testimony. Mr Lobb said that he had a clear recollection of the conversation because it involved a notable change in strategy and plan from BlueScope. Mr Lobb reiterated that he had a clear recollection that, to give him some comfort, Mr Ellis had said that Mr Larkin, SMS and other import distributors had agreed to price at the levels in the price list.

900 In cross-examination, Mr Lobb was also challenged on the fact that he did not mention the conversation with Mr Ellis to anyone else at CMC Steel. It was put to Mr Lobb that, if Mr Ellis had said the things as recounted by Mr Lobb, Mr Lobb would have relayed the conversation to someone at CMC Steel. Mr Lobb said that he did not mention the conversation because he did not believe that it was commercially feasible and did not believe that it would be carried out. Again, I accept Mr Lobb's answer.

Evidence given by Mr Ellis

901 In his affidavit, Mr Ellis deposed that he remembers calling Mr Lobb some months after he started as General Manager, Sales and Marketing at CIPA, rather than early on, because Mr Lobb was a relatively junior person within the decision-making structure at CMC Steel (being a State Manager, rather than a National Manager) and Mr Ellis spoke to other people within CMC Steel before Mr Lobb (such as Messrs Simpkin and Stedman). Mr Ellis deposed that he may have said words to the effect that recommended resale prices or list prices would give distributors the opportunity to increase their margins. But Mr Ellis denied saying that Southern Steel, SMS or import distributors had agreed to set their prices at or above the level of those prices. Mr Ellis said that he never had any conversation with Mr Larkin (or anyone else from Southern Steel), Mr Bray (or anyone else from SMS) or non-aligned distributors in which they had agreed to set their prices at or above CIPA's recommended resale prices. Mr Ellis also deposed that the price benchmarking strategy was simply not designed to bring about any agreement to set prices at or above the level of the CIPA price list. Mr Ellis said that he did not

tell anyone that anyone else had agreed to price at that level because that was not an element of the pricing strategy.

Findings

902 I accept the evidence given by Mr Lobb. In my view, Mr Lobb had no reason to be untruthful. He gave his evidence confidently. The substance of his evidence, given in oral testimony, is largely consistent with statements he made to the ACCC in the course of a s 155 examination in May 2018 without an opportunity for reflection. I consider that the discrepancies between his oral testimony and the statements made in the course of the s 155 examination are explicable, and they do not undermine my confidence in Mr Lobb's reliability as a witness. In contrast, and for reasons given earlier, I have no confidence in Mr Ellis's evidence.

NZSA offer to Mr Larkin (Southern Steel) on 17 September 2013

903 At 11.30 am on 17 September 2013, Mr O'Brien sent an email to Mr Larkin of Southern Steel attaching NZSA's December shipment offer to Surdex Steel (a subsidiary of Southern Steel). Mr O'Brien said that the prices that he sent to Mr Larkin were cheaper than CIPA's prices for the equivalent products, but were in line with NZSA's pricing model at that time.

904 About 20 minutes later, at 11.50 am that day, Mr Larkin forwarded Mr O'Brien's email to Mr Ellis with the message:

Jason
Any idea why NZ, haven't increased their pricing? (sept/oct/nov) and now December

905 I infer from that email that Mr Larkin had been told by Mr Ellis that NZSA would be increasing their prices, and Mr Larkin was informing Mr Ellis that that had not occurred.

906 About 10 minutes later, at 12.03 pm that day, Mr Ellis forwarded Mr Larkin's email to Mr Hennessy with the message (punctuation in original):

.....was going to buy some time and ask them what was going on – this is just another reason why NZ Aust should report through to us.

907 I also infer from Mr Ellis's email that he had expected NZSA to increase their prices and the email expressed some frustration that that had not occurred.

908 About an hour and a half later, Mr Hennessy forwarded the email chain to the BANZ Sales and Marketing Distribution Lead Team and to Mr Palermo with the message "FYI - Please do not forward". Mr Hennessy said that he forwarded this to his team so that they were informed about a potentially important change within BlueScope and so that they were aware that Mr Ellis

knew of the problems caused by the pricing of NZSA and was working to fix the issue. Mr Hennessy said that he stated “[p]lease do not forward” because the earlier email from Mr Ellis included his comments on the internal dynamics and politics between NZSA and CIPA.

909 The next day, on 18 September 2013, Mr Gent replied to Mr Hennessy’s email with questions about offers he proposed to make to CMC Steel relative to NZSA’s pricing. Mr Hennessy replied to Mr Gent’s email approving the offers and stating: “[w]e need to fix NZSA”. Mr Hennessy said that, by that statement, he meant that BlueScope needed to make sure that NZSA was pricing at the CIPA list price.

910 Mr Hennessy also gave evidence that, soon after he returned from leave in October 2013 (Mr Hennessy was on annual leave for three weeks between 20 September 2013 and 14 October 2013), he had a discussion with Mr Ellis in which Mr Ellis said words to the following effect:

We need to align the New Zealand Steel’s list price with the CIPA list price so that there is an alignment with our price benchmarking strategy. We need to talk to Sean O’Brien.

911 Mr Hennessy replied by stating that he would speak with Mr Palermo. Mr Hennessy said that, in the usual course, Mr Palermo would meet with Mr O’Brien on a monthly basis to discuss the import parity price benchmarks for each product and have a conversation about the net price (list price less rebates).

Dissemination of December 2013 Benchmark spreadsheet on 17 September 2013

Discussions with aligned distributors

912 Mr Hennessy said that he asked his direct reports to have discussions with the aligned distributors about the December 2013 Benchmark spreadsheet and to get feedback from those customers before he sent the December 2013 Benchmark spreadsheet to them.

913 At 10.30 am on 17 September 2013, Mr Hennessy sent an email to his sales team stating that Mr Unicomb would shortly be circulating “a one page summary page for OST, SSG and CMC SD this morning to assist with our conversations today”. The abbreviations refer to OneSteel, Southern Steel Group and CMC Steel Distribution. The one page summary is a reference to the December 2013 Benchmark spreadsheet with calculations specific to those distributors (rather than calculations specific to BlueScope Distribution, which were in the original version of the spreadsheet). At 11.55 am on 17 September 2013, Mr Unicomb circulated by email an updated version of the December 2013 Benchmark spreadsheet. Apart from some minor corrections to the calculations, the updated spreadsheet contained four tabs which contained the same

spreadsheet format but which had been separately prepared for each of BlueScope Distribution, OneSteel, Southern Steel and CMC Steel (the latter designated “CSD”). In each tab, the first four columns were identical (ie, the import parity price, list price change, list price and distributor support) but the net price payable by each distributor differed (having regard to the different discounts afforded to each distributor).

914 At 11.27 am on 17 September 2013, Mr Kelso sent an email to Mr Hennessy, copied to Messrs Unicomb, Gent, Troy, Sparks, Bryers and Palermo and Ms Pilkadaris, titled “Pricing discussion December 2013 offer”. In the email, Mr Kelso reported on a discussion he had had with OneSteel, stating (amongst other things) that “[a]ll OST sheet and coil is quite aligned”. Mr Kelso said that the email indicated to him that he understood that OneSteel Sheet & Coil were comfortable with the prices which he had provided to them for their feedback.

915 At 12.18 pm on 17 September 2013, Mr Sparks replied to Mr Kelso’s email, copying all recipients of the original email, and reported on a discussion with Southern Steel. In the email, Mr Sparks stated:

Dave Lander and Jim Larkin both had positive feedback on our approach and are comfortable with our pricing position for December.

...

Jim would like to see us take the same approach with COLORBOND® steel as we have with ZINCALUME® steel and GALVSPAN® steel in regards to an increase in list price and additional rebate.

916 In his written statement, Mr Sparks stated that the email is an accurate record of the feedback he received from Messrs Lander and Larkin at the time. I infer that Mr Sparks’s conversation with Mr Lander was the conversation on 16 September 2013, described above. In relation to Mr Sparks’s conversation with Mr Larkin, there exists a Salesforce record containing Mr Sparks’s notes of a phone call he made to Mr Larkin on 17 September 2013. The notes record the following:

- Talked Jim through our December pricing position. Broadly comfortable with the position although he did mention that SK and Toyota Tsusho bought in a small parcel of Galvanneal for late November at \$1080 - \$1,090/t. Believes it is only 250t and we shouldn’t price based on that

917 There also exists a Salesforce record of a telephone conversation between Mr Sparks and Kevin Smaller of Southern Steel on 17 September 2014. However, as that conversation is not referred to in Mr Sparks’s email at 12.18 pm, I infer that the conversation with Kevin Smaller occurred later that day (and is referred to below).

918 On 17 September 2013, Mr Hennessy sent the December 2013 Benchmark spreadsheet to the following distributors by separate emails:

- (a) Mr Bray of BlueScope Distribution;
- (b) Mr Cornelius of SMS;
- (c) Messrs Birchall and Szecsodi of OneSteel Sheet & Coil;
- (d) Messrs Peter Smaller, Kevin Smaller, Larkin and Lander of Southern Steel;
- (e) Messrs Simpkin and Stedman of CMC Steel;
- (f) Messrs Gregory and Collis of Selection Steel.
- (g) Mr Calleja of Apex Steel; and
- (h) Mr Casey of Vulcan Steel.

919 On the same day, Mr Kelso sent an email to Messrs Bolzan and Lewin of OneSteel Metalcentre attaching a version of the December 2013 Benchmark spreadsheet that was limited to steel plate products.

920 In his evidence, Mr Hennessy said that sending the December 2013 Benchmark spreadsheet to distributors represented a change from CIPA's previous practices. Mr Hennessy said that, prior to September 2013, CIPA determined the applicable import parity price and net price changes for its flat steel products, and then discussed the proposed list price changes with BlueScope Distribution and aligned distributors to obtain feedback. After obtaining feedback, CIPA finalised the list prices and prepared the monthly price list for the distribution market. However, BlueScope's internal calculations of the kind contained in the December 2013 Benchmark spreadsheet (including the net price calculations) were not sent to distributors. Mr Hennessy also said that, prior to September 2013, CIPA did not send pricing information to Mr Calleja of Apex Steel or Peter Smaller of Southern Steel, who were both owners of their respective businesses. Ordinarily, CIPA would speak with their subordinates who were responsible for procurement. Mr Hennessy said that the only reason that the December 2013 Benchmark spreadsheet was sent to Mr Calleja and Peter Smaller was because they were in attendance at the Melbourne Airport meeting on 6 September 2013 where the price benchmarking strategy was first raised and, during that meeting, Mr Hennessy had indicated that he would send pricing information to them. Mr Hennessy also said that, prior to September 2013, CIPA did not send its monthly price lists to non-aligned distributors such as Vulcan Steel and Selection Steel, let alone information concerning the calculation of the import parity prices and net prices.

Email to BlueScope Distribution

921 At 12.30 pm on 17 September 2013, Mr Hennessy sent an email to Mr Bray, the National Manager of BlueScope Distribution, attaching the December 2013 Benchmark spreadsheet (the tab relating to BlueScope Distribution). In the email, Mr Hennessy simply stated “cheers”. Mr Hennessy said the message was brief because Mr Ellis told him that Mr Ellis would speak to Mr Bray (and that Mr Hennessy should speak to Mr Cornelius of SMS). Mr Ellis said that he does not recall speaking to Mr Bray, but I place no weight on that evidence.

Email and discussion with SMS

922 At 2.13 pm on 17 September 2013, Mr Hennessy forwarded his email to Mr Bray to Mr Cornelius, the National Manager of SMS, copying Messrs Palermo and Gent, attaching the December 2013 Benchmark spreadsheet (the tab relating to BlueScope Distribution). In the email, Mr Hennessy stated:

Please find attached the summary of our proposed December prices, that we intend to release to the market tomorrow, for discussion this afternoon.

AP – can you please send the MI Benchmark spreadsheet with IPP details.

923 I infer that the second sentence of the email was an instruction to Mr Palermo to provide to Mr Cornelius the spreadsheet labelled “BANZ Benchmark Premiums December 2013” which had been prepared for the purposes of the CIPA pricing meeting on 16 September 2013 and which contained data and calculations for the purpose of CIPA determining its list prices for December 2013.

924 Mr Hennessy said that he had a discussion with Mr Cornelius with words to the following effect:

Mr Hennessy: Gerald, Jason and I have had discussions with lots of distributors about using the December list price as a pricing benchmark.

Jason is talking to Andrew Bray about this.

What we are doing is increasing the list price more than the net price to create a 15% margin. As a part of implementing that, we are changing the early order offer to a distributor discount.

What we want you to do is to seriously consider raising your prices in line with the list price.

Mr Cornelius: This is a leap of faith... this won't have traction in the market.

925 Mr Hennessy does not recall whether Mr Cornelius said that he would apply the list prices. In cross-examination, Mr Hennessy agreed that while he was recommending to Mr Cornelius that he consider pricing by using the prices in the price list as a benchmark, and he was hoping that Mr Cornelius would do so, Mr Hennessy knew that SMS's prices were ultimately a matter for independent decision by Mr Cornelius. Mr Hennessy said that he reported his conversation with Mr Cornelius to Mr Ellis in words to the effect that Mr Cornelius was unconvinced that the strategy would work.

Email to OneSteel Sheet & Coil

926 At 2.14 pm on 17 September 2013, Mr Hennessy sent an email to Messrs Birchall and Szecsodi of OneSteel Sheet & Coil, copying Mr Lambourne (OneSteel) and Messrs Ellis and Kelso, and attaching the December 2013 Benchmark spreadsheet (the tab relating to OneSteel). In the email, Mr Hennessy stated:

Further to our discussions this morning, please find attached the summary of our December Prices that will be released to the market tomorrow.

Thank you for your support.

927 A short time later, Mr Szecsodi replied by email to Mr Kelso stating:

I think this should be the benchmark document template for all future price reviews. Its excellent.

928 Mr Hennessy forwarded that email to Mr Ellis.

Email to Southern Steel

929 At 2.29 pm on 17 September 2013, Mr Hennessy sent an email to Kevin Smaller, Mr Larkin and Mr Lander, copying Peter Smaller and Messrs Ellis and Sparks, and attaching the December 2013 Benchmark spreadsheet (the tab relating to Southern Steel). In the email, Mr Hennessy stated:

Further to our recent discussions, please find attached a summary of our proposed December prices, that we intend to release to the market tomorrow.

Thank you for your support.

930 Three minutes later, at 2.33pm on 17 September 2013, Kevin Smaller replied to Mr Hennessy by email (copying all original addressees) with the message:

Have you yet communicated this level of detail with BSD/SMS or OSD or CMC/Coils?

931 Mr Hennessy said that he does not recall responding to Kevin Smaller’s email, either by email or phone. Nevertheless, based on his usual practice, Mr Hennessy said that he believes that he would have called Mr Smaller and answered his question in the affirmative. That evidence is consistent with a Salesforce record of a conversation between Mr Sparks and Mr Smaller on 17 September 2014. The Salesforce record states:

- Discuss December pricing position with Kevin which he had actually earlier discussed with Matt. Comfortable with the increase on plate of \$35/t based on sighted offers.
- Offered his support if we are coming up against road blocks within the Southern business as we tighten our position on providing end customer discounts into the market.

Email to CMC Steel

932 At 2.33 pm on 17 September 2013, Mr Hennessy sent an email to Mr Simpkin, CMC Steel copying Mr Stedman (CMC Australia) and Messrs Ellis and Gent, and attaching the December 2013 Benchmark spreadsheet (the tab relating to CMC Steel). In the email Mr Hennessy stated:

Further to our recent discussions, and Troy Gent’s discussions with Ashley and Nick, please find attached a summary of our proposed December prices, that we intend to release to the market tomorrow.

I have left you a voice mail message to discuss.

Thank you for your support.

933 Mr Simpkin forwarded the email to Mr (Ashley) Smith at CMC Steel. The next day Mr Smith replied to Mr Hennessy providing CMC Steel’s comments on the import parity price for various products in the spreadsheet. Mr Hennessy forwarded those comments to Mr Gent.

934 Late in the day on 17 September 2013, Mr Gent sent an email to Mr Hennessy and the Distribution Markets sales team summarising his feedback from distributors, including CMC Steel. In respect of CMC Steel, Mr Gent’s email stated, amongst other things: “OK with all suggested benchmarks and movements and also pricing strategy”.

Email to OneSteel Metalcentre

935 At 4.46 pm on 17 September 2013, Mr Kelso sent an email to Messrs Lewin and Bolzan of OneSteel Metalcentre, copying Mr Hennessy, and attaching an extract of the December 2013 Benchmark spreadsheet (the tab relating to OneSteel) limited to plate products (which were distributed by OneSteel Metalcentre). In the email, Mr Kelso stated:

Based on our discussions we are wanting to release the December pricing however we

would like to get some alignment with OST in this regard. Attached is the summary of what we would like to do which follows on from some of the principals [sic] discussed at the Gold Coast or on the phone.

If we can meet post the Southern Regional review that would be ideal so we can go over the strategy and I hope you will find that this is the right step in bringing some value back to Distributors in the market.

936 I infer that the reference to the discussion at the Gold Coast is a reference to the discussion at the Australian Steel Institute conference on 10 September 2013 between Messrs Ellis, Hennessy and Lewin. I also infer that the phrase “bringing some value back to Distributors in the market” is a euphemism for an increase in distributors’ gross sales margins (the difference between the sale price and the cost of goods). The statement indicates that the benchmarking strategy contemplated that the distribution market broadly would adopt the strategy and set prices at the level of CIPA’s price lists. Mr Kelso said that his request for “alignment with OST” was a request for OneSteel Metalcentre to provide him with feedback in relation to the prices set out in the attached spreadsheet. In cross-examination, it was suggested to Mr Kelso that he was not seeking feedback as to whether OneSteel would, in fact, be charging the list prices in the spreadsheet, because these were just going to be recommended prices. Mr Kelso replied that he was constantly trying to get OneSteel’s prices up. Mr Kelso said that, as part of his encouragement to get prices up, he would suggest to customers that the recommended resale price lists were a useful tool for them to make an acceptable margin in the market.

937 At 5.57 pm on 17 September 2013, Mr Bolzan replied by email to Mr Kelso (copying the original addressees). The email referred to an ongoing disagreement with respect to November prices and stated that Mr Bolzan would not comment on the December prices until the November issue was resolved. The email then continued as follows:

PRICING STRUCTURE

Changing the BSL pricing structure is of definite appeal. We continue to have confusion around pricing and there would appear to be confusion with our competitors so eliminating this is good for both BSL and the general Market. Open to understanding how this would work and believe we are all in agreement that December or January is ideal to start – we would indeed like BSL to also start in January with supplying their pricing in an electronic format for us to upload into SAP so this may coincide well.

938 I infer that, by the email, Mr Bolzan was expressing general support for the benchmarking strategy, but that he wanted further discussion with BlueScope about how the strategy would work.

939 At 8.09 pm on 17 September 2013, Mr Lewin also replied by email to Mr Kelso (copying the original addressees). The email stated:

Happy to discuss tomorrow time permitting. I think it is paramount that we work through this in detail collectively and consider the consequences of the change and how the change is managed.

Please do not think we have already reached an agreement on the mechanism or quantum of change, this is quite separate to the in principle discussions we have had to date.

940 I infer that the reference to “change” is a reference to the change in CIPA’s pricing approach, which was part of the benchmarking strategy (ie, increasing the list prices as a recommended resale price and providing a greater discount to distributors to maintain the same net prices). I also infer that Mr Lewin’s request for further discussions about “the consequences of the change and how the change is managed” indicates that Mr Lewin wanted further discussions with BlueScope about implementing the benchmarking strategy and increasing OneSteel’s prices to the level of CIPA’s list prices.

941 Later that day, Mr Hennessy forwarded both Mr Bolzan’s email and Mr Lewin’s email to Mr Ellis with the same message: “FYI – some work to do with OST MC re plate tomorrow”. Mr Hennessy believed, from the emails sent by Messrs Bolzan and Lewin, that BlueScope had work to do to convince OneSteel Metalcentre of CIPA’s net price change and possibly the benchmarking strategy.

942 At 4.02 pm on 19 September 2013, Mr Bolzan sent an email to Mr Hennessy and Mr Kelso, copied to Mr Lewin with the subject “BSL Pricing Discussions and Confirming Actions”. In the email, Mr Bolzan stated:

Hey Guys,

Firstly, thank you for the discussions this morning – I appreciate that this information could have easily been held back and I hope it reflects the mutual relationship maturity and co-operation.

Just wanted to cover off our understanding of actions from here for November and December pricing, taking into account the SANWA intelligence received which verifies our assumptions around real Trader offers.

For November (an increase proposed of \$19) – we will put through the price rise into our systems and work through the necessary process of recovering from the market as much as possible (ideally of course all!). BSL will rebate back an additional \$10 similarly to the 2% Customer Loyalty (we agreed to keep this confidential to the same group).

For December (a proposed \$35 increase) – we will again put through the price rise in our systems and work through as necessary recovery of this additional cost in the

market. It will hopefully allow an opportunity to also reset margins to a more acceptable level. However, given the SANWA information verifying our assumptions/intelligence, this additional \$35 is to also be rebated back (as per the \$10 above and in addition to) – meaning a \$45/T rebate in December.

The structure of that pricing from BSL we are happy to discuss and work with you further on to ensure that the pricing is simplified and ensures distributors are clear on their base pricing.

...

943 It is apparent from the email that Mr Bolzan had had a discussion with Messrs Hennessy and Kelso that morning (ie, on 19 September 2013). The email also follows on from Mr Bolzan’s email sent on 17 September 2013 in which he referred to an ongoing disagreement with respect to November prices. The email records acceptance of the proposed December 2013 price increase and expresses a hope that the increase will “allow an opportunity to also reset margins to a more acceptable level”. The email also expresses acceptance of CIPA’s restructured pricing and an acknowledgment that the purpose of the restructure is to “ensure distributors are clear on their base pricing”. I infer from the content of the email that, in the discussion, Messrs Hennessy and Kelso communicated to Mr Bolzan that the purpose of the proposed changes to the December 2013 price list was to provide distributors with recommended resale prices for the purpose of setting their base prices.

944 Mr Hennessy said that he does not have an independent recollection of this discussion.

945 Mr Kelso said that, where Mr Bolzan stated “it will hopefully allow an opportunity to also reset margins to a more acceptable level”, he understood, based on their discussions, that Mr Bolzan was referring to the implementation of the RRP strategy and distributors’ ability to extract better margins from their end customers. Mr Kelso also said that, at least from the date of this email, OneSteel Metalcentre had said that they would use the recommended resale price as the base-line when pricing the steel that they purchased from BlueScope. In cross-examination, Mr Kelso agreed that whether or not OneSteel could increase its margins depended on what happened in the market.

Email to Selection Steel

946 At 4.26 pm on 17 September 2013, Mr Hennessy sent an email to Messrs Gregory and Collis (Selection Steel), copying Mr Ellis, and attaching a version of the December 2013 Benchmark spreadsheet. Selection Steel was not an aligned distributor of BlueScope and therefore not a regular purchaser of CIPA’s flat steel products. The figures in the spreadsheet for import parity price, list price and distributor support (discount) were the same as for the other December

2013 Benchmark spreadsheets sent to BlueScope Distribution and aligned distributors. The figures in the spreadsheet for the net price were the same as in the version sent to Southern Steel. In the email, Mr Hennessy stated:

Further to our recent discussions, please find attached a summary of our proposed December prices, that we intend to release to the market tomorrow.

Gary - I will call to discuss.

Thank you for your support.

947 In his written statement, Mr Hennessy said that, after sending the email, he had a conversation with Mr Collis in words to the following effect:

I have sent you our December pricing summary. It contains changes that we are making including an increase to the list price and there is an opportunity for you to use our list price as a benchmark when you set your prices.

948 Mr Hennessy said that, by that statement, he intended for Selection Steel to increase its prices across all their products, not just CIPA products. Mr Hennessy's statement to Mr Collis would not have made any sense unless the reference to "benchmark" was a reference to pricing across all of Selection Steel's products. Mr Hennessy said that he did not recall how Mr Collis responded. In cross-examination, Mr Hennessy clarified that, by the word "intended", he meant to convey that he was recommending that Selection Steel increase their prices across all their products and he was hoping that they would do so.

949 It was put to Mr Hennessy in cross-examination that he was not intending to convey to Mr Collis that it would be safe to benchmark against CIPA's price list without losing volume because other distributors would be doing the same. Mr Hennessy resisted that suggestion. He said that, by using the words "this is the price list we're releasing to the market tomorrow", and sending out consistent information, there was coordination. He nonetheless agreed in cross-examination that he did not intend to give Mr Collis comfort about what other distributors would do (because Mr Hennessy did not know what other distributors would be doing).

950 Mr Hennessy said that, soon after he sent the email, he received a reply email from Mr Gregory containing words to the effect: "Matt – what do you want me to do with this". Mr Hennessy said that he no longer has a copy of the email Mr Gregory sent to him. Mr Hennessy said that the impression he had upon reading Mr Gregory's response was that Mr Gregory was affronted that Mr Hennessy had sent him the information in the spreadsheet.

951 Mr Collis said he had no recollection of receiving the email or attachment from Mr Hennessy. He said that it was not normal for BlueScope to send Selection Steel any documents with that level of pricing detail.

Email to Apex Steel

952 At 5.51 pm on 17 September 2013, Mr Hennessy sent an email to Mr Calleja (Apex Steel), copying Mr Ellis, and attaching a version of the December 2013 Benchmark spreadsheet. Although Apex Steel was generally referred to as an aligned distributor of BlueScope, and was a regular purchaser of CIPA's flat steel products, the final version of the December 2013 Benchmark spreadsheet prepared by Mr Unicomb on 17 September 2013 did not have a separate tab for Apex Steel (unlike OneSteel, Southern Steel and CMC Steel). The figures in the spreadsheet sent to Mr Calleja for import parity price, list price and distributor support (discount) were the same as for the other December 2013 Benchmark spreadsheets sent to BlueScope Distribution and aligned distributors. The figures in the spreadsheet for the net price were marginally above the figures in the version sent to CMC Steel. In the email Mr Hennessy stated:

Further to our recent discussions, please find attached a summary of our proposed December prices, that we intend to release to the market tomorrow.

I will call to discuss.

Thank you for your support.

953 In his written statement, Mr Hennessy said that, after sending the email, he had a conversation with Mr Calleja in words to the same effect as his conversation with Mr Collis of Selection Steel:

Joe, I have sent you our December pricing summary. It contains changes that we are making including an increase to the list price and there is an opportunity for you to use our list price as a benchmark when you set your prices.

954 Mr Hennessy's evidence with respect to his intention in making those statements was also the same as with respect to Selection Steel; ie, he intended for Apex Steel to increase its prices across all its products, not just CIPA products. Mr Hennessy did not recall Mr Calleja's response.

955 In his written statement, Mr Calleja said that the email he received from Mr Hennessy was a follow up email from Mr Hennessy after the Melbourne Airport meeting on 6 September 2013. Having refreshed his recollection from reading the email, Mr Calleja stated that he believed

that he had a conversation with Mr Hennessy prior to the email being sent to him in words to the following effect:

Hi Joe, I am going to send to you our December prices that includes our recommended retail pricing that Jason raised at our meeting on the 6th. We encourage you to implement it and raise your prices.

956 For reasons given earlier, I place little reliance on Mr Calleja's evidence. Nevertheless, I give some weight to the above evidence as it is broadly consistent with Mr Hennessy's evidence. As noted earlier, Mr Hennessy also gave evidence that the only reason that he sent the December 2013 Benchmark spreadsheet to Mr Calleja and Peter Smaller was because they were in attendance at the Melbourne Airport meeting on 6 September 2013. Mr Calleja confirmed in evidence that he did not usually deal with pricing for distribution of flat steel products. Mr Compagnino usually dealt with BlueScope and others in relation to pricing for flat steel products that Apex Steel wanted to purchase. I accept that evidence. It supports the finding, which I make, that Mr Hennessy sent the December 2013 Benchmark spreadsheet to Mr Calleja as a follow up to the discussion at the Melbourne Airport meeting and intending that the list prices shown in the spreadsheet be used by Apex Steel as a benchmark for its pricing of flat steel products.

957 At 8.32 pm on 17 September 2013, Mr Hennessy sent an email to Ms Minogue, copying Mr Ellis and Messrs Calleja and Compagnino of Apex Steel. The email stated:

Further to my discussion with Joe and them [sic] Jason, can you please arrange a time in the next two weeks for Jason to meet with Joe and Nello at Apex, Dandenong Sth.

958 Mr Hennessy said he has some recollection that the meeting he was requesting was to discuss the December price list and the benchmarking strategy. I readily draw the inference from the email that, after speaking with Mr Calleja on 17 September 2013, Mr Hennessy then spoke to Mr Ellis, and Mr Ellis asked Mr Hennessy to organise a meeting with Messrs Calleja and Compagnino. I infer that the meeting was to discuss CIPA's list prices and the benchmarking strategy. Mr Hennessy said that he was on annual leave for three weeks from 20 September 2013 and the meeting was ultimately scheduled for early October 2013 so he did not end up attending.

Email to Vulcan Steel

959 At 5.54 pm on 17 September 2013, Mr Hennessy sent an email to Mr Casey of Vulcan Steel, copying Mr Ellis, and attaching a version of the December 2013 Benchmark spreadsheet. Vulcan Steel was not an aligned distributor of BlueScope and therefore not a regular purchaser

of CIPA's flat steel products. The figures in the spreadsheet for import parity price, list price and distributor support (discount) were the same as for the other December 2013 Benchmark spreadsheets sent to BlueScope Distribution and aligned distributors. The figures in the spreadsheet for the net price were marginally above those in the version sent to Apex Steel. In the email Mr Hennessy stated:

Further to our recent discussions, please find attached a summary of our proposed December prices, that we intend to release to the market tomorrow.

I will call to discuss.

Thank you for your support.

960 In his written statement, Mr Hennessy said that, after sending the email, he had a conversation with Mr Casey in words to the same effect as his conversation with Mr Collis of Selection Steel and Mr Calleja of Apex Steel:

I have sent you our December pricing summary. It contains changes that we are making including an increase to the list price and there is an opportunity for you to use our list price as a benchmark when you set your prices.

961 Mr Hennessy's evidence with respect to his intention in making those statements was also the same as with respect to Selection Steel and Apex Steel; ie, he intended for Vulcan Steel to increase its prices across all its products, not just CIPA products. Mr Hennessy said that, during this conversation, Mr Casey said words to the following effect:

We have good pricing discipline. This is more of an opportunity for others including SMS to improve their discipline.

962 Mr Hennessy understood Mr Casey's reference to "discipline" to mean that Vulcan Steel were already pricing higher than other distributors.

963 There exists a Salesforce record of a discussion between Mr Kelso and Mr Moss of Vulcan Steel that purportedly occurred on 18 September 2013. In his written statements, Mr Kelso appears to verify the call record. However, whilst the record states that the conversation occurred on 18 September 2013, having regard to its content and other documents (specifically, emails sent on 24 and 25 September 2013), I consider it probable that the conversation occurred on 24 or 25 September 2013. The record indicates that it was not created until 30 September 2013, and I consider it probable that, when the record was created, the conversation was incorrectly recorded as having occurred on 18 September 2013. The record is addressed below.

Dissemination of CIPA's Distribution Market price lists for December 2013

964 At 4.03pm on 18 September 2013, Mr Unicomb sent the members of CIPA's Distribution Markets sales team an email advising that all the relevant price schedules and letters for CIPA's Distribution Market price lists for December 2013 had been finalised. In his email, Mr Unicomb summarised the key changes that had been made to the December 2013 price lists, including:

- (a) the removal of the "early order offer";
- (b) the introduction of the "distributor support discount"; and
- (c) no cut-off date applied to the Distributor Support Discount but normal lead times would apply.

965 The email included pro forma emails and letters to SMS, OneSteel, Southern Steel and CMC Steel summarising the key changes and which also contained a table of standard flat steel products with the list price change (applicable to each distributor) stated in terms of dollars per tonne and percentage.

966 Apart from the foregoing changes, the Distribution Market price list for sheet and coil products for December 2013 (which was dated 18 September 2013) was similar in form to price lists issued in previous months. The price list continued to include the "Advanced Offer" and the "Custom Offer" and stated an "Invoice Price (ex GST)" in respect of the range of available flat steel products. There was no express reference to "recommended resale price".

967 On 19 December 2013, the Distribution Market price list for sheet and coil products for December 2013 was sent to SMS, the aligned distributors OneSteel, Southern Steel and CMC Steel, and to Vulcan Steel and Selection Steel. Mr Hennessy said that this was the first time, as far as Mr Hennessy was aware, that the CIPA monthly price list for distribution customers had been sent to Vulcan Steel or Selection Steel.

968 In respect of the aligned distributors, the Distribution Market price list for sheet and coil products for December 2013 was sent by standard form email in the morning of 19 September 2013:

- (a) by Mr Sparks to Peter Smaller, Kevin Smaller, Mr Larkin and Mr Lander of Southern Steel together with the standard form letter advising Southern Steel of the percentage price change across a sample of flat steel products;

- (b) by Mr Gent to Messrs Simpkin, Klingos and Smith of CMC Steel together with the standard form letter advising CMC Steel of the percentage price change across a sample of flat steel products; and
- (c) by Mr Kelso to Messrs Birchall and Szecsodi of OneSteel Sheet & Coil together with the standard form letter advising OneSteel Sheet & Coil of the percentage price change across a sample of flat steel products.

969 On 20 September 2013, Mr Szecsodi of OneSteel Sheet & Coil forwarded Mr Kelso’s email of 19 September 2013 and attachments to OneSteel staff. In his email, Mr Szecsodi stated:

Hi all – please see BSL offer for December 2013 attached. You will note that there have been some significant increases in list pricing to support recommended retail price increases in the distribution market, however in most cases (other than Zincanneal and CR [Cold Rolled]) these have either been completely or partially offset by the introduction of the “Distributor Support Discount” or DSD.

970 Mr Kelso confirmed in evidence that he had a series of conversations with Mr Szecsodi about the RRP strategy, in which Mr Kelso said words to the effect: “[t]here are a series of increases in the list price to reflect the recommended retail price that we encourage you to sell at”.

971 Mr Kelso also sent an email to, amongst others, Messrs Bolzan and Lewin of OneSteel Metalcentre attaching CIPA’s December 2013 list prices for a range of steel plate products.

972 At about lunchtime on 19 September 2013, Mr Hennessy sent emails to:

- (a) Messrs Gregory and Collis of Selection Steel; and
- (b) Mr Casey of Vulcan Steel,

attaching a copy of the Distribution Market price list for sheet and coil products for December 2013 and containing the message:

Further to our recent discussions, please find attached a copy of our December 2013 Sheet & Coil Offer.

973 Mr Collis said he had no recollection of receiving this specific email. However, he generally recalled receiving documents like this from BlueScope for a number of years beginning at around this time. Mr Collis observed that the prices in this document were CIPA’s list prices and not the final (or “net”) prices they would have actually charged Selection Steel (after rebates and other discounts). The document provided no information about the net prices that BlueScope was offering to Selection Steel.

974 On 22 September 2013, Mr Casey of Vulcan Steel forwarded Mr Hennessy's email of 19 September 2013, together with the attached Distribution Market price list for sheet and coil products for December 2013, to his colleagues at Vulcan Steel, Messrs Moss and Millard, and copied to Mr Gousmett, stating:

Hi guys,

Not sure if you have seen this pricing from Bluescope, but they claim to be trying to lift the retail pricing in the market, this is not your pricing you negotiate monthly the new list prices.

Probably best to give me a call tomorrow to discuss.

975 I infer from this email that Mr Casey's understanding was that, through the new pricing in the Distribution Market price list for sheet and coil products for December 2013, BlueScope was seeking to increase prices for flat steel products in the distribution market. I also infer that that understanding would have arisen from the conversations between Messrs Ellis, Hennessy, Casey and Gousmett at the Australian Steel Institute conference on 9 September 2013 and between Mr Hennessy and Mr Casey on 17 September 2013.

976 For reasons that are not explained in the evidence, there was a delay in sending the Distribution Market price list for sheet and coil products for December 2013 to Apex Steel. Nevertheless, on 23 September 2013, Mr Sparks sent the price list by email to (amongst others) Mr Compagnino of Apex Steel in the same form as the email sent to the other aligned distributors together with the standard form letter advising Apex Steel of the percentage price change across a sample of flat steel products.

Mr Hennessy's annual leave from 20 September to 14 October 2013

977 Mr Hennessy was on annual leave between 20 September 2013 and 14 October 2013. Mr Hennessy said that he did not do any business for CIPA whilst he was on leave; however he did occasionally check his emails remotely and, to the extent that any needed to be forwarded to other people, forwarded those emails.

EUT pool for SMS – 23 and 24 September 2013

978 As noted earlier, on 16 September 2013 Mr Gent notified Mr Cornelius (SMS) that, in accordance with discussions with Messrs Ellis and Hennessy, BlueScope was reducing the level of EUT support. Mr Cornelius voiced his objection. On 23 September 2013, Mr Ellis sent an email to Messrs Bray and Cornelius, copied to Messrs Hennessy and Gent, proposing that they wait for Mr Hennessy's return from leave to review the position with

respect to the “pool” funds but that specific EUTs be approved by Mr Gent in Mr Hennessy’s absence. Later that day, Mr Gent sent a response outlining his understanding of CIPA’s position and why the EUT pool would be limited significantly.

Discussions with CMC Steel and Vulcan Steel on 24 and 25 September 2013

979 On 24 September 2013, Mr Simpkin of CMC Steel sent Mr Ellis an email with the heading “Pricing Vs Import”. In his email, Mr Simpkin stated:

I expect we will continue to run into competitive pricing on imports while the channel still has some cheap product in it. Below is an example and one I hope you may be able to address. I assume you remain focused on keeping the Distributors profitable and fighting imports? If so we will continue to need assistance from time to time.

980 Under those statements, Mr Simpkin extracted communications he had received from his subordinates complaining about CIPA’s refusal to provide financial support to CMC Steel (in the form of a tactical pricing or EUT rebate) to enable it to lower its price to compete with Vulcan Steel. It is apparent from the context of the email that CMC Steel had given a quote to a customer, Titan, but had been told by the customer that Vulcan Steel had offered a lower price. The email referred to statements made by “Troy” (whom I infer is Troy Gent) to Mr Smith (CMC Steel) to the effect that CIPA was “not going to compete with import parcels ... in a climate where they are pushing prices up” and that CIPA was doing it (ie refusing support) “to bring profitability back into distribution”. I infer from the email that Mr Gent had communicated to Mr Smith that CIPA was seeking to bring about an increase in prices in the distribution market in order to improve the profitability of distributors, and that CIPA would not undermine that strategy by offering an EUT rebate that would assist distributors to reduce prices to compete with imports.

981 At about 7.00 pm that day, Mr Ellis forwarded Mr Simpkin’s email to Mr Kelso. In his affidavit, Mr Ellis deposed that he wanted Mr Kelso to investigate the authenticity of the information provided by Mr Simpkin before determining whether an EUT should be provided. I consider that evidence to be only partially correct. The benchmarking strategy, instigated by Mr Ellis, was directed at persuading or encouraging distributors, including non-aligned distributors, to use CIPA’s price lists as a benchmark or base price. As seen below, Mr Kelso had a conversation with Vulcan Steel which included reference to the benchmarking strategy. I consider that Mr Ellis intended for Mr Kelso to have such a conversation because it was consistent with CIPA’s overall business strategy at that time.

982 At 10.58 am on 25 September 2013, Mr Kelso responded to Mr Ellis’s email as follows:

Jason

I had a chat with Vulcan – Dave Millard and Andrew Moss.

This business has been sitting primarily with Southern (imported) for the last 3 months. Vulcan has only been getting short call small volume orders. They categorically stated they have not done a parcel of any consequence. Vulcan has indicated that they are increasing prices post September by 4-5% but they have been at \$1280/mt up to this month only.

I did discuss our strategy and they did highlight they have not been briefed by either Adrian Casey or Jon Gousmett on your meeting with Matt in the Gold Coast. They committed to following up with Adrian in a phone hook up tomorrow. As expected they believe the principles are very sound.

They indicated there is some irony – the BSL aligned channel in their view is the one which has been eroding the value of the Distribution channel.

983 As noted earlier, there exists a Salesforce record of a conversation between Mr Kelso and Mr Moss of Vulcan Steel that purportedly occurred on 18 September 2013. However, the record of the conversation is materially the same as the content of Mr Kelso's email of 25 September 2013. I consider it probable that the conversation occurred on the morning of 25 September 2013, and not on 18 September.

984 In his written statement, Mr Kelso deposed that, having refreshed his memory by reviewing this email, he recalled that he had a discussion with Messrs Moss and Millard of Vulcan Steel in words to the following effect:

Mr Kelso: Is Vulcan trying to capture some of the Titan business at the moment?

Moss/ Millard: Titan's business has been sitting primarily with Southern for the last 3 months. Southern are using imported product. We have only been getting short call volume orders. We have not done a parcel of any consequence. We are increasing our prices post September by 4%-5%.

Mr Kelso: Have you been briefed by Adrian Casey or Jon Gousmett on their discussion with Jason Ellis and Matthew Hennessy on the Gold Coast?

Moss/ Millard: No, we have not been briefed yet.

Mr Kelso: BlueScope is implementing a strategy whereby we are trying to provide distributors, like Vulcan, with an opportunity to make a better margin on the steel that you sell to your customers. BSL distribution strategy is to set a RRP in the market allowing distributors to use this as a base for their pricing.

Moss/ Millard: How?

Mr Kelso: The opportunity to extract more value is in the form of a List Price, which we will refer to as the RRP. The RRP has been set internally to allow you to buy steel at a net net price and sell that steel at a list price that has been increased. The increased list price allows you to make a 15% margin, approximately, across a range of products, if the list price

is used as a baseline or benchmark for your pricing.

Moss/ Millard: Those principles are sound. We will follow up with Adrian Casey by phone tomorrow. We actually think it is BlueScope's aligned channel that is eroding the value of the distribution channel.

985 I infer that the reference to the "meeting with Matt on the Gold Coast" is a reference to the meeting between Messrs Ellis, Hennessy, Casey and Gousmett at the Australian Steel Institute conference on 9 September 2013. The email is significant because it reinforces the conclusion that the benchmarking strategy was to encourage all distributors, including non-aligned distributors, to use CIPA list prices as a benchmark or base price in setting their prices to customers.

986 In cross-examination, Mr Kelso said that, in having this conversation with Mr Moss and Mr Millard, he was not suggesting or intending for them to understand that they could benchmark their prices based on the recommended resale price without losing volume because other distributors would be doing the same. I give that evidence little weight. I consider it to be a benign re-characterisation of Mr Kelso's conduct. The evidence supports a conclusion that CIPA was intentionally encouraging all distributors to use CIPA's list prices as a benchmark or base price, and doing so on the basis that the same message or encouragement was being given to all other distributors.

987 Later that day, Mr Gent replied to the foregoing email chain, in the form of an email sent to both Messrs Ellis and Kelso. In part, the email commented that: "... it would appear titan [sic] are playing the game a little and presenting an old offer from Vulcan that is no longer relevant. Either that or Vulcan are leading us astray. The ambiguity of Distribution!".

988 On 30 September 2013, Mr Gent sent a further email to Mr Ellis advising that CMC Steel had "locked in the GALVSPAN® business with Titan and achieved their target margin". The email also expressed the opinion that CMC Steel "have been played here and left money on the table as Vulcan from our intelligence were not at the table". On 1 October 2013, Mr Ellis replied to Mr Gent's email in the following terms:

Thanks Troy - good example..... we really need our guys to be very careful with 'giving' away price or price information..... has to be held far more tightly.

989 In his affidavit, Mr Ellis deposed that his reference to "giving away price" was a reference to EUT rebates. Mr Ellis said that he did not want his sales team giving away "price" by offering EUTs when it was not necessary for winning the end customer's business. Mr Ellis deposed

that his reference to “pricing information” was CIPA’s market intelligence on import trader offers and CIPA’s IPP rates on which its short lead time offers were based.

990 In his affidavit, Mr Ellis deposed that the above email chain exemplified the reason for Mr Ellis’s frustration with EUTs. In Mr Ellis’s view, distributors and end customers were using (or creating) misinformation in the market to derive a benefit at the expense of CIPA. That is, distributors would complain that one of their competitors was offering lower prices and request EUTs to compete. In Mr Ellis’s view, this simply had the effect of reducing the value of CIPA product in the marketplace, to the detriment of CIPA and distributors. I accept Mr Ellis’s evidence that, in the relevant period, he held those opinions. Indeed, it is uncontroversial that, at the time Mr Ellis commenced at CIPA, the market was highly competitive at both the manufacturing/import level and at the distribution level. It is plausible that end customers used “misinformation” about competing offers in order to obtain the best offer from suppliers. However, this evidence merely provides the commercial backdrop or context for Mr Ellis’s benchmarking strategy and why he implemented the strategy when he commenced at CIPA. It is clear that his business objective was to seek to bring about an increase in the prevailing market price for flat steel products at the distribution level of the market, which would be likely to produce a flow on increase in prices and sales revenue at the manufacturing/import level of the market and benefit BlueScope.

991 In his affidavit, Mr Ellis also deposed that he believed that if CIPA were to limit EUTs or tactical pricing support only to situations where a distributor was genuinely competing against import offers that it otherwise could not compete with, this would:

- (a) demonstrate to distributors that CIPA was not favouring BSD and SMS;
- (b) reduce the level of pricing complexity and administration; and
- (c) provide the opportunity for an increase in the value for CIPA material (ie, less CIPA material would be sold at cheaper prices, particularly for short lead time customers that could not otherwise purchase material from import traders).

992 In his affidavit, Mr Ellis claimed that he had decided to implement the initiative of restricting EUTs independently of any other matter, and it was not in return for distributors doing anything. In support of that claim, Mr Ellis said that he recalled saying to some distributors that CIPA was going to reduce the level of tactical pricing to all distributors including BSD and SMS; however, he never said to any distributor that BSD or SMS was going to sell at or above the CIPA recommended price.

993 I place no weight on Mr Ellis's evidence that he never said to any distributor that BSD or SMS was going to sell at or above the CIPA recommended price. I consider it inherently unlikely that, in promoting the benchmarking strategy to distributors, Mr Ellis did not indicate that BlueScope Distribution would be participating in the strategy. The strategy would have had no prospect of success without the participation of BlueScope Distribution. That is confirmed by the fact that Mr Ellis raised the topic of the price levels being charged by BlueScope Distribution at the Melbourne Airport meeting. I accept Mr Ellis's evidence that he said to distributors that CIPA would reduce the level of tactical pricing to all distributors including BSD and SMS. Contrary to Mr Ellis's claim, the evidence shows that the reduction in the availability of tactical pricing (EUTs) was an important component of the benchmarking strategy because it gave distributors confidence that other distributors, and particularly BlueScope Distribution, would not be receiving preferential pricing that would undermine the strategy's object.

Call to Southern Steel on 25 September 2013

994 There exists a Salesforce record of a telephone call made by Mr Gent to Bob Taylor of Southern Sheet & Coil (Qld) on 25 September 2013. Mr Gent recorded the following note of the call:

Challenged bob on a need to change the way distributors are behaving in the market. He admitted that no one is making money so challenged that something needs to change. If he and other distributors keep behaving as they do no one will win.

995 I infer that this conversation concerned CIPA's benchmarking strategy and that, in the conversation, Mr Gent challenged Mr Taylor to increase Southern Sheet & Coil's pricing in the market.

BlueScope discussions concerning NZSA pricing on 3 to 7 October 2013

996 On 3 October 2013, Mr Palermo sent an email to Mr Ellis stating:

As requested yesterday, an overview of the intra-relationship dynamics between CIPA & NZSA, and the corresponding impact in the Australian market.

997 Attached to the email was a two page document that summarised the history of pricing tensions between CIPA and NZSA. The paper referred to a number of attempts that had been made over the years to align the pricing of the two companies, but which had been unsuccessful. The paper noted that there was a pricing review meeting focussed on products that had traditionally been sold by the distribution sector which was attended on behalf of NZSA by Mr O'Brien, CIPA (Messrs Hennessy and Palermo), BSD/SMS (Messrs Cornelius, Cousins and Watson) and

Impact Steel (Mr Hussey). Under the heading “current pricing dynamics”, the paper stated that “CIPA provide guidance on desired price levels (as opposed to approving the NZSA price)” and “CIPA have attempted to set the price but with little success. Primary reason being differences in opinion regarding the competition/import benchmark”.

998 On 7 October 2013, Mr Ellis sent Mr Palermo’s document to Messrs Vassella and Garey with the following message:

Hi Mark & Andrew,

Would it be possible to discuss the CIPA/NZSA trading relationship issue either at the BANZ lead team meeting or separately if more appropriate.

Andrew G had raised this with me prior to going to NZ and it would be my preference to gain a direction before letting the issue drag on too long in a new tenure (for both of us).

Attached is a summary paper I had asked Anthony Palermo to draw up.

999 As noted earlier, Mr Ellis replaced Mr Garey at CIPA and Mr Garey had taken up the position of head of NZ Steel. Thus, at that time, Mr Ellis was seeking a meeting with the CEO of BANZ, Mr Vassella, and the head of NZ Steel, Mr Garey, about NZSA’s pricing in the Australian market. In his affidavit, Mr Ellis said that he does not recall the details of his discussion with Messrs Vassella and Garey. However, he recalled presenting the summary paper to them and supporting a change to the relationship between CIPA and NZSA. I infer that Mr Ellis pressed Mr Vassella to allow CIPA to exercise control over NZSA’s pricing in Australia, as Mr Ellis had proposed to Mr O’Brien on 13 September 2013.

Meeting with Mr Ra (SK Steel) on 9 October 2013

1000 A Salesforce entry made by Mr Gent records that, on 9 October 2013, Messrs Ellis and Gent met with James Ra, the General Manager of SK Steel. The summary of the discussion includes the following statements:

Jason explained our concerns with the market and that if everyone continues to sell at ~10% GM then businesses will continue to close and thus we felt if the market used our advanced offer as a benchmark then businesses could be profitable again or at least break even. James agreed that this was required but did not feel market was that disciplined [sic], especially SSG (who buy cheap and sell cheap and do not make extra money when they can and drag the rest of the market down) and Selection (who in Melbourne he feels do the same).

1001 In cross-examination, Mr Ellis agreed that the reference to the “GM” was a reference to gross margin and the reference to “advanced offer” was a reference to the Advanced Offer in the CIPA Distribution Market price list for sheet and coil products. Mr Ellis did not recall the

conversation. In cross-examination, Mr Ellis debated the meaning of the statements that were attributed to him. In my view, their meaning is clear. Mr Ellis conveyed to Mr Ra that if distributors of flat steel products priced their products at the level of CIPA's list prices (the Advanced Offer), the distribution businesses would be profitable. Mr Ra agreed, but indicated that he did not believe that distributors would price in that manner, making specific reference to Southern Steel and Selection Steel.

Meeting with Tony Lachimea (Apex Steel) on 9 October 2013

1002 On 9 October 2013, Mr Lachimea, the Finance Director of Apex Steel, sent an email to Mr Ellis, copied to Messrs Calleja and Compagnino of Apex Steel and Mr Croft of BlueScope, with the following message:

Jason,

Great to meet you this morning and discuss the Apex business relationship, and importantly how we both can continue to improve and strengthen the relationship.

Over the last few years the Apex Group have successfully managed to increase their purchases from Bluescope, especially in the Building Products market. With significant growth in Melbourne, Queensland and now S.A coming on board, we continue to grow our business in the Building Products market.

Our intention has always been to form closer bonds with Bluescope, however the objective has resulted in considerable pressure on our funding position, given current payment terms of 45 days.

Moving away from the import model has been very difficult and challenging from a funding perspective especially with the extended Credit Terms offered by the overseas mills and trading houses.

We welcome your offer to extend our Credit Terms by 30 days, as detailed in email previously sent to Joe Calleja by Matt Hennessey.

Our aim will be to purchase the additional if not most of our tonnes from Bluescope, however as highlighted and discussed in our meeting today, we cannot implement the change immediately without serious financial impact to our business. We will however aim to achieve this over the coming months, especially if the market moves towards Alto pricing and we receive competitive pricing from Bluescope.

We kindly ask if Bluescope would consider and immediately grant the additional 30 day Credit Terms, as this will assist the Apex Group to aim and achieve the objectives discussed today.

We await your reply

1003 I make the following findings on the basis of the email. First, Mr Lachimea had met with Mr Ellis that morning to discuss Apex Steel's trading relationship with BlueScope. Second, Mr Lachimea had communicated Apex Steel's intention to increase its purchase of steel from BlueScope, but could not do so immediately because it would have a negative financial impact

on its business. Third, there had been a discussion about the market moving towards “Alto pricing”. Fourth, Mr Lachimea was communicating in the email that increased purchases from Apex Steel were dependent on the market moving toward “Alto pricing” (and Apex Steel receiving competitive pricing from BlueScope).

1004 As discussed earlier, the evidence indicates that the acronym “alto” was an abbreviation for “advanced lead time offer” and was a reference to the Advanced Offer in CIPA’s monthly Distribution Market price list for sheet and coil products. I infer from the email that, at the meeting between Messrs Ellis and Lachimea, there had been a discussion about the benchmarking strategy with the aim of the strategy being that pricing in the distribution market would move to the Advanced Offer stated in CIPA’s Distribution Market price list for sheet and coil products. I also infer that, at that time, Mr Ellis understood the expression “alto” offer. This becomes relevant to an aspect of Mr Ellis’s evidence, discussed below.

Internal reports as at 11 and 12 October 2013

1005 On 11 October 2013, Mr Ellis sent an email to the BANZ Sales and Marketing Leadership Team in relation to the format of CIPA’s monthly review internal reporting, which Mr Ellis was revising with the assistance of “Matthew K” (whom I infer is Matthew Kari). Mr Ellis requested feedback on a monthly basis on the topics set out in the email, specifying that he just wanted “the big ticket items”. The email provided an illustration of the type of reporting Mr Ellis was seeking. Under the topic heading “Key Customer Issues”, the first bullet point was “Benchmarking concept is gain [sic] some traction amongst distribution customers”. In his affidavit, Mr Ellis deposed that the foregoing statement was not reporting on any particular event, but simply identifying the type of things that might be included in a monthly report. Mr Ellis said that he did not mean to suggest that any distributor was setting prices at or above the level of the recommended resale price and that Mr Ellis did not understand that to be occurring at any time. I do not accept that evidence. Whilst the email principally concerned the format for future monthly reporting, and the above statement was illustrative of the content of reports, the content of the email indicates that the above statement was intended to be a factual report on the state of the market. In my view, the email provides evidence that, at that time, Mr Ellis’s opinion was that his benchmarking strategy was gaining acceptance amongst distribution customers.

1006 Later on 11 October 2013, Mr Kari circulated the “CEO Market Report” for October 2013 to Mr O’Malley (Managing Director of BlueScope), Mr Vassella and other members of the

BlueScope Executive Leadership group, copied to the BANZ Sales & Marketing Lead Team (which included Messrs Ellis and Hennessy). The Report contained a detailed overview of the business. Under the heading “Distribution” and sub-heading “Price”, the Report stated:

A different strategy was adopted to previous months for December delivery including (i) earlier announcement timing than usual (11 weeks notice compared to 9 weeks) to deliver a price leadership outcome, and (ii) increased list price through a changed tactical support mechanism as a means to support channel partners to increase prices in the market and improve overall profitability.

1007 In his written statements, Mr Hennessy stated that the “different strategy” described in that document was a reference to several of the key elements of the benchmarking strategy. I infer that the Report was prepared with input and oversight of Mr Ellis. The above statements confirm that the object of the benchmarking strategy was to support distributors in increasing their prices and improving their profitability.

BlueScope announces acquisition of OneSteel Sheet & Coil – 14 October 2013

1008 On 14 October 2013, Mr Vassella sent an email to all BANZ employees announcing that BlueScope had agreed to acquire OneSteel’s sheet and coil distribution assets (encompassing OneSteel’s flat steel processing and distribution businesses in Sydney, Brisbane, Adelaide and Perth). Mr Vassella advised that the acquisition remained subject to ACCC approval and the completion was targeted for the end of the December quarter. Mr Vasella also stated that, upon approval and completion of the acquisition, BlueScope intended to integrate the OneSteel sheet and coil processing and distribution assets into BlueScope’s SMS distribution business.

Proposed joint meeting with CMC Steel and Southern Steel – 15 October 2013

1009 At 8.43 am on 15 October 2013, Mr Simpkin sent an email to Mr Ellis (copying Mr Hennessy and Ms Minogue) which stated:

Jason

I have had advise [sic] from our Legal Department that I should not attend the proposed meeting with Southern. Happy to meet with you one on one but there is some concern over the anti-competition implications. Can we arrange for a separate meeting.

1010 At 10.20 am, Mr Ellis replied to Mr Simpkin as follows:

Hi Glenn - can - no issue - Alison can u work out an alternative - cheers Jason

1011 In his affidavit, Mr Ellis deposed that the “proposed meeting with Southern” was a meeting that he was trying to arrange between representatives of CIPA, CMC Steel and Southern Steel for the purposes of CMC Steel and Southern Steel providing processing services to each other.

In cross-examination, Mr Ellis was challenged about that evidence. Mr Ellis denied that, at that time, he was attempting to bring together distributors to discuss the benchmarking strategy. There is no documentary or other evidence that corroborates Mr Ellis's evidence concerning the meeting. As discussed below, a meeting between CIPA and CMC Steel proceeded on 22 October 2013. That meeting discussed the benchmarking strategy. For reasons given earlier, I place no weight on Mr Ellis's evidence concerning the planned joint meeting between CMC Steel and Southern Steel. Nevertheless, there is insufficient evidence to make an affirmative finding that Mr Ellis had proposed the joint meeting to discuss the benchmarking strategy collectively with CMC Steel and Southern Steel.

Discussion with Selection Steel on 15 October 2013

1012 On 16 October 2013, Mr Gent sent an email reporting on a recent discussion with Mr Gregory of Selection Steel. Mr Hennessy had just returned from leave and Mr Gent had been acting in Mr Hennessy's role during his time on leave (including with respect to approvals for tactical pricing support). The email included a preceding chain of emails recording that CMC Steel had sought support in respect of an order in Western Australia to compete against an offer from Selection Steel. In his email, Mr Gent reported to Mr Hennessy that he had spoken to Mr Gregory about Selection Steel's offer in Western Australia. The email reports that Mr Gregory made the following statements:

He has also stated that they sell minimal volume in WA and was surprised that Selections name was raised but interested that market intelligence was correct re price but not re location of material. His WA business returns on average 17-20% GM so he has no concerns with his sales manager there or their behaviour in market and will continue to walk from business if unprofitable.

1013 The email indicates that Mr Gregory provided some assurance to Mr Gent about the gross margin being achieved by Selection Steel in Western Australia and that Selection Steel would not pursue unprofitable business. In his statement, Mr Hennessy said that he understood those statements in that manner. The email provides evidence that Selection Steel understood the benchmarking strategy to be an understanding by which distributors would seek to set their prices (as a base or benchmark) in line with the 15% gross margin reflected in the CIPA Distribution Market price lists for December 2013.

BlueScope instructions to NZSA concerning list prices – 16 to 18 October 2013

1014 In his written statement, Mr O'Brien said that, on a date he does not recall, he had a conversation with Mr Ellis in words to the following effect:

Mr Ellis: BSL wants you to introduce a list price so that we can drive channel profitability in the market.

Having one list price across the market will give distributors a benchmark price which they can use to resell our products to their end customers.

Mr O'Brien: How do you think that is going to work? That is not how our customers actually purchase steel from us or how we have ever run our pricing process to our customers.

1015 Mr O'Brien's recollection is consistent with BlueScope's instructions to NZSA in relation to the January 2014 pricing offer.

1016 In his written statement, Mr Hennessy said that soon after he returned from leave in October 2013, he and Mr Ellis had a discussion about NZSA's prices and Mr Ellis said words to the following effect:

We need to align the New Zealand Steel's list price with the BSL CIPA list price so that there is an alignment with our price benchmarking strategy. We need to talk to Sean O'Brien.

1017 Mr Hennessy said that he told Mr Ellis that he would speak to Mr Palermo.

1018 The evidence indicates that CIPA held a pricing meeting on Friday, 11 October 2013 in relation to preparing its January 2014 price offer. In the evening of Tuesday, 15 October 2013, Mr Unicomb circulated an email to Messrs Hennessy, Gent, Kelso, Sparks, Bryers and Palermo with the subject "Pricing discussion January 2014 offer" which contained notes from the pricing meeting (in which Mr Unicomb apologised for the delay in sending the notes because he had been unwell). At 11.14 am on 15 October 2013, Mr Fogarty (NZSA) sent an email to Messrs Palermo and Unicomb, copying Mr O'Brien, with the subject "NZSA/BSL discussion Dec/Jan pricing". As noted earlier, NZSA's price offers were issued before CIPA's price offers because of the longer lead time between order and delivery. NZSA's offers for December shipment (and January delivery) were sent out in September. In the email, Mr Fogarty referred to a discussion that morning and stated that "NZSA is looking to go flat for January shipment". The email set out NZSA's expected "lowest list prices". Mr Fogarty also stated that NZSA was "looking to release pricing by Friday at the latest" and concluded with an invitation for feedback. In his written statement, Mr O'Brien said that the phrase "looking to go flat" was an industry phrase that meant that NZSA did not intend any price movement for a particular month. A number of clarifying emails were exchanged during the day.

1019 At 2.41pm on Wednesday, 16 October 2013, Mr Unicomb sent a follow up email to Messrs Hennessy, Gent, Kelso, Sparks, Bryers and Palermo with the details of the proposed NZSA January 2014 offer. In the email Mr Unicomb stated:

They are planning to go to the market on Friday morning and therefore if we wish push [sic] for a “better” result we will need to decide tomorrow.

1020 At 9.19 am on Thursday, 17 October 2013, Mr Hennessy replied by email stating:

I recommend that we get NZSA to increase their list price in line with ours and then they rebate back off-line to align with our strategy.

Your thoughts?

1021 At 11.28am on 17 October 2013, Mr Unicomb sent a further email to Messrs Fogarty and Palermo, copied to Mr O’Brien, outlining further observations about prevailing prices in the market and concluding with the following request:

We are having some more pricing discussions shortly so please don’t go to the market until you hear from Anthony or myself.

1022 In his written statement, Mr O’Brien said that he understood Mr Unicomb’s email to be an instruction to NZSA not to send out its price list until they heard back from CIPA.

1023 At 9.48 am on Friday, 18 October 2013, Mr O’Brien replied to Mr Unicomb’s email (and the other addressees) and referred to a discussion that he had had with Mr Palermo that morning. The email stated:

Gents

Following our conversation this morning Anthony I am looking at the below pricing – a \$20t increase (excluding CR) but more like a \$30t one with the FEX movement.

Cold Rolled \$980 (before any adjustment)

HR Dry \$900

P&O \$950

Floorplate (coil) \$970

Coilplate \$940

Will call shortly to discuss.

1024 At 10.32 am, Mr Palermo forwarded Mr O’Brien’s email to Mr Hennessy stating:

Matt, FYI

I have again advised Sean that our position is that NZSA get their list price up to match CIPA. He does not agree and hence has asked that you call Scott Fuller to mediate a suitable outcome for both parties. Scott will be aware.

1025 Mr O'Brien forwarded to his boss, Mr Fuller (the Vice President, Sales and Marketing of NZSA), his earlier email to Mr Unicomb. The email had no message other than the salutation "Regards". I infer that Mr Fuller had been contacted by Mr Hennessy about the disagreement with respect to NZSA's list prices and had contacted Mr O'Brien and asked him to forward the latest proposed prices. The email bears the time of 12.18 pm, but the email chain is then followed by a reply from Mr Fuller bearing the time of 11.18 am. It appears that one of the computers on which the email was sent or received had been set to allow for daylight savings, but the other computer had not been so set. The chronology of the emails is nevertheless clear from the email chain.

1026 At 11.18 am, Mr Fuller replied to Mr O'Brien's email with the message:

Sean

As discussed please advise if my understanding is the same from Anthony

Thanks

Scott

1027 It is apparent from the email that Mr Fuller had had a conversation with Mr Palermo. In his written statement, Mr O'Brien said that Mr Fuller would not normally get involved in pricing discussions.

1028 Ten minutes later, Mr O'Brien replied by email to Mr Fuller as follows:

Will call but here are the numbers – Anthony believes the request is for our list prices to match their January prices (despite ours being related to effectively February in market).

	NZSA Dec	CIPA Jan	Change	% change
CR	\$980	\$1,100	\$120	12.2%
HR	\$880	\$1,030	\$150	17.0%
P&O	\$920	\$1,085	\$165	17.9%
Plate	\$920	\$1,065	\$145	15.8%
Flr Plate	\$950	\$1,130	\$180	18.9%

1029 At 1.52 pm, Mr O'Brien forwarded to Mr Palermo, copying Mr Fuller, the email he had sent to Mr Fuller with the following message:

Anthony

A couple of issues with the proposal to move NZSA January SHIP pricing in line with CIPA January SUPPLY pricing.

1. Whilst some of our Jan ship volume will arrive in January, a large portion will

not with Xmas shuts and storage requirements for December shipment across that time. Thus the pricing timeframes do not line up and therefore doesn't make sense for pricing to match up.

2. To have exactly the same pricing in my opinion a bad look for the business. If the approach with NZSA is to change then that needs to be planned out and agreed upon. The market clearly views NZSA as independent and this is an element we have permeated through the industry. The proposed approach will most certainly destroy this perception.

As a result, I propose we move to the following price points for January shipment –

CR \$1080t
 HR \$990t
 P&O \$1045t
 Plate \$1025t
 Flr Plate \$1080t

Appreciate your feedback.

1030 At 2.38 pm, Mr Palermo sent a responding email to Mr O'Brien, copying Mr Hennessy and Mr Fuller, which stated:

After having discussed the NZSA proposal below with Matt, we still remain steadfast around the principle that NZSA List Prices should match CIPA (even accounting for the timing differences). On this basis, we ask that your January 2014 shipment offer prices increase in line with the proposed CIPA prices (highlighted below in yellow).

	NZSA Dec	CIPA Jan	Change	% change
CR	\$980	\$1,100	\$120	12.2%
HR	\$880	\$1,030	\$150	17.0%
P&O	\$920	\$1,085	\$165	17.9%
Plate	\$920	\$1,065	\$145	15.8%
Flr Plate	\$950	\$1,130	\$180	18.9%

1031 In the email, the column headed "CIPA Jan" was highlighted in yellow.

1032 At 2.41 pm, Mr O'Brien sent a responding email to Mr Palermo, copying Mr Fuller and Mr Hennessy, which stated:

As discussed with Scott we will proceed to market with one list price across the market per the below CIPA rates.

1033 The reference to "per the below CIPA rates" was a reference to the "CIPA Jan" rates in the table in Mr Palermo's preceding email. I infer from the email that Mr O'Brien had received an instruction from Mr Fuller to set NZSA's list prices at the same level as CIPA's list prices. In his written statement, Mr O'Brien said that, at the time, he held the view that the introduction of a list price that matched CIPA's list price was a façade because, while NZSA's list price would be the same as CIPA's list price, the prices that Mr O'Brien ultimately charged

customers was a “net price” (ie, discounted from the list price). Mr O’Brien said that he understood that the reason why CIPA wanted NZSA to introduce a matching list price was to allow resellers to sell their steel at the recommended resale price in CIPA’s price lists.

1034 At 3.04 pm, Mr Hennessy forwarded Mr O’Brien’s email to Mr Ellis with the message:

FYI – finally got there!

1035 At 10.46 am on Saturday, 19 October 2013, Mr Ellis responded to Mr Hennessy’s email and stated:

Would still be good to see the emphatic email from Andrew outlining this new policy!

The other we need to do is put a case as to why the Sales manager NZ aust should report to u - can u have a think about it

1036 I infer that the reference to “Andrew” was a reference to Andrew Garey, who was then the General Manager of New Zealand Steel. In his written statement, Mr Hennessy said that he understood Mr Ellis was referring to Mr Garey.

1037 In cross-examination, Mr Ellis was taken to the foregoing email correspondence and asked whether he agreed that there was a strategy that NZSA’s list prices would match CIPA’s list prices. Mr Ellis denied that there was such a strategy, and denied that he ever endorsed such a strategy or that it was ever implemented. The denial was extraordinary in the face of the email correspondence referred to above. Mr Ellis was subsequently taken to a strategy paper in relation to NZSA, which is discussed below. Having been taken to the strategy paper, Mr Ellis changed his evidence and agreed that BlueScope had pursued a strategy whereby NZSA’s published list prices would be aligned with CIPA’s list prices.

1038 Mr Palermo was asked about the above email correspondence in his s 155 examination. Mr Palermo said that, when he first came into his role, NZSA had a greater level of autonomy with respect to pricing decisions, without needing to have regard to CIPA’s prices. Mr Palermo said that, when Mr Garey was head of Sales and Marketing at CIPA, Mr Garey was dismayed at the disparity in CIPA’s and NZSA’s price points. Mr Palermo said that the collaboration between the two companies increased during Mr Garey’s tenure at CIPA, but it “really ramped up” when Mr Ellis commenced in that role (and Mr Garey became head of NZ Steel). Mr Palermo said that Mr O’Brien felt aggrieved about Mr Palermo’s involvement in his pricing decisions. Mr Palermo said that, once Mr Ellis took over at CIPA, Mr Garey “decreed that New Zealand should toe the line” and “Sean ... then reluctantly rolled over”. Mr Palermo’s statements are consistent with the above email correspondence.

BlueScope instructions to NZSA concerning net prices – 21 to 28 October 2013

1039 In cross-examination, Mr Ellis acknowledged that there was a strategy for NZSA's net rates to be the same as CIPA's net rates. I accept that part of Mr Ellis's evidence. The documentary record, extracted below, shows that, after NZSA agreed to publish list prices that matched CIPA's list prices, Mr O'Brien offered significant discounts to his customers and that generated further pressure from CIPA for NZSA to increase its net prices.

1040 In his written statement, Mr O'Brien said that after NZSA had been instructed to introduce a list price (which matched CIPA's list price), Mr Fogarty and he decided that they would send out the list price as instructed, and then send out revised pricing shortly thereafter which reflected NZSA's net price to their customers. Mr O'Brien also said that, shortly after NZSA sent the new list prices to their customers (and on some occasions after having sent the revised price list), Mr O'Brien and Mr Fogarty had conversations with most of their customers in words to the following effect:

I have sent you our monthly offer which refers to a 'List Price'. Please ignore this.

I was forced to send this to you by BSL.

1041 Depending on whether Mr O'Brien had already sent the revised price list or was going to, he also informed his customers, in words to the following effect:

I will send you a revised price list shortly that contains the net prices that we intend to charge you for our products.

1042 Mr O'Brien gave evidence about such correspondence with Mr Wood of Selwood Steel. On Monday, 21 October 2013, Mr O'Brien emailed "NZSA's January Shipment List Price" to Mr Wood. The email stated:

Dale,

Please find attached NZSA's January Shipment List Price. The following offer provides base prices only. (FIS port city metropolitan area). Please contact our office for any requirements.

1043 The prices stated in the email were in accordance with the "CIPA Jan" prices in the final email from Mr Palermo at 2.38 pm on 18 October 2013, reproduced above.

1044 On Tuesday 22 October 2013, Mr Fogarty sent an email to Mr Wood, copying Mr O'Brien, which provided a revised January shipment offer. The email stated:

Hi Dale,

In light of NZSA's January shipment offer release yesterday, I propose revised base

prices as follows:

Cold Rolled	\$920
HR Dry	\$880
P&O	\$920
F/plate	\$970/\$1020
Coilplate	\$910
Galv – soft	\$1040 100mt

Happy to discuss

1045 In his written statement, Mr O’Brien observed that the revised prices were lower than the net prices that he had notified to Messrs Unicomb and Palermo at 9.48 am on 18 October 2013.

1046 In cross-examination, Mr Wood said that he had had discussions with Mr O’Brien in September 2013 in which Mr O’Brien had indicated that he was being pressured to increase the NZSA offer to the “alto” BlueScope offer. Mr Wood said that, before he received the January 2014 offer from NZSA on 21 October 2013, he had a phone call from Mr O’Brien. Mr Wood said that Mr O’Brien told him that he had to release the offer based on the “alto” offer, and that Mr Ellis had told him he had to position it exactly the same as the “alto” offer. Mr Wood said he understood from this conversation that Mr O’Brien was not happy with what Mr Ellis had said to him. Mr Wood said that when he received the offer, he saw that the price for hot rolled went up from \$890 per tonne in September 2013 to \$1030 per tonne for the October offer.

1047 In his written statement, Mr Wood said that the January 2014 Shipment offer in the form of two emails (one on 21 October and another on 22 October 2013) was the first time Mr Wood received NZSA’s price offers in that format. Mr Wood said that, each month for about a year after Mr Wood received the official price list, Mr O’Brien or Mr Fogarty continued to follow it up with a further email or discussion that contained the revised cheaper base price for relevant products.

1048 At 10.07 pm on Tuesday, 22 October 2013, Mr Ellis sent an email to Mr Garey with the subject “NZSA/BSL discussion Dec/Jan pricing”. The email forwarded a copy of Mr O’Brien’s email to Messrs Unicomb and Palermo sent at 9.48 am on 18 October 2013 and stated:

Hi Andrew,

3 points as discussed;

1/ The benchmark pricing was as per the agreement (approx. A\$120/t higher than the net rates across the board) – however 4 separate customers had been instructed that these prices were ‘forced’ upon NZSA – this is not only not true, it’s highly inappropriate given the timing.

2/ Below are the prices that were discussed at a ‘net’ level (see below).

3/ The attachment show the pricing ‘offered’ outside this discussion (ie/ A\$940/t on the document – A\$910/t offered to customers for coil plate). This offer was made widely across the market.

Pls let me know if you need any further feedback – thanks for taking this up

1049 I infer from that email that at least four customers had contacted CIPA and said that they had received NZSA’s January Shipment List Price and also received a follow up phone call from Mr O’Brien or Mr Fogarty in which they were told that NZSA had been forced to send the list prices. In his email, Mr Ellis asserted to Mr Garey in his email that that was not true. However, the email correspondence reproduced above demonstrates that it was true. Mr Ellis then referred to the net prices that had been provided to Messrs Unicom and Palermo by Mr O’Brien on 18 October 2013 and, I infer, compared them with lower offers made by NZSA in the market. The email constitutes a complaint by Mr Ellis to Mr Garey about NZSA offering lower net prices in the market.

1050 At 9.33 am on Wednesday, 23 October 2013, Mr Ellis forwarded to Messrs Hennessy and Palermo his email to Mr Garey from the previous evening with the message “FYI”.

1051 In his written statement, Mr O’Brien said that Mr Fuller telephoned him from Auckland and they had a conversation in words to the following effect:

Mr Fuller: Mate...you’ve offered pricing below what you agreed with CIPA.

Pull your head in and tow [sic] the line.

Mr O’Brien: Righto.

1052 I infer that, in response to Mr Ellis’s email, Mr Garey directed Mr Fuller to speak to Mr O’Brien about the net prices he was offering in the market.

1053 At 8.51 am on Thursday, 24 October 2013, Mr O’Brien sent an email to Mr Palermo in which he asked Mr Palermo to confirm what he considered to be the benchmark price for the January shipment. In his written statement, Mr O’Brien explained that his reference to “benchmark pricing” in the email was a reference to the competitor pricing (other import traders) that NZSA usually based its pricing off. The email stated:

Anthony

Just wanting to clarify what you consider the benchmark pricing for January shipment. Have had some feedback that we are below – wanting to be clear that the monthly price discussions that we have is on list price and then there is a negotiation that takes place with various customers to arrive at a nett rate. This nett rate is always pitched above the comparative price from other importers. ...

1054 At 10.56 am on Friday 25 October 2013, Mr Ellis sent a follow up email to Mr Garey with the message:

Hi Andrew – any update?

1055 At 4.41 pm on 25 October 2013, Mr Garey responded to Mr Ellis’s email (of 22 October 2013) stating:

Scott had a very direct conversation with Sean.

Bottom line is that Sean is clearly struggling with not being an independent trader operating with no accountability. Unless he can get comfortable (very quickly) with model we are running we will need to move him on. He is crystal clear that he cannot go outside of boundaries and that he needs to take more responsibility for BANZ decisions and act/communicate appropriately.

1056 At 7.02 pm on 25 October 2013, Mr Ellis forwarded Mr Garey’s response to Messrs Hennessy and Palermo with the message:

Good news. See below

1057 At 9.42 am on Monday, 28 October 2013, Mr Palermo forwarded Mr O’Brien’s email of 24 October 2013 to Mr Hennessy and stated:

I haven’t responded to Sean (via email) but we did speak. I suggested to him that he needs to be a whole lot more transparent with us, reiterating the point that his original assessment of the coil plate price at \$930-\$940 has now been reflected at \$900/t (as per below). This has been an on-going issue for us in our relationship.

He said that he has always negotiated beyond those originally prescribed prices in order to secure volumes. Sounds as though that will now change as per Jason’s email late last week.

1058 At 9.55 am on 28 October 2013, Mr Hennessy replied by email to Mr Palermo as follows:

Thanks mate.

We need to advise Sean that we will advise him of his minimum net price by product each month and he will need approval from you or me prior to going below this level.

For example dropping Coil Plate price to compete with Essar, India, at <2% premium is crazy!

Also once he has completed his monthly sales he will need to send us a volume by customer by price.

Do you want to discuss with Sean first or have a three way conference call?

1059 Although not recorded on the email chain, it appears that Mr Hennessy copied or forwarded that email to Mr Ellis. At 11.28 pm on 28 October 2013, Mr Ellis responded to Mr Hennessy’s email and stated:

Either way – you’re correct Matt - we set his minimum number!

1060 In his written statement, Mr O’Brien said that, from that point on, NZSA had to provide (to CIPA) detailed information in relation to its proposed net pricing to its customers and the net price or the maximum discount that NZSA was allowed to provide had to be agreed with CIPA.

Meeting with Mr Simpkin (CMC Steel) on 22 October 2013

1061 As stated above, in an email on 15 October 2013, Mr Simpkin asked to meet separately with Mr Ellis, rather than in a joint meeting with Southern Steel, and told Messrs Hennessy and Ellis that he had received legal advice that attending a joint meeting raised “anti-competition implications”. In response, Mr Ellis asked Ms Minogue to set up an alternative meeting. That meeting occurred on 22 October 2013, after Mr Hennessy returned from leave.

1062 On 21 October 2013, Mr Hennessy sent an email to Mr Ellis, copying Mr Gent, setting out a proposed agenda for the meeting with Mr Simpkin (with some 11 items). None of the items concerned the supply or acquisition of processing services to or from Southern Steel. One of the items on the agenda was: “Oct, Nov & Dec price and volume”. In his written statement, Mr Hennessy said that this related to a proposed discussion with CMC Steel on the pricing of steel supplied by CIPA to CMC Steel and the pricing of steel offered by CMC Steel to its customers, including the benchmarking strategy.

1063 Following the meeting, at 4.43 pm on 22 October 2013, Mr Simpkin sent an email to Messrs Ellis and Hennessy, copied to Mr Stedman, with the subject “Today’s Meeting”. In the email Mr Simpkin advised:

In terms of the December price increase we will notify the market in November which is as per our normal cycle.

1064 On 26 November 2013, Mr Lobb of CMC Steel issued a circular to CMC Steel’s customers advising of the percentage price increases for flat steel products for orders supplied from 1 December 2013. In his written statement, Mr Hennessy said that he had compared the CIPA list price percentage increase in the Distribution Market price lists for December 2013 and the price increase percentages advised by CMC Steel in its November circular, and observed that CMC Steel had followed CIPA’s list price percentage increases.

1065 I infer that, at the meeting on 22 October 2013, Messrs Ellis and Hennessy encouraged Mr Simpkin to use the CIPA price list as a benchmark or base level for its pricing. That inference is supported by the consistent pattern of conduct by Messrs Ellis and Hennessy and other CIPA

sales managers, the fact that the benchmarking strategy was on the agenda of the meeting and that, in percentage terms, CMC Steel increased its prices in line with the increases in the CIPA price list.

CIPA Sales and Marketing Business Review – 24 October 2013

1066 On 24 October 2013, Mr Ellis sent an email to Mr Vassella’s executive assistant, Alisha Guihenneuc, copied to Mr Vassella, attaching a presentation titled “CIPA Sales and Marketing – CIPA Business Review”. The email indicates that a quarterly review had been scheduled for Tuesday 29 October 2013 and the presentation was intended for that meeting. On a slide of the presentation titled “Market Intelligence”, under the heading “Key Customer Issues”, the first bullet point stated:

Benchmarking concept is gaining some traction

1067 In my view, the meaning of that statement is clear. BlueScope was observing that, at the distribution level of the market, distributors were beginning to set their prices using CIPA’s price lists as a benchmark or base level.

Development of NZSA Strategy paper – 29 October 2013 to 5 November 2013

1068 On 29 October 2013, Mr Fuller sent Mr Hennessy an email, copying Messrs Ellis, Garey and O’Brien, with the subject “Australian Market Channel Strategy”. The email stated:

Matt/Jason

Further to Andrew’s email last week here is a document to kick things off, and look forward to feedback and progressing.

Regards

Scott

1069 The first draft of the strategy paper attached to that email was not in evidence. On 30 October 2013, Mr Hennessy sent a reply email attaching “our feedback”. Again, that version of the strategy paper was not in evidence. On 5 November 2013, Mr Ellis replied, attaching what was labelled as version 2 of the paper and asking whether anyone had any feedback.

1070 The strategy paper attached to Mr Ellis’s email was titled “Summary Paper on NZ Steel (Australia) Ltd”. The author was designated as Mr Fuller and its distribution was stated to be Messrs Garey, Ellis, Hennessy and O’Brien. The paper commenced as follows:

Context

It has been agreed between GM Sales-Marketing CIPA and GM-NZS to review BANZ

channel strategy in the Australian market. Whilst the presence of NZSA in the Australian market has been formally reviewed on a number of occasions, it is acknowledged that market dynamics change and flexibility and alignment remain critical aspects in the market.

This review is subject to ensuring alignment on the following principles:

1. Approach needs to deliver a best for BANZ margin outcome (and Bluescope).
2. CIPA needs visibility and sign off on Australian market pricing (net level by customer) and customer engagement.

1071 The paper then purportedly summarised the “NZSA current operating model” and, under the heading “Next Steps”, stated that CIPA would review and propose which parts of the key processes (in the current operating model) could change to be better overall for BANZ. It is apparent that aspects of the “current operating model” were not merely the current operating model but were options for change. For example, under the subheading “Structure”, the following statement appeared:

There are many options available however whatever model is chosen needs to ensure it is the most effective in upholding the principles of best for BANZ Margin, CIPA sign off on all pricing, avoidance at all costs of CIPA substitution ...

1072 I infer that the reference to “CIPA substitution” was a reference to NZSA sales that were made in substitution for a CIPA sale.

1073 Under the subheading “Pricing”, the strategy paper stated that:

- (a) CIPA (after consultation with NZSA on Tier 1 Asian Benchmarks) would provide NZSA with net prices by product by region and the published list prices which were to be aligned with CIPA’s list prices;
- (b) NZSA would propose the target and minimum net prices by customer;
- (c) any discounts below those prices would need to be proposed by NZSA (volume and price by customer by product) to CIPA (Mr Palermo or Mr Hennessy or their appointed delegates) and then approved by CIPA before NZSA could offer to their customers; and
- (d) post the offer closing, NZSA would provide CIPA with actual volumes and prices by customer by product by region.

1074 In his affidavit, Mr Ellis acknowledged that one of the key recommendations in the strategy paper was for CIPA to sign-off on NZSA pricing in Australia. Mr Ellis said the recommendations were subsequently implemented. Mr Ellis said that, around late 2013, Mr O’Brien began reporting indirectly (his direct supervisor was Mr Fuller) to Mr Hennessy and

Mr Palermo. Effectively, Messrs Hennessy and Palermo became responsible for approving NZSA's prices and discounting in respect of sales in Australia.

1075 In his affidavit, Mr Ellis said that he did not recall NZSA having a recommended resale price at or around this point in time. I reject that evidence. The email correspondence reproduced earlier demonstrates that CIPA instructed NZSA to publish list prices that were aligned with CIPA's list prices. Mr Ellis was aware of that instruction. I am satisfied that the instruction was a component of CIPA's benchmarking strategy, so that there were common list prices being presented to distributors in Australia by BlueScope, whether from CIPA or NZSA. It is an obvious commercial fact that CIPA's benchmarking strategy would have been undermined if NZSA had the freedom to publish lower list prices in the Australian market.

Meeting with Mr Wood (Selwood Steel) on 30 October 2013

Arranging the meeting

1076 In his written statement, Mr Wood said that, in late October 2013, he received a phone call from a man who introduced himself as Denzil Whitfield, an Account Manager at BlueScope. During oral testimony, Mr Wood identified a telephone log record kept by Selwood Steel which showed that Mr Whitfield contacted Mr Wood by phone on 22 October 2013 at 1.40 pm. There also exists a Salesforce entry of the contact with Mr Wood on 22 October 2013 created by Mr Whitfield. The Salesforce entry recorded that the contact was "face to face". I consider it probable that that aspect of the Salesforce record is inaccurate and that Mr Whitfield spoke to Mr Wood by telephone, having regard to the log record kept by Selwood Steel. The Salesforce record indicated that the contact was "unplanned", the objective was to meet Mr Wood and the outcome was recorded as "build repour" [sic].

1077 In his written statement, Mr Wood recounted that, on the telephone call, Mr Whitfield said that his boss, Mr Ellis, wanted to meet Mr Wood; that they wanted to discuss market issues with Mr Wood; and that BlueScope was aware of Selwood Steel's business and wanted to know how Selwood Steel had won the tender for the Furphy Water Tank contract in Shepparton which BlueScope had also competed for. Mr Wood agreed to meet and Mr Whitfield said that he would come back to Mr Wood and propose a date to meet.

1078 In oral testimony, Mr Wood said that he did not know Mr Whitfield or Mr Ellis prior to that phone call, although he had heard of Mr Ellis in the previous month. After the phone call, he made some inquiries about Mr Ellis. He phoned one of Selwood Steel's suppliers, Mr Wright,

to inquire about Mr Ellis. In their call, Mr Wright mentioned that Mr Ellis had worked for BlueScope in Thailand and that he had also worked for Coil Steel (CMC). Mr Wood said that he did not know why Mr Ellis wanted to meet with him, but he thought that BlueScope may want to sell to him.

1079 On 25 October 2013, Mr Wood received a calendar invitation from Mr Whitfield that scheduled a meeting at Selwood Steel’s premises in Carrum Downs, Victoria, at 9.30 am on 30 October 2013. The invitation contained the following message:

Hi Dale,

Thank you very much for the catch up the other day, it was very valuable to me to get a feel for your business. Your insights into the Victorian Steel distribution industry were great.

As mentioned Jason will be down next Wednesday and I think it will be excellent for him to visit you, your Business, and discuss some of the broader issues that BlueScope are challenged with over the next few years, and what impacts this could have on you.

Further to this I also look forward to being in contact with you in the future, and if you ever want to discuss anything from a BlueScope perspective you have my contact details, I am always available to chat or catch up.

1080 In oral testimony, Mr Wood said he understood the reference to “the catch up the other day” to be a reference to his phone call with Mr Whitfield on 22 October 2013. He understood the reference to his “insights into the Victorian steel distribution industry” to be a reference to the discussion about the Furphy Water Tank contract in Shepparton and another client of Selwood Steel, Seely.

Written records of the meeting

1081 It was uncontroversial that a meeting occurred at Selwood Steel in Carrum Downs attended by Messrs Wood, Ellis and Whitfield. Each of Mr Wood and Mr Ellis gave an account of the discussion at the meeting. There also exists a Salesforce entry created by Mr Whitfield that records a meeting between Messrs Wood, Ellis and Whitfield on 31 October 2013. Mr Whitfield created the Salesforce record on 31 October 2013 and I consider it likely that the record misstates the date of the meeting. Mr Ellis did not contest that the meeting occurred on 30 October 2013. The Salesforce record contains a very brief description of the discussion at the meeting in the following terms: “introduce dale and jason. - general business discussion. - talked about the opportunity to open an account”. The record provides no assistance in determining what was discussed at the meeting, save that it refers to the prospect of Selwood Steel opening an account with CIPA.

1082 The only other written record of the meeting is contained in an email sent by Mr Whitfield to Mr Hennessy, copying Mr Gent, eight days later on Thursday, 7 November 2013. The email relevantly stated as follows:

Hi Matt,

I met with Dale Wood (Selwood) and Jason Ellis last Wednesday to discuss the Victorian distribution market. Dale was very open in his discussions and opinions of the Victorian steel market place, and I firmly believe he is open with everyone else in the market (eg Surdex knew we had been out to visit him).

Selwoods are a very capable processor of sheet coil, they have a slit line, several sheet lines and guillotines, and a laser cutter he does not use. Dale has also indicated that he has several loyal customers that he has more value added relationships with, eg he will sell them coil and sheet, however will also do fabrication for them as well, and also purchase value added goods from them.

He used to make Gun safes, however now he mainly sticks to tool boxes etc.

Dales key suppliers are Wrights (YP) and NZ steel.

From our meeting Jason indicated that we would like to continue discussing opportunities to sell to Dale, provided we targeted business that was not a conflict of interest to our current aligned distributor or drove price down.

...

Risks

- Dale talks, if we start doing business with him he will use this information to talk himself up in the market and this reduces our VP to our aligned distributors.
- We compete with NZ steel volume
- Dale competes with the aligned channel in the regional market.

Opportunities

- Dale has a good regional footprint.
- Dale has a low cost to serve and is an efficient channel to market.
- I believe we can sell to Dale at a premium to IPP as he is smaller in size and our value proposition is greater value to him.
- Dale has captive customers that we struggle to target with our aligned distributors.
- Incremental volume for Dist.

Are you comfortable with me discussing further spot opportunities with Dale, and to offer him an account application (no guarantee of offers)?

1083 A short time later, Mr Hennessy gave his approval, but suggested that Mr Whitfield “ask Dale for confidentiality”.

1084 There is no reason to doubt that Mr Whitfield’s email accurately records his reflections on the meeting with Mr Whitfield, as far as it goes. As discussed below, Mr Wood’s testimony is that

Mr Ellis also discussed the price benchmarking strategy, which is not referred to in Mr Whitfield's email. However, I do not consider that the absence of that topic from the email weighs significantly against Mr Wood's testimony. Mr Whitfield's email establishes the following about the meeting:

- (a) BlueScope considered that Selwood Steel was a significant distributor to supply, having a "good regional footprint", being an "efficient channel to market" and a "very capable processor of sheet coil" and had "captive customers" that CIPA struggled to target with its aligned distributors;
- (b) Mr Wood was talkative in the market and competed with CIPA's aligned distributors and therefore supplying Selwood Steel had the potential to damage CIPA's relationship with its aligned distributors; and
- (c) at the meeting, Mr Ellis had indicated that CIPA would like to continue discussing opportunities to sell to Mr Wood, provided that in doing so they (ie CIPA and Selwood Steel in a supply relationship) targeted customers that did not conflict with CIPA's aligned distributors or drove prices down.

1085 As discussed below, Mr Wood's account of the meeting is more consistent with the foregoing email than Mr Ellis's account.

Mr Wood's account of the meeting

1086 In oral testimony, Mr Wood said that Messrs Ellis and Whitfield arrived together and Mr Wood greeted them and showed them through to the boardroom. Mr Wood said that the meeting began by Mr Whitfield thanking him for agreeing to meet with them and reiterating what they had heard about Selwood Steel in the market. Mr Whitfield then handed over to Mr Ellis. Mr Ellis then said words to the effect that he had heard that Selwood Steel was winning quite a bit of work in the market, and that he had heard Mr Wood was well respected in the market by his peers. Mr Ellis then went on to ask Mr Wood whether, if BlueScope offered him a transactional account, Selwood Steel would be interested. Mr Wood said he had never heard the term "transactional account" before this. He asked Mr Ellis what a transactional account was. Mr Ellis replied that it was an offer to supply on the basis of a transaction only. Mr Ellis made it clear that he was not offering a distributorship or a franchise and Selwood Steel would not be buying on the distributor "alto" offer. Instead, BlueScope would offer Selwood Steel a price on a transactional basis. Mr Ellis also indicated that he did not want his "four pillar distributors" to know that BlueScope was selling to Selwood Steel, and Mr Ellis also said that BlueScope

would want to know who Selwood Steel was selling the product to. Mr Wood said that he was not “too thrilled” about having to tell BlueScope who Selwood Steel would sell to and he told Mr Ellis that. It was not clear from the evidence whether the expression “four pillar distributors” was an expression used by Mr Wood or an expression used by Mr Ellis. Nevertheless, it was clear that the expression was a reference to BlueScope Distribution and CIPA’s three principal aligned distributors, being Southern Steel, OneSteel and CMC Steel.

1087 Mr Wood then recounted that, in the course of the discussion, Mr Wood referred to the fact that he had recently purchased two coils of steel from Surdex Steel, which is part of Southern Steel, a BlueScope aligned distributor. Mr Wood said that the coils were meant to be “Black Form” (which is BlueScope’s registered trademark for hot rolled coil), but when the product arrived, it was apparent that it was an imported China Steel product. Although not stated expressly by Mr Wood, my impression was that Mr Wood raised that matter in the course of the conversation in order to unsettle or “bait” Mr Ellis. However, Mr Ellis did not respond to Mr Wood’s statements.

1088 Mr Wood said that the conversation turned to the types of products that BlueScope would be willing to supply Selwood Steel. Mr Wood asked Mr Ellis whether he could buy “Purlin Fade”, and Mr Ellis immediately said that BlueScope would not be in a position to offer that. Mr Wood had recently imported a quantity of Aluzinc (which is the generic (import) name for BlueScope’s Zinalume product) and he asked Mr Ellis about the supply of that product. Mr Ellis said that that product fell under the banner of someone else within the company, and he would have to make a phone call to them to see whether they could sell Mr Wood that product. Mr Ellis then made a phone call to someone, and Mr Wood overheard the person on the other end of the phone making comments to the effect of: “[w]hy would we want to sell Selwood the Zinalume product when they would just be selling it against our four pillar distributors”. When Mr Ellis got off the phone, Mr Ellis said that he was speaking to Mr Hennessy, who covered products including Zinalume, and Mr Ellis acknowledged that Mr Hennessy had questioned why BlueScope would sell Zinalume to Selwood Steel. Mr Wood said that he then showed Mr Ellis a sales order dated 26 October 2013 recording a sale by Selwood Steel of imported Aluzinc to BlueScope Distribution (through its Metalcorp Bendigo account). A copy of the sales order is in evidence. Mr Wood said that, once he showed this document to Mr Ellis, Mr Ellis seemed a little agitated and asked why BlueScope Distribution would be buying from Selwood Steel.

- 1089 Mr Wood said that, following this, Mr Ellis changed the subject by saying that what he really wanted to talk to Mr Wood about was how low the prices were in the marketplace. Mr Wood said that Mr Ellis went on to say that he would like Selwood Steel to use its influence in the market to benchmark the price up to the “alto” offer. Mr Wood said that he understood the “alto” offer to be BlueScope’s offer in the market, on the basis of which BlueScope sells to its four pillar distributors (with discounts). Mr Wood said that he understood that Mr Ellis wanted him to go to the distributors that Mr Wood dealt with in Melbourne, or his competitors, and convince them to all benchmark their price up. Mr Wood said that Mr Ellis said something to the effect that, if they did, they would all be making money.
- 1090 Mr Wood said that, at this point, he said to Mr Ellis that this would be a “breach of the ACCC”. Mr Wood said that Mr Ellis denied that and said words to the effect: “[i]f I had all of you in the room, it may be, but there’s only you and I in the room, and it’s your word against mine”. Mr Wood said he then pointed to Mr Whitfield and said “Denzil is here”, to which Mr Ellis replied “Denzil works for me”. Mr Wood said that the mood of the meeting changed after that and not a lot more was said. At the end of the meeting, Mr Ellis said that Mr Whitfield would be in touch at some stage in the future.
- 1091 Mr Wood said that he formed the impression from the meeting that Mr Ellis may have offered the prospect of a transactional account with BlueScope as a “carrot” to obtain Mr Wood’s assistance in benchmarking prices up.
- 1092 Mr Wood said that, after the meeting ended, both Mr Ellis and Mr Whitfield left his office. Mr Wood said that his boardroom has glass walls and he and two other people in the office stayed in there to have a discussion. From the boardroom, they could see that Messrs Ellis and Whitfield remained out the front of their office on the footpath for 20 to 25 minutes. They observed that Mr Whitfield stood there while Mr Ellis made a number of phone calls and was shouting.
- 1093 Mr Wood said that Mr Whitfield phoned him later that afternoon asking whether he could come back to see Mr Wood. Mr Wood said that he received the call from Mr Whitfield just after 4 pm and Mr Whitfield indicated that he would be there just before 5 pm. Mr Whitfield said that he lived nearby in Seaford, and asked if he could come back past and bring a couple of beers to have with Mr Wood. Mr Wood said that he responded “yes” and asked “what was all that out front?”. Mr Wood said that Mr Whitfield replied “you rattled [Mr Ellis’s] cage”. When Mr Wood asked Mr Whitfield what he meant, Mr Whitfield replied: “[w]ell, he wasn’t happy

about the hot rolled but he was furious about the Zinalume”, and he made a comment along the lines that: “[h]e [Mr Ellis] must have said the F-word 300 times between Carrum Downs and Braeside”. Mr Wood took this to mean that Mr Ellis was obviously not happy that Selwood Steel were selling to one of his distributors, and thought that the distributor should have been buying from CIPA. Mr Wood said that Mr Whitfield arrived at about 4.45 pm as anticipated and stayed until about 5:25 pm. When he left, Mr Whitfield said that he would be in touch in due course to discuss further the prospect of doing business with Selwood Steel.

1094 Mr Wood said he has not had further contact with Mr Ellis since 30 October 2013.

1095 Mr Wood stated that he had reflected many times on this meeting since it occurred on 30 October 2013. His accountant and the sales people who were in the office that day were able to hear the conversation that took place in the boardroom, and also witnessed the aftermath when Mr Ellis and Mr Whitfield remained on the front footpath for 20 to 25 minutes. For this reason, Mr Wood said he has had many conversations with the people in his office about what occurred that day.

1096 In cross-examination, Mr Wood agreed that he also discussed the events at the meeting on 30 October 2013 with Mr Wright, the first occasion being the day after the meeting (Selwood Steel’s telephone log book records a call from Mr Wright on 31 October 2013). Mr Wood said that he told Mr Wright that Mr Ellis had offered him a transactional account and had asked Mr Wood to benchmark his prices to the “alto” offer. Mr Wood also agreed that, at some point, he told Mr Wright that he would be giving evidence in this proceeding, and Mr Wright said that he would also be giving evidence. Mr Wood denied that Mr Wright told him about the dinner that Mr Wright had attended with Mr Ellis.

1097 In cross-examination, Mr Wood also said that he discussed the events at the meeting on 30 October 2013 with Mr O’Brien. Mr Wood said that the conversation had followed on from the earlier conversation he had had with Mr O’Brien about the NZSA offer for January 2014 which Mr Wood had received from NZSA on 21 October 2013. Mr Wood said that Mr O’Brien had told him that he had been pressured by Mr Ellis to put NZSA’s prices up, and Mr Wood understood that Mr O’Brien was unhappy about that. Mr Wood told Mr O’Brien that, at the 30 October 2013 meeting, Mr Ellis had offered him a transactional account and had asked Mr Wood to benchmark his prices to the “alto” offer. Mr Wood agreed that, after Mr O’Brien left NZSA, he first went to work at a timber truss manufacturing business in Geelong for probably 10 months and subsequently, in early 2015, came to work for Selwood Steel (for about six or

seven months). Mr Wood also said that he had had a similar conversation with Mr Fogarty of NZSA in the same context (ie, following on from the NZSA offer for January 2014 which Mr Wood had received on 21 October 2013).

Mr Ellis's account of the meeting

1098 In his affidavit, Mr Ellis said that, on 30 October 2013, he attended two meetings with Mr Whitfield in Melbourne, one with Mr Hoenger of Surdex Steel and the other with Mr Wood of Selwood Steel. Mr Ellis said he believed that Mr Whitfield set up both meetings. Based on his Outlook calendar, Mr Ellis believed that the meeting with Mr Hoenger was at Surdex Steel's Dandenong premises at 8.00 am and the meeting with Mr Wood was at Selwood Steel's Carrum Downs premises at 9.30 am. Mr Ellis said he had not met Mr Whitfield before 30 October 2013, and he said they met in a car park outside the Surdex Steel office and had a brief conversation before the meeting. Mr Ellis had rented a car at Melbourne Airport and Mr Whitfield arrived at the Surdex Steel office in a separate car. Mr Ellis said that Mr Whitfield was a relatively junior member of the CIPA sales and marketing team at the time. Mr Ellis said they spoke about their objectives for the meetings with Surdex Steel and Selwood Steel, which Mr Ellis understood were: first, to demonstrate that a senior BlueScope manager was going to engage at the "State" level, and second, to reinforce the message that CIPA was open for business and wanted to win more share from Surdex Steel and to win a share of Selwood Steel's business.

1099 After the discussion in the car park, Mr Whitfield and Mr Ellis met with Mr Hoenger at Surdex Steel's offices. In cross-examination, Mr Ellis agreed that, at the meeting with Mr Hoenger, he had suggested bringing together some distributors for a dinner in Melbourne. Mr Ellis denied that one of the topics that would be discussed at the dinner would be the benchmarking strategy. That denial was contradicted by Mr Hennessy. At 7.28 am on 31 October 2013, Mr Ellis sent an email to Mr Hoenger, copied to Messrs Whitfield, Hennessy and Larkin of Southern Steel. In the email, Mr Ellis referred to his meeting with Mr Hoenger on 30 October 2013 and stated:

As discussed would you be able to think about a dinner for the group we discussed on the evening of the 27th of Nov in Melbourne?

1100 At 7.45 am that morning, Mr Hoenger replied stating:

The 27th works ok for me.

Were you going to initiate the idea with the other parties first?

1101 At 7.59 am, Mr Ellis replied stating:

Hi Brad – already have to most – for those not done – Matt or I will do it before the end of next week – if you could start the process of invitations that would be great

1102 Following the receipt of the above emails, Mr Hennessy said that he had a conversation with Mr Ellis in which Mr Ellis said words to the following effect:

I've spoken to Brad about getting a group of Victorian distributors together to talk about price benchmarking.

1103 I prefer Mr Hennessy's evidence to Mr Ellis's evidence. Given the actions that Mr Ellis had undertaken during September and October 2013 in relation to the benchmarking strategy, I consider it likely that the purpose of organising a dinner with a group of Victorian distributors at that time would have included the purpose of discussing the benchmarking strategy.

1104 Mr Hennessy said that, to the best of his knowledge, the dinner did not take place. The significance of the evidence is that, immediately prior to meeting with Mr Whitfield of Selwood Steel, Mr Ellis had met with Mr Hoenger of Surdex Steel and suggested bringing together some distributors for a dinner in Melbourne to discuss the benchmarking strategy.

1105 Following their meeting with Mr Hoenger, Mr Ellis said that he and Mr Whitfield drove in their separate cars to Selwood Steel's offices. When they arrived at Selwood Steel's offices, they were shown through to an office where they had their meeting with Mr Wood. Mr Ellis said he does not believe that the room was a conference room, because he recalled Mr Wood sitting behind a desk.

1106 Mr Ellis said that he recalled that this meeting was not a particularly pleasant experience. Mr Ellis said that Mr Wood had his arms folded throughout the meeting and gave short, often one-word answers throughout the conversation. Mr Ellis said that he would not describe Mr Wood as being confrontational throughout the meeting, but he was not friendly.

1107 In his affidavit, Mr Ellis denied that he said to Mr Wood at the start of the meeting, or at any time during the meeting, that Mr Wood was well respected in the market by his peers. Mr Ellis said that this was the first time he had met Mr Wood, and he did not know much about him or Selwood Steel at the time. So far as Mr Ellis was aware, Selwood Steel was just a small player in the Victorian marketplace. In cross-examination, however, Mr Ellis conceded that the conversation was a long time ago and he may have been aware at the time that Selwood Steel was a low cost competitor who had won some volume from some of BlueScope's aligned distributors.

1108 In his affidavit, Mr Ellis said that, early in the meeting, he asked Mr Wood whether Selwood Steel would be interested in buying any steel from CIPA. Mr Ellis said that this was his reason for meeting with Mr Wood. Mr Ellis also said that he did not believe that he said to Mr Wood that he would need to know who Selwood Steel would be selling CIPA's products to. In cross-examination, Mr Ellis said he did not care who Mr Wood was selling to, because he viewed Selwood Steel as a potential opportunity to sell incremental volumes of BlueScope steel. In further cross-examination, however, Mr Ellis was taken to the email sent by Mr Whitfield to Mr Hennessy on 7 November 2013, in which Mr Whitfield stated:

From our meeting Jason indicated that we would like to continue discussing opportunities to sell to Dale, provided we targeted business that was not a conflict of interest to our current aligned distributor or drove price down.

1109 In cross-examination, Mr Ellis acknowledged that Mr Whitfield's account in the email differed from his recollection, although Mr Ellis maintained his original evidence. I do not accept Mr Ellis's evidence and consider that the relatively contemporaneous email from Mr Whitfield is likely to be a more accurate reflection of the discussion at the meeting. The email corroborates Mr Wood's version of events.

1110 In his affidavit, Mr Ellis said that he did not recall discussing pricing with Mr Wood during the meeting and he thinks it is unlikely that he did so given Mr Wood's relatively hostile reaction to his proposal that CIPA sell steel products to Selwood Steel. Mr Ellis said that he did not believe that he said the words "[w]hat I really want to talk to you about is how low prices are". Mr Ellis also denied asking Mr Wood to use his influence with his peers to benchmark the price up to the "alto" offer. Mr Ellis said that it was not part of his approach to suggest to any distributor that they price at any particular level, and it was not part of his approach to suggest that distributors should persuade other distributors to price in a particular way. Mr Ellis said that, in his view, pricing decisions were a matter for each distributor. Mr Ellis also does not believe that "alto" offer is a term that he used or understood at the relevant time.

1111 Mr Ellis's evidence that it was not part of his approach to suggest to any distributor that they price at any particular level is contradicted by Mr Ellis's conduct in pursuing the benchmarking strategy. The evidence shows that from the moment Mr Ellis commenced at CIPA, he sought to encourage and persuade distributors to increase their prices to the level of CIPA's list prices.

1112 In cross-examination, Mr Ellis initially maintained that, when he first came back to Australia, he did not think that he was familiar with the term "alto" offer. He said that he became more familiar with the term as time went on, but in the first few months of coming back to Australia,

he was not aware of that term being applied to CIPA's price list. Mr Ellis was taken to Mr Lachimea's email of 9 October 2013, referred to earlier, and it was suggested to Mr Ellis that the reference to the market "mov[ing] towards Alto pricing" meant distributors selling steel at CIPA's list price. Mr Ellis said that he did not read the email like that; rather, he read this as a reference to the market moving to "longer lead time pricing". I reject that evidence and I also reject Mr Ellis's evidence that he was unfamiliar with the expression "alto" offer or "alto" price. I consider that the meaning of Mr Lachimea's email is clear, in light of the benchmarking strategy, and the use of the expression "alto" pricing in that context demonstrates Mr Ellis's familiarity with that expression.

1113 In his affidavit, Mr Ellis denied that Mr Wood raised any ACCC concerns during the meeting, or said in response to the recommended resale price concept that it was "a breach of the ACCC". Mr Ellis said that he left the meeting with Mr Wood thinking it may not have been productive. Mr Ellis said that he does not recall the meeting finishing with an open opportunity to supply steel to Selwood Steel. Again, Mr Ellis's evidence is contradicted by Mr Whitfield's email to Mr Hennessy on 7 November 2013, in which Mr Whitfield stated that, in the meeting, Mr Ellis indicated that CIPA would like to continue discussing opportunities to sell to Mr Whitfield.

1114 Mr Ellis said that he may have had a debrief with Mr Whitfield after the meeting. Mr Ellis acknowledged that he was disappointed by Mr Wood's revelation that he was selling flat steel products to BlueScope Distribution, but said he does not recall using any expletives in his debrief with Mr Whitfield.

After the meeting

1115 As noted above, on 7 November 2013 Mr Whitfield sent an email to Mr Hennessy, copying Mr Gent, which summarised the outcomes of the meeting. The email concluded with the question:

Are you comfortable with me discussing further spot opportunities with Dale, and to offer him an account application (no guarantee of offers)?

1116 On 12 November 2013, Mr Whitfield sent an email to Mr Wood with the subject heading, "current sheet coil pricing structure". The email included the following statements:

Hi Dale,

Please find attached copies of the BSL price schedules, these price schedules are distributed to key BSL Distribution customers, and should give you a rough idea on our market offers and product availability. By providing you these price schedules I am not offering you access to these service offers or products, this is something we can

discuss on a needs basis. (I would also think that the prices do not make a great deal of sense either).

...

I would think initially our best opportunities will be to discuss import replacement opportunities, ie orders for Hot Rolled, Cold Rolled, Galvanised that you would traditionally place on a trader, and we would want to focus on markets that are not typically serviced by current BSL accounts, I certainly have a few that come to mind.

Speak soon,

Denzil.

- 1117 Attached to the email were various CIPA Distribution Market price lists, including the CIPA Distribution Market price list for sheet and coil products for January 2014.
- 1118 Mr Wood said that Mr Whitfield’s email was unexpected because, at the meeting, he had not indicated an interest in becoming a BlueScope distribution customer. Mr Wood did not respond to Mr Whitfield’s email. Mr Wood said that he had not previously received a CIPA price list prior to Mr Whitfield’s email and has not sought or received one since his email.
- 1119 There exists a Salesforce entry recording an interaction between Mr Whitfield and Mr Wood on 19 November 2013. There are some discrepancies in the record. While it purports to record an interaction on 19 November 2013, the entry states that it was created on 17 November 2013 and was last modified on that date. The entry states that the discussion was “face to face”, but I place no reliance on that aspect of the record. The entry states that the objective was “Meet with Dale to discuss account”. The summary of the interaction was “- discussed product opportunities. - discussed opening account. - Understands that opening an account doesn’t mean his [sic] is a BSL distributor or have access the BSL distributor price schedules, that we need to be discrete”. The outcome of the interaction was stated to be “Dale is going to apply for an account”. Despite the date discrepancy, the matters stated in the foregoing Salesforce record are corroborated by the fact that, on 27 November 2013, Mr Wood signed a Commercial Credit Account Application with BlueScope on behalf of Selwood Steel. Mr Wood, however, was not asked about that application in cross-examination.
- 1120 Mr Wood’s notebook records that he spoke to Mr Whitfield on 16 and 17 January 2014 about the supply of Zinalume for a customer with a preference for BlueScope product. On 21 January 2014, Mr Whitfield sent an email to Mr Hennessy, copying Mr Gent, seeking approval to provide a quote to Selwood Steel for March 2014 delivery. Mr Whitfield’s email includes the comment:

He currently has orders in place with CMC trading, however I believe we need to start providing some requested offers, and I would consider this very low risk business where imports are readily available. My intent is to get provide [sic] him with the offer and then get some feedback for future commitment if he wants revised pricing.

1121 The request for approval is followed by emails revealing internal debate between Messrs Hennessy, Gent and Whitfield as to whether the sales to Selwood Steel are likely to be incremental (ie, not in substitution for sales to CIPA's aligned distributors). Approval was not given. On 22 January 2014, Mr Gent replied to Mr Whitfield, copying Mr Hennessy, with the following message:

Denzil,

As discussed not really the market we are chasing on short lead time. Fine to discuss long term again if it will not upset current channel e.g. incremental volume for BSL. Key focus for Selwood short term should be the volume that feeds their manufacturing business as this is completely incremental with no channel implications. Hopefully from there volume will grow.

Findings

1122 There is significant conflict between the evidence given by Mr Wood and the evidence given by Mr Ellis concerning the meeting on 30 October 2013. I consider that Mr Wood was an honest witness and, subject to observations I make below, his reliability as a witness was not undermined in any significant way. In contrast, and for reasons expressed earlier, I considered Mr Ellis to be an unreliable witness. Further, and as already noted above, there were numerous aspects of Mr Ellis's evidence concerning the meeting on 30 October 2013 which I reject.

1123 Mr Whitfield was available to be called by BlueScope as a witness but BlueScope chose not to do so. Mr Whitfield would have been able to give direct evidence about the issues in dispute concerning the meeting on 30 October 2013 and its immediate aftermath. Mr Whitfield had sworn an affidavit in the proceeding which was filed by BlueScope. No explanation was proffered for the decision not to call him as a witness. I infer that the evidence of Mr Whitfield would not have assisted BlueScope. In those circumstances, I more readily conclude that the evidence given by Mr Wood in respect of the meeting on 30 October 2013 is to be preferred to the evidence of Mr Ellis. I note for completeness that this is not a case in which it was unnecessary for BlueScope to call Mr Whitfield because the evidence would have been merely duplicative. The content of the discussions at the meeting were in dispute and Mr Whitfield was one of only three attendees at the meeting.

1124 In assessing the reliability of Mr Wood's account of the meeting on 30 October 2013, it is necessary to bear in mind that about four years elapsed before he reduced his account to writing

in his first witness statement. However, there are reasons to believe that the meeting would have been memorable for Mr Wood. At the time, Selwood Steel imported flat steel products and sold those products in competition with CIPA manufactured products. NZSA and Wright Steel were the two largest suppliers of Selwood Steel. Mr Wood had had discussions with Mr O'Brien of NZSA in September 2013 in which Mr O'Brien had indicated that he was being pressured to increase the NZSA offer to the "alto" BlueScope offer. Then, before Mr Wood received the January 2014 offer from NZSA on 21 October 2013, he had another phone call from Mr O'Brien in which Mr O'Brien told him that Mr Ellis had told Mr O'Brien to position the NZSA offer the same as the CIPA "alto" offer. On 21 October 2013, Mr O'Brien emailed NZSA's "January Shipment List Price" to Mr Wood which contained a large increase in price (matching the CIPA list prices for January 2014). The next day, on 22 October 2013, Mr Fogarty sent an email to Mr Wood, which provided a revised January 2014 shipment offer with much lower prices. That same day, Mr Wood was contacted by Mr Whitfield from CIPA, whom he had never met, and Mr Whitfield proposed a meeting with Mr Ellis. CIPA was not a supplier to Selwood Steel. Mr Wood made enquiries about Mr Ellis.

1125 The meeting was proposed by CIPA, not Selwood Steel. Mr Whitfield's written records and communications before and after the meeting suggest that his (personal) primary focus was on pursuing incremental sales of flat steel products for CIPA. It is apparent that Mr Whitfield considered that Selwood Steel was a significant distributor of imported flat steel products and therefore a significant potential customer for CIPA, and I infer that he communicated that opinion to Mr Ellis prior to the meeting. It can be accepted that, at that time, Mr Ellis was exploring the prospect of increasing sales to non-aligned distributors. However, CIPA's internal documents reveal that it was wary about damaging its relationship with its aligned distributors and conscious that a sale to a non-aligned distributor may simply come at the cost of a sale to an aligned distributor. That wariness was demonstrated by CIPA's refusal to supply Zincalume to Selwood Steel a few months later.

1126 It is significant that, immediately prior to the meeting at Selwood Steel, Mr Ellis had met with Surdex Steel (a subsidiary of Southern Steel) in which, I infer, he had discussed the benchmarking strategy and proposed a meeting of Victorian distributors to discuss the benchmarking strategy. The evidence shows that, throughout the period of September and October 2013, in the course of meeting many distributors, Mr Ellis was relentlessly pursuing the benchmarking strategy.

1127 Given these circumstances, I find it probable that the discussion at the meeting was generally to the effect as recounted by Mr Wood. I find it probable: that Mr Ellis complimented Mr Wood on his business; that Mr Ellis asked Mr Wood whether he was interested in acquiring products from CIPA on a transactional basis; that Mr Ellis emphasised that Selwood Steel would not have the commercial relationship of a distributor, and that CIPA would be concerned to know who Selwood Steel would sell to and the price at which it would sell; that Mr Wood was suspicious of what that would mean in practice and that Mr Wood baited Mr Ellis by identifying a transaction in which Surdex Steel was offering Selwood Steel imported products and a transaction in which Selwood Steel was offering BlueScope Distribution imported product. I also find it probable that Mr Ellis raised the benchmarking strategy with Selwood Steel. I find it probable that Mr Ellis said: that he wanted to talk to Mr Wood about how low the prices were in the marketplace; that CIPA had increased its pricing in its price lists to be a recommended resale price; that Selwood Steel ought to base its prices on the “alto” price in the price lists; and that if distributors based their prices on the price lists, “they would all be making money”. However, I am not satisfied that Mr Wood’s evidence, to the effect that Mr Ellis said that he would like Selwood Steel to use its influence in the market to benchmark the price up to the “alto” offer, is a reliable recollection of what was said. In circumstances where Mr Ellis had never previously met Mr Wood, I consider it unlikely that Mr Ellis sought to make that request of Mr Wood. Rather, I consider it likely that Mr Wood misunderstood what Mr Ellis had said. I consider it likely that Mr Ellis merely said that he would like Selwood Steel to benchmark its prices up to the “alto” offer. In respect of any reference to other distributors, I consider it likely that Mr Ellis said words to the effect that he had spoken to other distributors about the benchmarking strategy, particularly given the fact that Mr Ellis had just attended a meeting at Surdex Steel in which he had proposed a meeting of Victorian distributors to discuss the benchmarking strategy.

CIPA Distribution Market price list for sheet and coil products for January 2014 issued 30 October 2013

1128 The CIPA Distribution Market price list for sheet and coil products for January 2014 was issued on 30 October 2013. The document was in the same form as the previous month. The price list continued to include the “Advanced Offer” and the “Custom Offer” and stated an “Invoice Price (ex GST)” in respect of the range of available sheet and coil products. There was no express reference to “recommended resale price”.

Feedback from Southern Steel Supplies WA on 1 November 2013

1129 Mr Sparks's statement refers to a Salesforce record containing his notes of a telephone call he had with Steve Rankin of Southern Steel Supplies WA on 1 November 2013. The record was created on 4 November 2013. The record contains the following "meeting summary" (errors in original):

- Provided Steve with an overview of our strategy in increasing the level of rebate on all products. - Steve very supportive of our approach and believe the plate market in particular is very heavily influenced by the BSL book price and they are generally, at a minimum able to pocket the rebates. Having the rebate level higher allows them the best opportunity to be profitable. - There is not significant discounting currently taking place in WA from Steve's perspective and the cheapest pricing he sees is generally in line with the BSL invoice price to distributors. - Some buoyancy in the market, albeit, coming off a very low base.

1130 The evidence is significant for two reasons. It is evidence that a distributor understood that CIPA's monthly price lists were intended to be a benchmark for setting resale prices and would enable distributors to increase margins and be more profitable, and also expressed distributor support for the benchmarking strategy. It also provides support for BlueScope's internal documents that record that the benchmarking strategy was gaining "traction" amongst distributors (as per Mr Ellis's email on 11 October 2013 and the presentation titled "CIPA Sales and Marketing – CIPA Business Review" scheduled for a quarterly review meeting on 29 October 2013).

Feedback from Mr Larkin (Southern Steel) on 8 November 2013

1131 There exists a Salesforce record of an interaction between Mr Sparks and Mr Larkin of Southern Sheet & Coil on 8 November 2013. The "meeting summary" section of the record includes the following statements:

- Jim has increased his margins by 3-4 points in November however his volume has dropped off significantly on the back of price holding and decreasing from CMC and SMS. He is getting extremely frustrated and won't be able to hold his position if it continues. ...

1132 I infer that Mr Larkin's comments relate to the benchmarking strategy and Mr Larkin was conveying his concern that the strategy was not working: while Mr Larkin was seeking to hold his prices up (and had enjoyed increased margins as a result), his sales volumes had declined because CMC Steel and SMS were lowering their prices.

Feedback from Surdex Steel on 13 November 2013

1133 Mr Sparks's statement also referred to a Salesforce entry containing his notes of a telephone call that he had with David Ferguson of Surdex Steel on 13 November 2013. The record was created on 24 November 2013. The "meeting summary" section of the record includes the following statements (errors in original):

- Surdex supportinve of our ricing approach to increase rebates which allows them to often capture greater margin on sales. - Volumes low and market still very comtettive on standard 2400 x 6000's which are sold at mid 900's by smaller players like E-Steel.
...

1134 Again, the evidence is significant because it shows that a distributor understood that CIPA's monthly price lists were intended to be a benchmark for setting resale prices which would enable distributors to increase margins, and also expressed distributor support for the benchmarking strategy.

Meeting with Messrs Stedman and Simpkin (CMC Steel) on 14 November 2013

1135 In his affidavit, Mr Ellis listed a number of meetings in which he had spoken to distributors about the benchmarking strategy. One of those was a meeting with Messrs Stedman and Simpkin of CMC Steel on 14 November 2013. Mr Ellis's telephone diary records that Mr Vassella also attended that meeting. In cross-examination, Mr Ellis confirmed that this meeting was one in which he had spoken about the benchmarking strategy and at which Mr Vassella was present.

NZSA List Price and net prices for February 2014 released 18 November 2013

1136 At 1.54 pm on 18 November 2013, Mr O'Brien sent an email to Mr Palermo, copying Messrs Hennessy, Fogarty and Fuller, seeking confirmation of the list prices and discounts to be offered by NZSA for the February 2014 shipment. The email set out a table showing, in respect of seven flat steel product categories, the applicable import parity price, list price, net price after distributor discount and net price after an alternative discount described as "Tier 1 Negotiated". In his affidavit, Mr O'Brien explained that "Tier 1 Negotiated" was a net price that NZSA was allowed to go down to for particular customers with volume or who were more price sensitive.

1137 At 2.00 pm, Mr Palermo replied by email and confirmed that the prices set out in Mr O'Brien's email were as agreed in their discussions that morning.

1138 At 2.29 pm, Mr O'Brien sent an email to Mr Wood of Selwood Steel attaching NZSA's "February Shipment List Price". In his written statement, Mr O'Brien said that those list prices matched the list prices that CIPA had asked NZSA to set its prices at. A short time later, at 2.42 pm, Mr O'Brien sent a second email to Mr Wood advising the "distributor discount" applicable to NZSA's February prices. The email included a request that Mr Wood keep the discounts confidential. In his written statement, Mr Wood said that he had a conversation with Mr O'Brien, who said words to the effect of: "I don't want BlueScope to find out about these price discounts". However, in his written statement, Mr O'Brien said that he does not recall why he asked Mr Wood to keep the discounts confidential, as the discounts offered were in line with CIPA's instructions to him. I consider it probable that Mr Wood's recollection of his discussion with Mr O'Brien is mistaken, and that Mr Wood is recalling a discussion that likely occurred in September or October 2013 before Mr O'Brien received more explicit instructions from BlueScope as to his pricing.

1139 At 6.42 pm that day, Mr Hennessy sent an email to Messrs Sparks, Gent and Kelso, copying Messrs Bryers and Palermo, with the subject "February Ship Offer". The email explained the prices that NZSA was permitted to offer and attached a spreadsheet that compared the NZSA net price to CIPA's expected March prices. Mr Hennessy advised that if NZSA believed it needed to discount any lower, it would need to obtain Mr Hennessy's approval first.

Feedback from Mr Lander (Brice Metals) on 20 November 2013

1140 Mr Sparks's statement referred to a Salesforce entry containing his notes of a telephone call he had with Mr Lander of Brice Metals on 20 November 2013. The record was created on 24 November 2013. The "meeting summary" section of the record includes the following statements (errors in original):

- Brice are strongly supportive of our current pricing structure which includes are higher level of rebate and it allows them to capture improved margins without passing this all on to the market. ... - CMC are consistently the cheapest distributor in the market and have been for some time. ...

1141 I infer that the reference to "current pricing structure" is a reference to the benchmarking strategy. Again the evidence is significant because it shows that a distributor understood that CIPA's monthly price lists were intended to be a benchmark for setting resale prices which would enable distributors to increase margins, and also expressed support for the benchmarking strategy.

BANZ Pricing Forum meeting on 21 November 2013

1142 On 24 November 2013, Mr Palermo circulated an email with the subject “BANZ Pricing Forum – Minutes /Price Position for Feb 2014”. The email commenced with the statement:

Summary of the CIPA price position for February 2014 following our phone hook-up on Thursday 21st November.

1143 The email indicates that the BANZ Pricing Forum in respect of the CIPA February 2014 price lists occurred by telephone meeting on 21 November 2013. The email set out the recommended list prices and distributor support discounts to be offered in respect of each of the principal categories of flat steel products. The email advised that the formal price announcement would be made by 27 November 2013. Attached to the email were spreadsheets in the usual form (discussed earlier in these reasons), showing the calculation of import parity prices. One of the spreadsheets was the “CIPA Benchmarks and Premiums” spreadsheet in the form prepared in September (and circulated to distributors), as discussed above.

1144 The email was circulated to persons involved in pricing at CIPA (including Messrs Hennessy and Gent), at BlueScope Distribution (Messrs Cornelius, Watson, Cousins, Zafiris and Hussey) and at NZSA (Messrs O’Brien and Fogarty). As discussed earlier, the BANZ Pricing Forum affords evidence of close cooperation between the BlueScope owned entities, CIPA, BlueScope Distribution and NZSA, in relation to pricing.

1145 None of the CIPA price lists for February 2014 were tendered in evidence.

Meetings with distributors on 26 November 2013

1146 On 26 November 2013, Mr Ellis, Mr Kelso, Mr Tzimas (an account manager who reported to Mr Kelso) and Mr Hennessy met with Barry Hunt, owner of QSS, a regional non-aligned distributor, in Pinkenba, Queensland. In his written statement, Mr Hennessy said that, at the meeting, Mr Ellis said words to the following effect:

I encourage you to use our list price as a pricing benchmark when setting your prices.

1147 Mr Hennessy also said that, in the afternoon on 26 November 2013, he and Messrs Ellis and Kelso met with Messrs Wells, Casey, Jones, Gousmett, Millard and Moss of Vulcan Steel at their sheet and coil business premises in Brisbane. The purpose of the meeting was to discuss CIPA increasing their sales to Vulcan Steel. Following the meeting, Mr Hennessy sent an email to Messrs Jones and Casey (copying Mr Ellis) on 29 November 2013 to thank them for the

meeting and to set up a further meeting. In a series of emails, the next meeting was arranged for 5 February 2014 in Auckland and is discussed below.

CMC Steel price increase notification on 26 November 2013

1148 On 26 November 2013, CMC Steel issued a price increase notification to its customers in respect of its prices for December 2013 and January 2014. The notification stated that the price increases would become effective on 1 December 2013 and that there would be no price movement for January 2014. The notification contained a table of standard categories of flat steel products and the percentage price increase. In his written statement, Mr Lobb stated that the percentage increases notified by CMC Steel were the same as the percentage increases that CIPA had published in September 2013 in respect of December 2013 deliveries. Mr Lobb also said, however, that CMC Steel's actual sell prices bore no resemblance to CIPA's price list.

1149 On the same day, Mr Lobb sent an email to Mr Gent attaching the price notification letter. In his written statement, Mr Lobb said that he could not specifically recall why he sent the price notification letter to Mr Gent, but he thought it likely that Mr Gent requested a copy.

1150 On 27 November 2013 (apparently at 12.41 am), Mr Gent sent an email to Messrs Hennessy, Sparks, Kelso and Ms Pilkadaris, copying Messrs Palermo and Bryers, attaching a copy of CMC Steel's price notification letter and stating:

Price letter out for CMCS Dec. As you may remember SMS and SSG went out in Nov with the Dec pulled forward while CMCS Dec went month on month.

1151 At the same time, Mr Gent sent an email to Mr Lobb in reply to Mr Lobb's email attaching the price increase notification which stated:

Neil,

Just so you are aware you may not see a December offer from others as they had pulled forward Dec into November and then held rather than CMC Steel who have gone month on month.

1152 In his written statement, Mr Lobb said that he understood that the reference to "others" in Mr Gent's email was a reference to other aligned distributors. Mr Lobb said that he understood from the email that Mr Gent was reassuring him that other aligned distributors had already implemented the price increase. In my view, Mr Lobb's understanding is the most likely meaning and purpose of Mr Gent's email.

NZSA March 2014 shipment list prices issued to Selwood Steel on 6 December 2013

1153 On 6 December 2013, Mr O'Brien sent Mr Wood of Selwood Steel NZSA's list prices for the March 2014 shipment and, a short time later, the distributor discounts applicable to the list prices.

BANZ Pricing Forum held on 9 December 2013

1154 On 9 December 2013, Mr Palermo sent an email to the participants in the BANZ Pricing Forum (including for CIPA, Messrs Hennessy and Gent, BlueScope Distribution, Messrs Watson, Cousins, Zafiris and Hussey and for NZSA, Mr O'Brien) attaching "supporting data" for the meeting scheduled that afternoon.

Discussion with Mr Arnold (Brice Metals) on 11 December 2013

1155 Mr Sparks's written statement referred to a Salesforce record containing his notes of a telephone call on 11 December 2013 with Peter Arnold, the Sales Manager for sheet & coil at Brice Metals. The record was created by Mr Sparks on 13 December 2013. The "meeting summary" section of the record included the following statement:

Provide update on March pricing position and also the simplification of the price book as he had discussed with Jason the earlier week. - Peter is still seeing significant levels of discounting into the market by both SMS and CMC. ...

1156 The evidence is significant because it records a complaint, by a distributor to BlueScope, that other competing distributors were discounting prices in the market. The complaint is indicative of a belief that such discounting would not be occurring, and that BlueScope should be informed.

Changes to CIPA's Distribution Market price list for sheet and coil products for March 2014

1157 In his written statement, Mr Hennessy said that, well before December 2013, CIPA had started working on a price list simplification project which related to the simplification and restructuring of its Distribution Market price list. Mr Hennessy said that he had a conversation with Mr Ellis in December 2013 in which Mr Ellis said words to the following effect:

Let's call the list price an RRP.

When we go out and talk to distributors we should tell them that the RRP is the price that we are recommending to them that they sell at.

1158 Mr Hennessy said that, from that time, he started calling the "list price" the "recommended resale price". I understand Mr Hennessy's evidence to concern his personal use of the

expression “recommended resale price”. As detailed earlier in these reasons, on Mr Ellis’s instruction, CIPA employees began referring to CIPA’s monthly list prices as recommended resale prices from September 2013. In his written statement, Mr Kelso said that he had been using the terminology of recommended resale price since September 2013, even though the prices lists that were distributed by CIPA in September 2013 did not refer to the “Recommended Resale Price”. Mr Sparks’s written statement also said that the Distribution Markets sales team had been communicating the monthly list price to customers as a recommended resale price since at least September 2013. Mr Sparks said that the changes in December 2013 formalised the use of recommended resale price and specifically “Recommended Resale Price” within the Distribution Market price list for sheet and coil products. Those statements are consistent with the evidence in the proceeding more broadly.

1159 On 16 December 2013, Mr Ellis sent an email to Mr Vassella with the subject “Review Issues for Mark V”. The email stated (errors in original):

Hi Mark,

These are the topics for tomorrow – no particular order. Some are just for information and some require discussion – understand you’ll be in and out of the board meeting so I will be in the office all day with other appointments and make time whilst your available

Cheers Jason

1160 The fifth topic referred to in the email was:

Distribution Channel Strategy (+ simplification of price list + recommended retail pricing) – working well thus far

1161 Mr Hennessy confirmed that Mr Vassella was at a board meeting at BlueScope’s head offices in Melbourne on 17 December 2013. Mr Hennessy was also in that office that day. During a break in the board meeting, Mr Hennessy said that he was involved in a conversation between Mr Ellis and Mr Vassella. The conversation was quite brief as Mr Vassella did not have a lot of time. Mr Ellis spoke about the distribution channel strategy in words to the following effect:

Mr Ellis: We are selling more volume to non-aligned distributors.

We’re finalising our price list which will be simplified with large changes to our extras that more closely reflect import offers.

We are also planning to release that price list as an RRP for distributors to consider when setting their prices.

Mr Vassella: Okay. I would like further detail on this Jason.

1162 On 18 December 2013, Mr Gent sent an email to representatives of SMS including Mr Cornelius, copying Mr Hennessy, attaching a draft cover letter for the March 2014 Distribution Market price list for sheet and coil products and sample pages. The email relevantly stated (errors in original):

Gentlemen,

As you are aware based on feedback from our customers CIPA is refreshing its price list to be more simplistic and easier to read as per a NZS price list. Our intent is to launch tomorrow afternoon however before sending we wanted to allow SMS a chance to review and offer feedback as to whether we achieved the ask of ease and simplicity. I appreciate this is short notice but the rationale to justify this change has only recently been approved to allow the schedules to be updated and finalised this afternoon. We have not asked our other channel partners so are reliant on your speed in response by midday tomorrow please.

As you will see there is the standard letter as per usual with some minor changes as to formatting and the use of “Recommended Resale Price” and inclusion of base price referring to two mill coils.

1163 The draft cover letter did not refer to a list price or invoice price; rather it notified CIPA’s “recommended resale prices”. Otherwise, the cover letter was in similar format to previous months.

1164 On 19 December 2013, Mr Gerada, the NSW Manager of SMS, replied to Mr Gent’s email in the following terms:

I like the look of this in general. The major issue for me is the letter with the recommended resale price, if this letter was to get into customers hands they would start making assumptions that their suppliers should be charging them the recommended resale price and I don’t think that is a precedent we want to set. I don’t want to see that on the letter.

1165 In his written statement, Mr Hennessy said that he understood that Mr Gerada was concerned that customers who were being charged by SMS above the recommended resale price would ask to be charged at the recommended resale price. I consider that to be the obvious meaning conveyed by Mr Gerada’s email. SMS’s concerns with respect to customers misunderstanding the recommended resale price is reflected in subsequent correspondence, referred to below. Mr Hennessy forwarded Mr Gerada’s email to Mr Ellis. Mr Hennessy said that there was no change to the RRP strategy.

1166 On 19 December 2013, Mr Unicomb sent an email to the Distribution Markets sales team explaining the revised price schedules. Mr Unicomb’s email attached a presentation titled “Distribution Price List Simplification”. The presentation explained the changes that were being made to the price schedules. Numerous changes were made and it is not necessary to

identify them all. However, one of the significant changes was to introduce an express “recommended resale price”. Mr Unicomb’s email indicated that the headline movements to price, which were to be included in the cover letter to customers, were to be phrased in terms of movements in the recommended resale price. In the presentation, on the page headed “Summary”, one of the objectives of the changes was described as delivering:

1. A sheet & coil price list that is easier to understand / use and can be communicated as a “Recommended Resale Price”.

Dissemination of CIPA’s Distribution Market price lists for March 2014 on 20 to 23 December 2013

1167 On 20 December 2013, CIPA sent the revised Distribution Market price list for sheet and coil products for March 2014 to BlueScope Distribution (Mr Bray) and CIPA’s aligned distributors (CMC Steel, OneSteel Sheet & Coil and Southern Steel, and, on 23 December 2014, to Apex Steel) by email. The emails to the aligned distributors attached a number of documents including a price notification letter, the Distribution Market price list for sheet and coil products for March 2014 and a presentation titled “Distribution Sheet & Coil Price List Changes”. In relation to those documents:

- (a) The price notification letter was titled “March 2014 Market Price Notification” and was in similar form to previous months, save that the letter stated, in respect of the principal categories of flat steel products, a “recommended resale price” (in dollars per tonne) and a “price list change” (being the percentage change in the recommended resale price in comparison to the previous month’s list price).
- (b) The Distribution Market price list for sheet and coil products for March 2014 was dated 19 December 2013. It had been reformulated from the previous month. Many pro forma aspects of the price schedule remained the same, but the layout of the pricing information was altered. In particular, what had previously been the “Custom” offer was now listed before the “Advanced Offer” and was referred to as a “Base” offer. For each principal product category, the price schedule commenced with a “Base” recommended resale price (rather than an invoice price), with variations in thickness, width, product specifications and processing subject to price adjustments. The “Base” offer had order lead times of between eight and ten weeks. The “Base” offer for each principal product category was then followed by the “Advanced Offer” which was renamed the “Advanced Service Offer”. That offer continued to state prices as “invoice

price” and not “recommended resale price”. The lead times for the Advanced Service Offer were shorter than for the “Base” offer and were generally four to eight weeks.

(c) The presentation summarised and explained the changes in the formulation of the Distribution Market price list for sheet and coil products for March 2014.

1168 Also on 20 December 2013, Jamie Cooper of BlueScope sent an email to (amongst others) Messrs Bolzan, Lewin and Szecsodi of OneSteel Metalcentre attaching a price notification letter and CIPA’s Distribution Market price lists for a number of steel plate products for March 2014. In contrast to CIPA’s Distribution Market price list for sheet and coil products, the price notification letter and price lists for steel plate products did not use the expression “recommended resale prices”. However, the covering email listed standard plate products with “recommended resale prices”.

1169 In his affidavit, Mr Ellis gave some evidence about the changes to CIPA’s Distribution Market price list for sheet and coil products. The evidence was riddled with errors. First, Mr Ellis said that an updated version of the CIPA price list was released on or about 8 January 2014. The evidence shows that the updated Distribution Market price list for sheet and coil products was dated 19 December 2013 and was released to aligned distributors on 20 December 2013. Second, Mr Ellis exhibited a document that he said was an example of the updated price list. The document exhibited was an email from CIPA to Vulcan Steel on 6 January 2014 attaching a price notification letter and CIPA’s price lists for a number of steel plate products for March 2014. The Distribution Market price list for sheet and coil products for March 2014 was not attached to the email. Nevertheless, it is significant to note that, while the price notification letter and price lists for steel plate products did not use the expression “recommended resale prices”, the covering email to Vulcan Steel listed standard plate products with “recommended resale prices” (in the same manner as the email to OneSteel Metalcentre referred to above).

1170 In his affidavit, Mr Ellis said that the changes to CIPA’s Distribution Market price list for sheet and coil products were made as part of the ongoing price simplification process. I accept that a component of the changes made to that price list had the object of simplification. However, it is apparent from the documents referred to above that a significant component of the changes was to give prominence to the recommended resale price. In that regard, Mr Ellis said that, in his view, the use of that terminology did not involve any change of substance to CIPA pricing. I accept that statement in the sense that, since September 2013, CIPA had attempted to rebadge its standard list price as a recommended resale price as part of its benchmarking strategy.

Feedback from Mr Larkin (Southern Steel) on 7 January 2014

1171 Mr Sparks's written statement referred to a Salesforce record containing his notes of a discussion with Mr Larkin of Southern Steel on 7 January 2014 at BlueScope's Alexandria office. The record does not state the date on which it was created, but states that it was last modified on 13 January 2014. The "meeting summary" section of the record included the following statements (errors in original):

- Broad feedback on the set out of the price list and the use of a Recommended Resale Price was positive from Jim. Explained that the RRP is based on full mill coils and the Distributors can value add from there. - Jim indicated some of the thickness extras may have been to large although didn't provide specifics. ... - Discussed providing a RRP for p[rocessing and agreed to work together in establishing the format and relevant pricing levels. - Continued frustration with behaviour of SMS and CMC in the market. Beleive CMC indicate one thing and then behave in a totoally contradicting manner.

1172 A number of aspects of that evidence are significant. First, the evidence shows a distributor's ongoing support for the use of a recommended resale price. Second, it records a complaint, by a distributor to BlueScope, that other competing distributors were discounting prices in the market, which is indicative of a belief that such discounting would not be occurring and that BlueScope should be informed. Third, it evidences an initial discussion of the introduction of "recommended resale prices" for processing. As discussed later in these reasons, BlueScope attempted to create a price list containing recommended resale prices for processing services supplied by distributors of flat steel products. I infer that Messrs Sparks and Larkin discussed that proposal on 7 January 2014.

CIPA's Distribution Market price list for sheet and coil products for March 2014 provided to Selection Steel on 8 January 2014

1173 On 8 January 2014, Mr Hennessy sent an email to Messrs Gregory and Collis of Selection Steel attaching a price notification letter, CIPA's Distribution Market price list for sheet and coil products for March 2014 and the presentation titled "Distribution Sheet & Coil Price List Changes". Those documents were in the same form as had been sent to CIPA's aligned distributors in December 2013.

1174 In his written statement, Mr Collis said that the products listed in the price notification letter were mostly products that Selection Steel did not, and had never (to Mr Collis' knowledge), purchased from CIPA. Mr Collis said that he never used or considered using CIPA's "recommended resale prices" when preparing Selection Steel's internal pricing guides, and he never suggested to any of Selection Steel's sales staff that they should use BlueScope's "recommended resale prices" when negotiating prices with end customers.

SMS price increase notification on 14 January 2014

1175 As noted earlier, on 18 December 2013, CIPA sought feedback from SMS about the revised Distribution Market price list for sheet and coil products for March 2014 and, on 19 December 2013, Mr Gerada of SMS replied with a concern about the use of the “recommended resale price” label. Mr Gerada’s concern was that customers may think that that was the price they should be paying SMS (whereas, I infer, SMS would be likely to charge a higher price on account of processing and other services provided).

1176 On 7 January 2014, David Maxwell circulated an internal email within SMS, copying Mr Gerada, in which he summarised CIPA’s changes to the Distribution Market price list for sheet and coil products. In respect of the recommended resale price, Mr Maxwell stated:

RRP rates included – these are guide / base number mainly for the non standard items (not for market advertising) extras per the schedule are to be added as applicable

1177 I infer that the statement in parentheses, “not for market advertising”, reflects the concern earlier expressed by Mr Gerada. In other words, SMS’s approach would be not to promote the recommended resale price out of concern that it would be misunderstood by customers who might ask SMS to lower its prices. That inference is supported by the following subsequent events.

1178 At 8.37 am on 14 January 2014, Mr Zafiris of BlueScope Distribution circulated an internal email attaching the SMS price increase communication effective for 3 March 2014. At 8.40 am, Mr Bray forwarded the email to Messrs Vassella, Garey, Ellis and Hennessy (amongst others) for their information. At 9.44 am, Mr Ellis sent an email to Mr Hennessy asking:

Does this line up with our recommendation?

1179 At 11.07 am, Mr Hennessy replied to Mr Ellis as follows:

Yes as per below the price increase percentages are exactly the same. There is no mention of our RRP, and thus the impact will depend on the starting point for the % increase.

I have left a message yesterday for Gerald to discuss how they will be communicating RRP.

1180 It is apparent from Mr Hennessy’s email, and Mr Ellis’s response, that Mr Ellis was on holiday in a skiing location at that time. I infer from the contents of Mr Hennessy’s email, which reproduced the relevant part of the SMS price increase communication, that the communication did not use the expression “recommended resale price”.

1181 At 5.01 pm, Mr Ellis replied as follows (copying Ms Minogue):

– we really need to start booking the ‘education tour’ as discussed – it would have been good for Gerald to discuss this prior to its release

Alison – can you work with Matt to book a ‘Distributor Tour’ – Matt knows the targets and other details

1182 I infer that the reference to “Gerald” was a reference to Mr Cornelius of SMS. I also infer that, in his email, Mr Ellis expressed some frustration that SMS had not adopted the “recommended resale price” phraseology in its price increase notification, and that Mr Ellis considered that CIPA should undertake an “education tour” to explain the recommended resale price.

The “Education Tour” – meetings with distributors on 20 and 21 January 2014

1183 On 16 January 2014, Ms Minogue followed up with Mr Hennessy about the “Distributor Tour” referred to in Mr Ellis’s email on 14 January 2014, and Mr Hennessy sent Ms Minogue a list of the distributors he wished to meet with (including BlueScope Distribution, Southern Steel, CMC Steel, Apex Steel, Selection Steel, Vulcan Steel, QSS, East Coast, SK Global and Selwood Steel), the dates on which some meetings had already been arranged, and asked Ms Minogue to suggest dates for the remainder.

1184 In his written statement, Mr Hennessy said that the “education tour” (as referred to in Mr Ellis’s email) was conducted over the next few weeks (across January and February 2014) to inform distributors about a range of topics concerning CIPA pricing, one of which was that CIPA’s price list would now be referred to as a “recommended resale price” in place of a list price. Mr Hennessy said that, during that education tour, they encouraged distributors to use the “recommended resale price” as a benchmark when they set their pricing.

1185 Although Mr Hennessy’s email above refers to meetings being arranged with a large number of distributors for the purposes of the “education tour”, evidence was only adduced in respect of a small number of those meetings. For example, while Mr Hennessy adduced in evidence calendar invitations in respect of meetings with Vulcan Steel, PCD and QSS on 20 January 2014, ultimately only evidence in respect of Vulcan Steel was adduced. The evidence that was adduced in respect of the distributor meetings at this time is addressed in this section.

Meeting with Vulcan Steel, Queensland on 20 January 2014

1186 On 20 January 2014, Messrs Hennessy, Kelso and Cooper attended a meeting with Mr Millard of Vulcan Steel at the Queensland offices of Vulcan Steel. The calendar invitation for the meeting indicated that Mr Moss was also invited. In his written statement, Mr Kelso said that

he could not specifically recall the meeting or whether Mr Moss attended. Mr Kelso made a Salesforce record of the meeting. The record was created on 27 January 2014. In the record, the meeting objective was stated to be “RRP Pricing Format” and “New Pricing expectations”. The Salesforce record included the statement:

...RRP working to some extent but plenty of examples where the discipline was being broken...

1187 In his written statement, Mr Kelso said that the above statement was a reference to a comment made by Mr Moss to the effect:

You have a price list with a RRP, which if people sold to, and made acceptable margins, would make the business sustainable, but your own aligned distributors aren't following it.

We are not even an aligned distributor but we represent your products better than your aligned distributors do.

1188 Mr Kelso said that he could not recall if the comment was made during the meeting on 20 January 2014. I consider it likely having regard to the Salesforce record.

1189 In his written statement, Mr Kelso said that, throughout this period, he had similar conversations with other representatives of Vulcan Steel and OneSteel. During those conversations, the representatives would state words to the effect of:

Yes. the RRP is working we are sticking to it. But there are instances where it's not working.

1190 Mr Kelso said that, during these conversations, the representatives of Vulcan Steel and OneSteel would typically also accuse other distributors of not following the RRP strategy. Mr Kelso said that these sorts of complaints were not new to him. Before the RRP strategy was implemented, distributors often complained to Mr Kelso about what other distributors were doing in the market to undercut the value or price of steel that was being sold and accused others of selling too cheap in the market.

Meetings with Southern Steel Supplies on 21 January 2014

1191 Mr Sparks's written statement referred to a Salesforce record he created of a meeting he attended with Sam Mounem of Southern Steel Supplies on 21 January 2014. The record indicates that it was created on 24 January 2014. The object of the meeting was stated to be “April Pricing” and “Market Activity”. The “meeting summary” section of the record included the following statements:

- Provided overview on the move to a RRP for all of our price lists. Sam interested but

also wanting to ensure that the RRP is high enough not to limit margins. ...

1192 The evidence indicates that Mr Sparks also met with Mr Larkin of Southern Steel on 21 January 2014 at 8.30 am in Bankstown. Mr Sparks's written statement referred to a Salesforce record he created of that meeting. The record indicates that it was created on 24 January 2014. The object of the meeting was stated to be "April Pricing", "Processing Rates" and "Market Activity". The "meeting summary" section of the record included statements to the effect that they discussed the April 2014 price movements and, apart from one product, Mr Larkin was broadly comfortable with the price movements. The "meeting summary" also refers to a discussion about a recommended resale price for processing services, which is discussed later in these reasons.

Meeting with SMS on 29 January 2014

1193 On 29 January 2014, a meeting occurred between CIPA representatives (including Messrs Ellis, Hennessy and Gent) and SMS representatives (including Messrs Cornelius and Gerada). The meeting was titled "CIPA Review – SMS Lead Team Meeting". The paper for the meeting contained market share data for CIPA and SMS and included a presentation titled "Distribution Price List Simplification" (which was in the same form as the presentation titled "Distribution Sheet & Coil Price List Changes" previously sent to SMS and aligned distributors in December 2013). I infer that one of the purposes of the meeting was to discuss the changes in CIPA's monthly price lists and the use of the recommended resale prices, but no other evidence was given about the meeting.

NZSA April 2014 Shipment "RRP"

1194 On 20 January 2014, Mr O'Brien sent an email to Mr Wood of Selwood Steel attaching NZSA's offer for April 2014 shipment. The email described the offer as "NZSA's April RRP offer". In his written statement, Mr O'Brien said that NZSA was instructed to change the terminology of its list price to "RRP". Despite that, the offer attached to the email continued to use the expression "list price". That email was followed by a second email to Mr Wood that set out the distributor discounts applicable to the list prices, and then by a third email that set out the net pricing for Selwood Steel.

1195 On 22 January 2014, Mr Hennessy sent an email to Mr O'Brien attaching CIPA's Distribution Market price list for sheet and coil products for March 2014 and the presentation titled "Distribution Sheet & Coil Price List Changes". Those documents were in the same form as had been sent to BlueScope Distribution and CIPA's aligned distributors in December 2013.

On 28 January 2014, Mr O'Brien sent an email to Mr Hennessy with the subject "Offer Process Feedback". The email stated:

Just wanted to touch base on some feedback we have received on our current RRP/Distributor Discount/Tier One pricing approach we are now utilising. I have had two customers request only their applicable nett pricing as they find the other info just noise and irrelevant. I have agreed to forward them only their applicable price.

Will advise of any more feedback but in essence we have gone from a simple pricing model to a more complex one with little perceived value for at least the two accounts in question.

1196 Mr Hennessy replied to the email asking for the names of the customers concerned and whether Mr O'Brien had received feedback from other customers. Mr Hennessy also forwarded the email exchange to Mr Ellis.

Feedback from Vulcan Steel regarding the RRP on 3 February 2014

1197 Early on 3 February 2014, Mr Kelso sent an email to Mr Hennessy reporting on a proposal for supply to Vulcan Steel that he would not be taking up. Mr Kelso reported that "Dave Millard of Vulcan called to tell me he is getting smashed by Southern, CMC with imported Aluzinc offers for SFS" and the email concluded as follows:

I will be letting this one go unfortunately the biggest issue, David advised he has not tested Indian waters yet nor Vietnamese but he is suggesting these guys are giving him no choice and the BSL distributors have ignored the RRP message all together.

1198 In his written statement, Mr Kelso confirmed that, by the email, he was informing Mr Hennessy that Vulcan Steel was not able to buy CIPA product and sell that at the recommended resale price to the end customer, SFS, because it was losing business to Southern Steel and CMC Steel who were providing SFS with quotes from imported product. Mr Kelso also said that the statement "the BSL distributors have ignored the RRP message all together" recorded Mr Millard's view that CIPA's aligned distributors were not following the recommended resale price message. In his written statement, Mr Hennessy said that he understood the statement in the same manner, specifically that the reference to "BSL distributors" was a reference to BlueScope's aligned distributors, in this case being CMC Steel and Southern Steel, and the reference to "ignoring the RRP message all together" was a reference to CMC Steel and Southern Steel, at least on this occasion, not pricing their steel in accordance with the price benchmarking strategy.

1199 Later that morning, Mr Hennessy forwarded the email to Mr Ellis, with copies to Messrs Kelso, Gent, Sparks and Bryers with the following statement:

Further evidence of the need to launch Vietnamese AluZinc AD Case. Also Southern & CMC apparently in this boots and all!

1200 In his written statement, Mr Hennessy confirmed that the reference to “AD Case” was a reference to an anti-dumping case against Vietnam in relation to Aluzinc (which he believed BlueScope was already considering at that time). Mr Hennessy said that Mr Ellis had responsibility for BlueScope’s anti-dumping actions. Mr Gibbs was the manager responsible for preparing BlueScope’s anti-dumping actions and he reported to Mr Ellis.

1201 On 4 February 2014, Mr Ellis replied to Mr Hennessy’s email, sending the reply to both Mr Hennessy and Mr Gibbs, copying Messrs Kelso, Gent, Sparks and Bryers, and stating:

Yes they are very much on the radar as soon as we are ‘allowed’

The other issue on RRP I will discuss with you off line.

1202 In cross-examination, Mr Ellis agreed that the first sentence referred to an anti-dumping case in respect of Aluzinc. In relation to the second sentence, which refers to discussing the “other issue on RRP” offline, Mr Ellis said that he did not recall that discussion. Mr Ellis denied that he wanted to discuss the issue offline because he had, by that time, become sensitive about putting anything in writing about the RRP. Mr Ellis reiterated his evidence that he believed that it was a matter for distributors whether they adhered to the RRP. I reject that evidence. If it were true, there would have been no need to discuss the “other issue on RRP” offline. The fact that Southern Steel and CMC Steel were not adhering to the recommended resale prices would have been a matter of no significance. However, the email chain demonstrates that:

- (a) Mr Millard of Vulcan Steel considered it sufficiently significant that Southern Steel and CMC Steel were not adhering to the recommended resale prices that he should complain to Mr Kelso; and
- (b) Mr Ellis considered it sufficiently significant that he wanted to discuss it with Mr Hennessy “offline”.

Dissemination of CIPA’s Distribution Market price lists for April 2014 on 4 to 5 February 2014

1203 On 4 and 5 February 2014, CIPA sent a price notification letter and the Distribution Market price list for sheet and coil products for April 2014 to certain of its aligned distributors (CMC Steel, Southern Steel and Apex Steel) by email. The price notification letter and the Distribution Market price list for sheet and coil products were in the same format as March

2014, including particularly the references to “recommended resale price” in both the price notification letter and the price list.

1204 A similar price notification to BlueScope Distribution was not in evidence but, based on CIPA’s usual practice, I infer that such a notification would have been given at the same time.

1205 Nor was there a similar price notification to OneSteel Sheet & Coil in evidence. However, on 4 February 2014, Mr Kelso sent an email to Messrs Bolzan and Lewin of OneSteel Metalcentre attaching a price notification letter and CIPA’s Distribution Market price lists for a number of steel plate products for April 2014. Again, in contrast to CIPA’s Distribution Market price list for sheet and coil products, the price notification letter and price lists for steel plate products did not use the expression “recommended resale prices”. However, the covering email listed standard plate products with “recommended resale prices”.

1206 On 13 February 2014, Mr Cooper of BlueScope sent an email to Russell Kroon of Vulcan Steel (copying, amongst others, Messrs Millard and Moss) attaching a price notification letter and CIPA’s Distribution Market price lists for a number of steel plate products for April 2014. Again, the covering email listed standard plate products with “recommended resale prices”.

The BANZ Blog on or around 5 February 2014

1207 On 31 January 2014, Ms Minogue sent an email internally to a number of people, including Mr Hennessy, stating that Mr Ellis was on “Blog Duty” the following week and requesting contributions for the “Blog”. On 5 February 2014, Mr Hennessy replied to Ms Minogue’s email suggesting the following inclusion in the Blog:

CIPA S&M have just released a new simplified Sheet & Coil Price List for our Distribution Customers. This price list is consistent with our strategy to be easier to do business with, however also “simpler does not mean dumb”.

The price list has been substantially restructured so that it is;

1. Easier to understand and use,
2. Demonstrates more clearly our competitiveness and captures maximum value, to deliver at a minimum a small increase in revenue, and
3. Is being communicated as a “Recommended Resale Price” for our Distribution customers to consider when they set their prices for our products to their customers.

1208 In his affidavit, Mr Ellis said that the “Blog” was an internal social media platform, similar to Facebook, which allowed employees to post about matters of interest.

1209 In cross-examination, Mr Hennessy agreed that the third point in the email was consistent with his understanding of Mr Ellis’s strategy in relation to the use of CIPA’s price list. When asked whether the third point was consistent with his understanding throughout the relevant period as to how the price list was meant to be used, Mr Hennessy replied “Yes. That was certainly the official term – by this stage”. Mr Hennessy further accepted that he understood that the strategy was that BlueScope was distributing a price list with prices that CIPA was recommending for use by distributors when they set their prices to customers, and that distributors could consider whether to follow that recommendation. Mr Hennessy agreed that, ultimately, it was up to the distributor as to whether they used the list prices when they set their prices to customers.

1210 I treat the Blog statement, as a description of the benchmarking strategy, and Mr Hennessy’s evidence in this respect, with caution. I consider it likely that, in the context of an online publication that was widely available within BlueScope, any description of the recommended resale prices, introduced as part of CIPA’s monthly price lists, would have been written in careful language and may not disclose the underlying objective of the recommended resale prices. Mr Hennessy’s evidence as to the benchmarking strategy has been discussed earlier in these reasons.

Feedback from Surdex Steel on 9 February 2014

1211 In evidence is a Salesforce record made by Mr Whitfield of a discussion with “Roo and Oz” of Surdex Steel (a subsidiary of Southern Steel) on 9 February 2014. The “meeting summary” section records the following feedback from Surdex Steel (errors in original):

- surdex have feedback the sms are selling 1500 wide ducting feed for \$1225 to \$1245/t for 1t recoils, this is well below the rrp. - Surdex are becoming very frustrated that they have not been able to secure volume into historical captive customers due to pricing form SMS, while they are trying to get prices up. - Surdex have large amounts of 1500 wide inventory and are planning to re-capture market share.

1212 Again, the evidence is significant because it records a complaint, by a distributor to BlueScope, that other competing distributors were discounting prices in the market below the level of the recommended resale price. The complaint is indicative of a belief that such discounting would not be occurring, and that BlueScope should be informed.

Meeting with SMS on 11 February 2014

1213 A Salesforce entry records a meeting between Ms Arzoumanian of CIPA and Andrew Taintey of SMS which occurred on 11 February 2014 at SMS’s premises in Sunshine, Victoria. The

“meeting objective” was recorded as, amongst other things, “[r]eview RRP Market pricing v Zincalume Recoil pricing”. The “meeting summary” included the following statements (emphasis added, errors in original):

Regarding Zincalume recoils pricing caught up with Andrew to discuss his view of the market. He provided the following insights - Flashing market does not differentiate Aluzinc with Zincalume (r) there is no value according to SMS to sell one or the other (Builders price sensitive) - Whilst BD have done work with builders and architects to specify Zincalume(r) this traction has not been realised in all markets (Perhaps testimonials are important here to reposition) - Design Sheet Metal who play in this space are a 100t customer per month (SMS won no tonnes in Nov Dec or Jan as a result of not using an EUT). - SMS have won 10t in Feb14 utilising a \$30 EUT, (which has created the differential between Surdex/SMS pricing ultimately) Andrew confirmed he would achieve a 1.8% margin without EUT and 4.2% with EUT using a \$48 recoiling cost, \$28 CTS, \$24 transport. Which leaves approx. 80- 90t up for grabs...Surdex don't appear to have won the business and its likely Selection have secured tonnes - Sentiment around general import displacement “SMS are not going to sit back and watch Selection win the market share”, Surdex have not been winning share either based on Selection pricing predominately - SMS intent is that the EUT there is to displace Aluzinc which is import product and head office allocate them EUT funds by mancat and Aluzinc is one of the mancats detailed in monthly Emails. *I discussed the RRP and Andrew gets it, however he also positioned that Selection who are not “aligned” to BSL were blowing price out of the water and this required some further consideration.* The intent with SMS is to promote and sell BSL product in his view and where that's happening he confirmed he is not the cheapest in the market all the time however in select areas he still needs to compete actively with imports as part of BANZ strategy to displace imports and at times he will use the EUTs to do so. I asked Andrew to clarify his understanding of EUTs he discussed that he could use with Zincalume(r) and that he would confirm with Gerald. I discussed that my understanding based on Troy's confirmation was that Zincalume(r) was not be used in the EUT pool given the value we place on it however he did present quite a solid argument around displacing Selections tonne and specific to Designer Sheet Metal. Troy may need to reposition this nationally re: ZIncalume EUTs? *It feels the biggest risk to our RRP strategy in this case and specific to a customer Surdex and SMS service (DSM) it appears Selection are winning most of the SOW at very low rates.* Regarding 1500 wide Ducting market ANDrew indicated that to get into bed with the ducting guys he was using EUTs however acknowledges that he needs to get his premiums up here as a result he has not moved down for Feb selling at a \$1260 net price. AT plans to increase March by 3% and April by a similar amount with Roo & OZ. He indicated SMS do not win any of the sheeted work and as a result he feels surdex would be picking this up. *His net price for Feb supply was \$1260 working off a \$48 recoiling cost, \$28 CTS, \$24 transport and no EUT in place which is below RRRP. I discussed with him the intent of RRRP is to bring disicipline back into market and i felt he was leaving money on the table here given there is no 1500 wide supply to market with imports from what we were hearing. ...*

1214 Two matters are apparent from the meeting summary. First, the manner in which Ms Arzoumanian raised the recommended resale price indicates that it was understood between CIPA and SMS that CIPA's recommended resale price was the price at which SMS should be targeting its sales. Ms Arzoumanian described the purpose of the recommended resale price as bringing “discipline” back into the market. I infer that that is a reference to price discipline at

the distribution level of the market. Second, Mr Taintey sought to make a case for SMS to receive EUTs for the sale of CIPA's Zinalume to enable it to compete against imported Aluzinc.

Meeting with CMC Steel on 12 February 2014

1215 On 12 February 2014, Mr Gent met with Andrew Dickson of CMC Steel at its premises in Derrimut, Victoria. The meeting is the subject of a Salesforce record created on 16 February 2014 and an internal email from Mr Gent to Mr Whitfield and Ms Arzoumanian on the same day containing his summary of a meeting. In the Salesforce record, the "meeting objective" was recorded as "discuss recommended resale position and general market". The summary commenced with the statements (errors in original):

Andrew Accross and supportive of using RRP as sees significant value for his business if he can achiev this but does not have faith in his peers. At present he feels that the VIC market is holding firm and his margins reflect this.

1216 The evidence is significant as it shows distributor support for the benchmarking strategy in order to increase distributor profitability.

Report from SMS NSW on 17 February 2014 regarding market competition and intention to move away from the recommended resale price

1217 At 3.39 pm on 17 February 2014, Mr Gerada, the NSW Manager of SMS, sent an email to Mr Cornelius with the subject "Mid Month Forecast Feb 2014". The email explained why sales volume was lower than expected for the month, reporting particularly on the prices being offered in the market by different distributors. The penultimate paragraph reported as follows (emphasis added):

We continue to refrain from reducing rates to compete with this transactional market, but if we miss forecast by more than the 12% indicated we will review stock profile and move some volume where required. This can be done through the Temperzone, Tasman Tank, Delta, Graham Group and ZINCANNEAL® steel businesses. However we are focused on ensuring that we are continuing to drive the profitability message with our team. *We believe we could swing the below business back by aggressively moving away from some of our pricing disciplines specifically strong margin improvement focus and use of RRP.*

1. FIP Brakes lost to Southern price - \$1060 tne for 100 tne we are at \$1140 tne
2. SMC lost to CMC - All our pricing is invoice rate plus \$100 (includes waste processing and transport) CMC at our invoice rate
3. Applied Laser lost to SK - Shop us back and they "will beat any price we offer"
4. McAlpine (Austral and Subbies) all quite
5. Temperzone - All our pricing is invoice rate plus \$80-90 (includes waste processing and transport) Southern at \$20tne under invoice rate
6. Delta - Southern \$1060tne our invoice price for FEB feed is \$1250

7. Tasman Tanks - All our pricing is invoice rate plus \$80-90 (includes waste processing and transport) CMC at \$50tne under invoice rate

1218 In the passage highlighted, Mr Gerada indicates that it would be necessary for SMS to move away from “some of our pricing disciplines specifically strong margin improvement focus and use of RRP” in order to win the identified business back to SMS. The email indicates that, at that time, SMS was seeking to price in accordance with the recommended resale price, but it was finding it difficult to compete successfully in the market at those prices.

1219 At 4.54 pm, Mr Cornelius forwarded the email to Messrs Ellis, Hennessy and Gent, copying Mr Gerada, stating, amongst other things:

At some point in the near future we will need to revisit the business lost and look to regain lost ground.

1220 At 5.02 pm, Mr Gent replied stating, amongst other things:

Thanks Gerald appreciate the information and can discuss in more detail on Thursday.

1221 At 6.40 pm, Mr Gerada replied stating:

Its [sic] really sad that things are tough so we automatically resort straight back to dropping market rates. I really don't want us to be party to this however if it does not stop we will need to assess our position and make some commercial decisions.

1222 In cross-examination, Mr Ellis was taken to the foregoing emails and it was put to him that he understood by mid-February of 2014 that SMS were pricing using the recommended resale price benchmark. Mr Ellis said that he was aware that SMS were publishing the recommended resale price book, but that he had no idea how they were pricing to their individual customers. Mr Ellis reiterated that “SMS’s pricing was completely up to them”. I reject that evidence. The documentary record, referred to in these reasons, demonstrates that SMS was attempting to set its prices in accordance with CIPA’s recommended resale prices but was facing competitive pressure to lower its prices. The documentary record also shows that Mr Ellis was aware of those facts.

Meeting with SMS on 20 February 2014

1223 On 20 February 2014, Mr Gent met with Mr Cornelius at Chullora. On 23 February 2014, Mr Gent sent minutes of the meeting to Mr Hennessy, copying Mr Sparks. The minutes state (errors in original):

Gerald very concerned that SMS are loosing significant Market share at the

expense of RRP and also not having any ability to stock and compete at a COG basis and achieve acceptable margins. His main concern is NSW and QLD where they have lost and walked from business that they can not compete with. CMCS D are being aggressive but did not get impression this was at ridiculous prices rather than they are active in market. ... Gerald has challenged that the BSL are being blinded by thoughts that RRP will work at present and although he is certain everyone is talking the talk behind closed doors they have not changed behaviour and it is costing his business volume. He does not want to drop his margins and thus asking for assistance from BSL. ...

1224 The minute again indicates that SMS was seeking to price in accordance with CIPA's recommended resale prices, but competition in the market was causing it to lose market share. The minute is also significant in referring to "talking the talk behind closed [sic] doors". It is evidence of a belief, held by Mr Cornelius (and seemingly shared by Mr Gent) that distributors were indicating their support for pricing in accordance with the recommended resale prices "behind closed doors".

Discussion with Mr Szecsodi (OneSteel) on 25 February 2014

1225 In his written statement, Mr Kelso referred to a Salesforce record of a discussion he had with Mr Szecsodi of OneSteel on 25 February 2014. The record indicates that it was created on 2 March 2014 by Mr Kelso. The "object" of the meeting, and the "meeting summary", indicates that the primary focus of the meeting was for Mr Kelso to obtain market intelligence from Mr Szecsodi in relation to import prices in the market for the purposes of CIPA calculating import parity prices for April 2014. Under the heading "lessons learnt", the record attributed the following statements to Mr Szecsodi:

Sees value in the recommended retail price and pushing premium. Has seen evidence of the market pushing for value. Believes BSL is showing good leadership and wants BSL to stick to our guns except coil plate.

1226 In his written statement, Mr Kelso said that he did not have an independent recollection of this meeting. He said, however, that the sentence "[s]ees value in the recommended retail price and pushing premium" is consistent with the general feedback Mr Kelso had received from Mr Szecsodi that OneSteel would use the recommended resale price as the base line when pricing the steel that they purchased from BlueScope. In cross-examination, Mr Kelso agreed that whether Mr Szecsodi used the recommended resale prices in setting prices to customers was a matter for him and Mr Kelso did not seek to have him commit to that or be under any obligation to do that. The Salesforce record is evidence that Mr Szecsodi understood that CIPA was encouraging OneSteel and distributors generally to set their prices using the recommended resale prices as a benchmark or base price.

Dissemination of CIPA's Distribution Market price lists for May 2014 on 5 to 7 March 2014

- 1227 Between 5 and 7 March 2014, CIPA sent a price notification letter and the Distribution Market price list for sheet and coil products for May 2014 to its aligned distributors (CMC Steel, OneSteel Sheet & Coil, Southern Steel and Apex Steel) by email. The price notification letter and the Distribution Market price list for sheet and coil products were in the same format as March and April 2014, including particularly the references to “recommended resale price” in both the price notification letter and the price list. A similar price notification to BlueScope Distribution was not in evidence but, based on CIPA’s usual practice, I infer that such a notification would have been given at the same time. The price notification letter showed that there was no increase in the recommended resale prices from April 2014.
- 1228 On 7 March 2014, Mr Gent sent an email to (amongst others) Messrs Simpkin and Klingos of CMC Steel attaching a price notification letter and CIPA’s Distribution Market price lists for a number of steel plate products for May 2014. Again, in contrast to CIPA’s Distribution Market price list for sheet and coil products, the price notification letter and price lists for steel plate products did not use the expression “recommended resale prices”. However, the covering email listed standard plate products with “recommended resale prices”.
- 1229 On 13 March 2014, Mr Kelso sent an email to Mr Kroon of Vulcan Steel attaching a price notification letter and CIPA’s price lists for a number of steel plate products for May 2014. The covering email listed standard plate products with “recommended resale prices”. Later that day, Mr Kelso forwarded the email to Messrs Millard and Moss.

CIPA email to CMC Steel regarding SMS price increases – 21 March 2014

- 1230 On 21 March 2014, Mr Gent sent an email to Messrs Lobb and Klingos of CMC Steel that had no message but attached:
- (a) a pro forma letter from SMS to customers dated 21 February 2014 advising SMS’s percentage price increases for the principal categories of flat steel products effective 1 April 2014; and
 - (b) a pro forma letter from SMS to customers dated 21 March 2014 advising SMS’s percentage price increase in respect of a range of Colorbond products effective 1 July 2014.

1231 In his written statement, Mr Lobb said that it was not routine for Mr Gent to send Mr Lobb a copy of his competitors' price information. Mr Lobb said that he believed that the reason why Mr Gent was sending a copy of SMS's price increase letters to him was to validate the price increases that CIPA had put through and to give him comfort that BlueScope's distribution arm, SMS, was implementing those increases. I consider that, as a matter of inference from the content of Mr Gent's email, Mr Lobb's understanding is the probable purpose of the communication.

1232 On 11 June 2014, Mr Gent again sent an email to Mr Lobb which forwarded an email that Mr Gent had received from Mr Gerada, the NSW Manager for SMS. Mr Gerada's email to Mr Gent stated:

Gents,

As a follow up from last week we have letters in the market place with our new tonne rates to our customers. We haven't had too much back lash however it appears that competitors are yet to send prices out.

1233 Mr Gent's email to Mr Lobb stated "FYI in confidence".

1234 In his written statement, Mr Lobb said that he did not know why Mr Gent provided him with a copy of Mr Gerada's email in confidence. Mr Lobb reiterated that it was not routine for him to receive emails like this from Mr Gent. I infer from the content of the emails that Mr Gent wished to provide some assurance to Mr Lobb about SMS's pricing approach in the market.

SMS complaint about Surdex Steel's pricing – 18 to 31 March 2014

1235 On 18 March 2014, Mr Taintey of SMS sent an email to Ms Arzoumanian advising that his staff were providing regular feedback concerning Surdex Steel's prices for Zincalume. The subsequent email exchange confirmed that SMS regarded Surdex Steel's pricing as too low and SMS was "walking away" from matching the prices and its stance was "to lead the pricing increases". On 20 March 2014, Ms Arzoumanian sent a copy of the exchange to Messrs Sparks and Whitfield, copying Mr Gent, with the observation that SMS's feedback suggested that Surdex Steel's prices were lower than the recommended resale prices.

1236 At 4.29 pm on 31 March 2014, Ms Arzoumanian sent an email to Messrs Hennessy, Sparks and Whitfield stating:

Hi Guys

SMS have indicated they have heard Surdex are not going to be embarking on a review of pricing for Zinalume in April is this something worth noting on the agenda for tomorrow?

I have been informed Surdex are positioning well below RRP

If this is correct it makes it pretty hard for any distributor to get the necessary increases pushed through in the market, this will also be one to watch for Colorbond too.

Anyway if you think it's the right opportunity to bring up – feel free!

1237 A few minutes later, at 4.36 pm, Mr Hennessy sent an email in reply to Ms Arzoumanian's email stating:

Hi all.

Can you please delete this e-mail.

Nettie – I will call to discuss.

Thanks.

1238 I infer that "Nettie" is Ms Arzoumanian (whose first name is Annette). In his written statement, Mr Hennessy said that he asked Ms Arzoumanian and everyone else in the email chain to delete Ms Arzoumanian's email because he did not want a record of Ms Arzoumanian's email to exist. Mr Hennessy said that, after reading Ms Arzoumanian's email, he had concerns that Ms Arzoumanian had put her message in writing because she was asking him to follow up with Surdex Steel to reinforce with them that they should price in accordance with BlueScope's recommended resale price. Mr Hennessy said that he did not want Ms Arzoumanian to record such communications in writing.

Completion of acquisition of OneSteel Sheet & Coil on 1 April 2014

1239 It was common ground that, on or around 1 April 2014, BlueScope completed the acquisition OneSteel's sheet and coil distribution assets.

Dissemination of CIPA's Distribution Market price lists for June 2014 on 1 to 2 April 2014

1240 Between 1 and 2 April 2014, CIPA sent a price notification letter and the Distribution Market price list for sheet and coil products for June 2014 to its aligned distributors (CMC Steel, Southern Steel and Apex Steel) by email. The price notification letter and the Distribution Market price list for sheet and coil products were in the same format as March, April and May 2014, including particularly the references to "recommended resale price" in both the price

notification letter and the price list. The price notification letter showed that there was no increase in the recommended resale prices from May 2014.

1241 A similar price notification to BlueScope Distribution was not in evidence but, based on CIPA's usual practice, I infer that such a notification would have been given at the same time.

1242 On 2 April 2014, Mr Kelso sent an email to Messrs Bolzan and Lewin of OneSteel Metalcentre attaching a price notification letter and CIPA's Distribution Market price lists for a number of steel plate products for June 2014. Again, in contrast to CIPA's Distribution Market price list for sheet and coil products, the price notification letter and price lists for steel plate products did not use the expression "recommended resale prices". However, the covering email listed standard plate products with "recommended resale prices".

1243 On 7 April 2014, Mr Cooper sent an email to Mr Kroon of Vulcan Steel, (copying, amongst other, Messrs Millard and Moss) attaching a price notification letter and CIPA's price lists for a number of steel plate products for June 2014. Again, the covering email listed standard plate products with "recommended resale prices".

Enquiry about ACCC training – 7 April 2014

1244 On 7 April 2014, Mr Sparks sent an email to Elizabeth Webb, the Manager HR for Sales, Marketing & Commercial within CIPA, copying Messrs Hennessy and Bryers, stating as follows:

Hi Elizabeth,

As discussed on Friday, I think it would be worthwhile to conduct an update on ACCC Training for the Distribution Account Management team as we have now introduced a Recommended Resale Price to our distribution price list and it is important the team is clear on the below areas

What a Recommended Resale Price means?

How they can communicate this to customers?

What actions and information sharing with customers is allowed/not allowed under law and could be considered price fixing.

Let me know if you need any more information.

1245 There was no reply to that email in evidence.

1246 I infer from the email that, in the period from the introduction of the benchmarking strategy until that date, Mr Sparks had not received any competition law training about the permitted use of a recommended resale price or price fixing.

NZSA July 2014 Shipment “RRP” – 14 April 2014

1247 On 14 April 2014, Mr O’Brien sent an email to Mr Wood of Selwood Steel attaching NZSA’s “July Shipment List Price”. The attachment did not refer to a recommended resale price. However, in a second email, Mr O’Brien set out the pricing in four columns, the first headed “RRP”, the second headed “Distributor Discount”, the third headed “Distributor Discount Nett” and the fourth headed “Tier One Price”. The fourth column was highlighted in yellow shading and stated the net pricing applicable to Selwood Trading.

CIPA Sales and Marketing Presentation to Mr Vassella – 9 to 17 April 2014

1248 On 17 April 2014, Mr Ellis gave a presentation to Mr Vassella in the presence of at least Messrs Palermo, Kari and Nedeski. The presentation lasted an hour. The presentation was titled “CIPA Sales and Marketing FY15 Pricing & Volume Review”. It is designated version 2 and is dated 9 April 2014. Toward the end of the document is a slide titled “Other Pricing Initiative” and subtitled “Recommended Resale Price Project – Distribution ... Building market coming”. The first bullet point stated as follows:

A project was undertaken to incorporate the concept of a “Recommended Resale Price (RRP)” into the Distribution Sector.

- Aim was to improve the profitability of our Distribution channel customers by attempting to set a price floor for each major product category within the sector.
- We have not yet measured success but anecdotal feedback has suggested that our Distributors have had some wins.
- The concept is attempting to be expanded into Sheet & Coil Processing, as well as the Building Market rollformers.

1249 The document is significant because it is one of the few documents that clearly states the purpose of the benchmarking or RRP strategy. As can be seen, the document states that the aim of the strategy was to improve the profitability of the Distribution Market customers by attempting to set a floor price for each major product category within the sector. The document directly contradicts Mr Ellis’s evidence that the strategy was merely to have the price list used as the starting point for distributors’ consideration of their prices before the application of discounts for particular customers, which Mr Ellis described as a “list price minus” approach rather than the “cost plus” approach.

1250 In his witness statement, Mr Hennessy said that he was not sent the presentation at the time but, having reviewed the slide titled “Other Pricing Initiative”, Mr Hennessy said that he understood this to be an accurate summary of the aim of the benchmarking strategy. Mr

Hennessy also said that the third point referred to above, that BlueScope was attempting to expand the concept into “Sheet & Coil Processing” was a reference to BlueScope’s attempted introduction of recommended resale prices for processing services, which is discussed later in these reasons. That aspect of the document is also significant because it indicates that the same purpose motivated the attempt to introduce recommended resale prices for processing services.

1251 In his affidavit, Mr Ellis acknowledged that he sent the presentation to Mr Vassella by email on the evening of 8 April 2014. He deposed, however, that he received the presentation on that day, he did not make any amendments to the presentation and, while he glanced briefly at the presentation, he did not recall noticing the statement concerning the “floor price” and that, if he had noticed it, he would have modified it because it was not accurate. Mr Ellis deposed that it was never part of BlueScope’s strategy for distributors to use the recommended resale price as a price floor.

1252 During cross-examination, Mr Ellis’s evidence concerning the preparation of the presentation was shown to be selective. First, Mr Ellis’s affidavit conveyed the impression that Mr Ellis was not significantly involved in the preparation of the presentation and that he received it and passed it on to Mr Vassella without reading it carefully. However, Mr Ellis’s diary shows, and Mr Ellis acknowledged in cross-examination, that on 7 April 2014 he had met with Messrs Kari, Palermo and Nedeski for one and a half hours in relation to the presentation and its content. Following that meeting on 7 April 2014, Mr Ellis sent an email to Messrs Kari, Palermo and Nedeski stating his “take-aways” from the meeting. Second, Mr Ellis’s affidavit omitted to refer to emails received by him from Mr Kari shortly after 8.00 am on 8 April 2014, and from Mr Palermo shortly after 10.30 am on 8 April 2014, attaching additional slides for the presentation. The email from Mr Palermo was significant because it attached only two slides, one of which was a draft of the slide that became the page titled “Other Pricing Initiative” and which contained the same description of the benchmarking strategy as in the final version of the presentation.

1253 I do not accept Mr Ellis’s evidence with respect to the correctness of the statement in the presentation concerning the benchmarking strategy. I consider it implausible in all the circumstances. The evidence shows that the presentation had been requested by Mr Ellis’s boss, Mr Vassella, and Mr Vassella stated in an email, when requesting the presentation, that he wanted to review it in detail with Mr Ellis. The evidence also shows that Mr Ellis had significant involvement in the preparation of the presentation and was sent additional slides in

response to his input. One of those additional slides was the page describing the benchmarking strategy. Mr Ellis reviewed the final form of the presentation before sending it to Mr Vassella in the evening of 8 April 2014. In the email by which Mr Ellis sent the presentation to Mr Vassella, Mr Ellis stated that the presentation included “Recommended Resale pricing – Distribution and Building Markets”, which was the subtitle of the page that contained the description of the benchmarking strategy. Mr Ellis then presented the presentation to Mr Vassella on 17 April 2014, in the presence of Messrs Palermo, Kari and Nedeski, and the presentation lasted an hour. Although Mr Ellis denied that he read the presentation carefully, I do not accept that denial in circumstances where Mr Ellis was responsible for the presentation and in fact presented it. Further, if the statement in the presentation concerning the benchmarking strategy was inaccurate, one or more of the persons present at the presentation would have identified the statement as being inaccurate. No evidence was given by Mr Ellis to that effect.

1254 In cross-examination, Mr Ellis agreed that Mr Vassella was aware of the benchmarking strategy and that Mr Ellis had explained to Mr Vassella what the benchmarking strategy was. I accept that evidence. I also find that Mr Vassella would have understood, from the presentation, that the object of the benchmarking strategy was to improve the profitability of CIPA’s distribution customers by attempting to set a price floor (or base price) for each major product category within the sector. I more readily make that finding in circumstances where Mr Vassella did not give evidence in the proceeding on behalf of BlueScope.

Dissemination of CIPA’s Distribution Market price lists for July 2014 on 30 April 2014

1255 Between 30 April and 6 May 2014, CIPA sent a price notification letter and the Distribution Market price list for sheet and coil products for July 2014 to its aligned distributors (CMC Steel, OneSteel Metalcentre, Southern Steel and Apex Steel) by email. The price notification letter and the Distribution Market price list for sheet and coil products were in the same format as the versions since March 2014, including particularly the references to “recommended resale price” in both the price notification letter and the price list. The price notification letter showed that there was a decrease in the recommended resale prices from June 2014.

1256 A similar price notification to BlueScope Distribution was not in evidence but, based on CIPA’s usual practice, I infer that such a notification would have been given at the same time.

1257 On 6 May 2014, Mr Cooper of BlueScope sent an email to Mr Kroon of Vulcan Steel, (copying, amongst other, Messrs Millard and Moss) attaching a price notification letter and CIPA’s price

lists for a number of steel plate products for July 2014. Again, in contrast to CIPA's Distribution Market price list for sheet and coil products, the price notification letter and price lists for steel plate products did not use the expression "recommended resale prices". However, the covering email listed standard plate products with "recommended resale prices".

Dissemination of CIPA's Distribution Market price lists for August 2014 on 30 May 2014

1258 Between 30 May and 2 June 2014, CIPA sent a price notification letter and the Distribution Market price list for sheet and coil products for August 2014 to its aligned distributors (CMC Steel, Southern Steel and Apex Steel) by email. The price notification letter and the Distribution Market price list for sheet and coil products were largely in the same format as the versions since March 2014 (although there had been a change to the front cover and some text rewritten). Relevantly, the references to "recommended resale price" in both the price notification letter and the price list and the formulation of the prices was unchanged. The price notification letter showed that there was a decrease in the recommended resale prices of certain products, and no changes for the remainder, from July 2014.

1259 A similar price notification to BlueScope Distribution was not in evidence but, based on CIPA's usual practice, I infer that such a notification would have been given at the same time.

1260 On 2 June 2014, Mr Kelso sent an email to (amongst others) Messrs Bolzan and Lewin of OneSteel Metalcentre attaching a price notification letter and CIPA's Distribution Market price lists for a number of steel plate products for August 2014. Again, in contrast to CIPA's Distribution Market price list for sheet and coil products, the price notification letter and price lists for steel plate products did not use the expression "recommended resale prices". However, the covering email listed standard plate products with "recommended resale prices".

1261 On 5 June 2014, Mr Cooper of BlueScope sent an email to Mr Kroon of Vulcan Steel, (copying, amongst other, Messrs Millard and Moss) attaching a price notification letter and CIPA's price lists for a number of steel plate products for August 2014. The covering email listed standard plate products with "recommended resale prices".

N. RECOMMENDED RESALE PRICES FOR PROCESSING SERVICES

Overview

1262 As discussed earlier, CIPA and distributors (including BlueScope Distribution) supplied a range of processing services in respect of sheet and coil products including shearing, slitting and recoiling. While a large proportion of the volume of sheet and coil products sold by

distributors (including BlueScope Distribution) to their customers was processed by the distributors, CIPA also carried out processing of sheet and coil and sold the processed sheet and coil to either its distributors or end customers directly.

1263 At the hearing, the ACCC adduced evidence demonstrating that, in early 2014, CIPA took steps to introduce a so-called “recommended resale price” list for the processing of flat steel products. The “recommended resale prices” for processing services were proposed to be included as an additional two pages in CIPA’s Distribution Market price list for sheet and coil products.

1264 As noted earlier in these reasons, the expression “recommended resale price” in the context of processing services is a misnomer. Processing services were not resupplied by CIPA or by distributors; those services were simply supplied in conjunction with the supply of flat steel products. Thus, the so-called recommended resale prices for processing services were nothing more than recommended prices. As discussed below, CIPA formulated proposed “recommended resale prices” for processing services and sought feedback from distributors about the level of those prices. It did so notwithstanding that CIPA, and its related company BlueScope Distribution, also supplied processing services in competition with the distributors.

1265 CIPA’s conduct in this respect was not disputed by the respondents. However, the respondents objected to the evidence on the grounds of relevance. The respondents contended that, in circumstances where the ACCC did not allege that the conduct contravened the Act and the ACCC did not seek relief in respect of the conduct, it was irrelevant to any issue in the proceeding. During the trial I received the evidence on a provisional basis under s 57 of the Act, subject to relevance.

1266 I have concluded that the evidence is relevant to the question of the respondents’ intention in implementing the benchmarking strategy. The evidence shows that the attempt to introduce recommended prices for processing services emerged out of the introduction of recommended resale prices for flat steel products. The origin and alignment of the two commercial strategies compels the inference that they were motivated by the same commercial intention and formed part of the same overall business strategy. That conclusion is also supported by the fact that the “recommended resale prices” for processing services were proposed to be included in CIPA’s Distribution Market price list for sheet and coil products.

1267 In his affidavit, Mr Ellis did not address the introduction of recommended prices for processing services.

1268 In his written statement, Mr Hennessy stated that, by providing a recommended resale price for the processing of sheet and coil, CIPA was expanding the “recommended resale price concept” to include processed products even where CIPA was not doing the processing of that product for the distributor.

1269 The documentary evidence, discussed below, indicates that Mr Sparks was heavily involved in the attempt to introduce recommended prices for processing services. Mr Sparks’s statement contains the following explanation of the commercial strategy:

In early 2014, following the implementation of RRP for flat steel products, Matthew Hennessy instructed me that we were to investigate extending the RRP concept to processing services.

In relation to processing services, BSL CIPA provided processing services in its own right and was a competitor or potential competitor to other distributors. However, for the Distribution Markets Team, this area of the business was a small component of our customer focus. For example, BSL CIPA offers processing services to distributors in some states where those distributors do not have significant processing assets.

I was aware that many of the distributors sold a significant proportion of their steel as a processed product. Bluescope Distribution (including BSD and SMS) also offered some processing services in competition with the other Aligned Distributors and Non-Aligned Distributors.

The RRP for processing services was similarly designed to increase the profitability for BlueScope's distributors for processed products, as these were a large proportion of the sales of those distributors. The RRP for processing services was capable of being used by distributors when setting prices to their customers for processed products. The distributor could add together the RRP for the steel product itself, then add on the RRP for the relevant processing service, to arrive at a final price for the processed product to their customer.

Matthew Hennessy assigned me some of the responsibility for developing BlueScope’s offering of RRP for processing services.

1270 BlueScope did not seek to contradict that evidence, and I consider that it is supported by the documentary evidence, discussed below.

Meeting with Southern Steel on 21 January 2014

1271 At 8.30 am on 21 January 2014, Mr Sparks met with Mr Larkin at Southern Steel’s premises in Bankstown. The calendar invitation records the subject of the meeting was “Recommended Resale Price – Processing”. Mr Sparks’s statement refers to a Salesforce record containing his notes of the meeting. The record was made the same day. The “objectives” of the meeting were recorded as threefold: “April Pricing - Processing Rates - Market Behaviours”. The “meeting

summary” includes the following statements with respect to recommended prices for processing services:

...Jim thinks it will be hard to provide a RRP on processing because it is also so varied and individual based on the machine. ...

1272 At 9.13 am that day, Mr Larkin sent an email to Mr Sparks forwarding an email that Mr Larkin had received from CMC Steel attaching the prices which CMC Steel offered to Southern Steel for processing services. At 9.15 am, Mr Larkin sent a second email to Mr Sparks forwarding an email that Mr Larkin had received from Metpol Villawood attaching the prices which Metpol Villawood offered Southern Steel for processing services. I infer that the emails were to provide Mr Sparks with information concerning prevailing market rates for processing services.

Meeting with Vulcan Steel, Auckland on 4 to 5 February 2014

1273 On 4 and 5 February 2014, Messrs Ellis and Hennessy attended meetings with representatives of Vulcan Steel in New Zealand, including Messrs Casey, Jones and Gousmett.

1274 Following the meetings, Mr Ellis sent an email to Messrs Casey and Jones, copying Mr Hennessy. The email chain was in evidence, but the first email in the chain, sent by Mr Ellis, is undated. I infer from its content that it was likely sent on 5 February 2014 or early on 6 February 2014. The first email relevantly stated:

Dear Adrian & Rhys

Thank you very much for both your time and openness over the last two days.

Matt & I really appreciate your candour and straightforwardness.

As discussed we thought it would be wise to record the actions agreed and also check that this is the same as your understanding.

1/ BSL to product [sic] a draft RRP for Processing of S&C for issue in March, effective for May delivery. This draft RRP will be sent to you guys well in advance of any publication such that we can gain feedback as to the relatively of the suggested numbers (When : Draft to Vulcan by 1st of March / By Matt H)

...

1275 At 9.04 am on 6 February 2014, Mr Casey replied. In respect of item 1 of Mr Ellis’s email reproduced above, Mr Casey added the following comment by way of reply:

Approach is fine for S&C, best to contact Jon Gousmett for initial feedback would appreciated being included in the correspondence, as discussed this approach would not work for plate cutting.

1276 In his written statement, Mr Hennessy said that Mr Ellis raised the topic of a recommended resale price for processing services at the meeting in Auckland. Mr Hennessy said that either Mr Casey or Mr Gousmett responded by saying that the proposal might have some merit for sheet and coil but it would not work for plate processing. Mr Hennessy explained that distributors which purchased plate often processed plate to particular shapes or sizes using specialised cutting machines. Accordingly, the processing of plate was much more customised to specific customer needs.

1277 In his written statement, Mr Jones said that he thought it was unusual that Mr Ellis would be proposing to send Vulcan Steel its “draft RRP for Processing of S&C” for feedback. Mr Jones said that, to the best of his knowledge, Vulcan Steel did not purchase any processing services from BlueScope and Vulcan Steel competed with BlueScope Distribution for the supply of processing services to end customers.

Development of “recommended resale prices” for processing services during February and March 2014

1278 Mr Sparks’s statement said that, over the month of February 2014, the BlueScope marketing team and pricing team, with input from the Distribution Markets team, worked to develop the processing recommended resale price list. That statement is consistent with the documentary evidence.

1279 On 5 February 2014, Mr Sparks sent an email to Ken Liddle, from CIPA’s marketing team, copying Mr Hennessy, with the subject “Recommended Resale Price for Processing”. The email attached the processing price lists that Mr Sparks had received from Mr Larkin and stated:

As discussed, we now want to investigate including a Recommended Resale Price of Processing to the Sheet & Coil price list for future releases. It could be included after the final steel product price list with a separate page and matrixes for Slitting, Shearing & Recoiling. I have sourced some current COM Processing Price Lists (attached) that we can use as both a guide to layout used in the market and also to assist us in establishing our RRP.

We are going to discuss this at our Lead Team meeting on Tuesday and begin to test with customers from then on, so can you please start developing a format that can be incorporated into S&C price list.

1280 On 21 February 2014, Mr Unicomb sent an email to Messrs Gent, Sparks and Kelso, copying Messrs Hennessy, Bryers and Palermo, with the subject “Processing Price in the Sheet & Coil Schedule & Plate Thickness extras”. The email stated (errors in original):

Attached is a draft schedule that has a couple of pages (19 & 20) which shows the format of how we intend to show an RRP for processing. This is a far simpler format than some of the examples that we have received (e.g. Metpol). We are still working on the actual numbers that will go into these tables to ensure that we are price leaders in processing without being too far off the mark. Hopefully we can fill in the tables on Monday or Tuesday.

1281 Attached to Mr Unicomb's email was a copy of CIPA's Distribution Market price list for sheet and coil products for April 2014, issued on 4 February 2014, with the addition of two pages (19 and 20) headed "BlueScope Processing Extras". The pages contained mocked-up tables listing the various processing services (shearing, slitting, slearing and recoiling), but the tables did not contain any prices.

1282 On 6 March 2014, Mr Palermo sent an email to Messrs Gent, Sparks, Kelso and Hennessy, copied to Messrs Bryers, Unicomb and Liddle, with the subject "Processing Price in the Sheet & Coil Schedule". The email stated:

All, see slides 19-20 within the attachment.

The attachment now includes a slightly revised format to the version that Graham sent out back on the 21st Feb as well as the actual processing charges that we have recommended/adopted post our assessment.

As an FYI, the assessment was carried out against three indicators, those being:

1. Market benchmarks, eg, Metpol, Sydney Slitters, East Coast and Surdex-VIC
2. Our own SCPS cost base, and
3. CIPA direct market offer rates for sales into Manufacturing and the Building market

Hopefully, the attachment should now provide you with the opportunity to seek feedback and counsel from our aligned Distributors.

If the feedback suggests that this initiative has some legs, then we should aim to officially deploy in line with our June-14' announcement. To that end, let's aim to have the feedback by the 14th March, allowing Graham & myself plenty of time to incorporate any suggested changes.

1283 Attached to the email was CIPA's Distribution Market price list for sheet and coil products for April 2014 with a further version of the additional two pages (19 and 20). In this version, the pages were headed "BlueScope Recommended Processing Charges". The pages contained tables listing the various processing services (shearing, slitting, slearing and recoiling) with "Recommended Processing Charges".

1284 On 10 March 2014, Mr Hennessy sent a response to Mr Palermo's email with the message:

Thanks AP – this is great.

Guys – can you please forward the schedule to your customers and obtain feedback by the middle of next week, including SMS, SS&C, CMC SD, Apex, and Vulcan.

1285 The evidence showed that members of CIPA’s Distribution Markets team had conversations with CIPA’s aligned distributors about the recommended prices for processing services. The principal discussions are summarised in the following sections.

Discussions with CMC Steel in March 2014

1286 In his written statement, Mr Lobb said that, in or around March 2014, Mr Ellis called him to tell him, in words to the following effect:

BlueScope is going to release a standard price list for processing services which distributors can use as a benchmark.

1287 Mr Lobb said that Mr Gent also called him at around this time and said words to the following effect:

We are looking to create a standard price list for processing which then could be used as a benchmark for other processors.

I will send you a draft price list for your review and feedback.

1288 On 12 March 2014, Mr Gent sent an email to Messrs Klingos, Dickson, Hill and Lobb of CMC Steel, copying Mr Simpkin, with the subject “Draft Recommended Sheet & Coil Processing Resale Prices – BSL Sheet & Coil Price Schedule”. The email attached CIPA’s Distribution Market price list for sheet and coil products for April 2014 with the two additional pages (19 and 20). The email stated:

Please find attached the Draft Recommended Sheet & Coil Processing Resale Prices that are situated on Pages 19 and 20 of the attached BSL Sheet & Coil Price Schedule.

As discussed with Glenn and Todd on Wednesday last week BSL would greatly appreciate your feedback on these recommended resale prices. It would be great if this could be done by close of business next Tuesday 18 March.

We intend to release finalised processing recommended resale prices by the end of this month as part of our June 2014 (deliveries) Sheet & Coil Price Schedule.

I look forward to your feedback.

1289 In his written statement, Mr Lobb said that the description “recommended resale price” does not make any sense in the context of processing services because there is no “resale” element involved in providing the processing services. Mr Lobb also said that CMC Steel was not a customer of BlueScope in New South Wales for processing services alone (which is referred to in the industry as being a customer for customers’ own material (“COM”) processing services). However, CMC Steel did buy fully processed products from BlueScope. CMC Steel

also competed with BlueScope, SMS, Southern Sheet & Coil and OneSteel when providing processing services to customers. Mr Lobb said that he believed that he could use BlueScope's price list for processing services, once it was in final form, as a guide to show to his customers and to justify CMC Steel's own increases to its prices for processing services. If CMC Steel's other competitors for processing in the market also put up their prices for processing, this was a way of CMC Steel being able to increase its profit margins on the processing side of the business.

1290 On 21 March 2014, Mr Lobb replied to Mr Gent's email as follows:

Troy

Apologies for the delay in responding.

As discussed, these prices appear a reasonable amount higher than current "market" prices – that said I am obviously supportive of any increases we may be able to achieve. One issue is the cost of pallets for sheared products – your documents states that is inclusive in the price. Rough costs on pallets are \$27 for 2400/2440mm, and \$38 for 3600/3660mm – these costs are passed on in addition to shearing prices. This makes your shearing prices – particularly on the heavier gauge products – too low.

1291 In his written statement, Mr Lobb said that by giving this feedback to Mr Gent, Mr Lobb was telling BlueScope that CMC Steel nationally was supportive of the idea of BlueScope introducing a benchmark price and CMC Steel being able to increase the price for processing services but the costs that BlueScope had noted for sheared products were too low because BlueScope had not factored in the cost of pallets.

Discussions with Vulcan Steel in March 2014

1292 On 10 March 2014, Mr Hennessy sent an email to Messrs Casey and Gousmett of Vulcan Steel in similar terms to Mr Gent's email to CMC Steel referred to above.

1293 On 25 March 2014, Mr Hennessy sent an email to himself containing notes of feedback on the proposed recommended prices he received in a discussion with Mr Gousmett on that date. The first line of the note records:

General terms - \$50/t higher than actual market prices (but excludes scrap and delivery)

Discussions with Southern Steel in March 2014

1294 On 11 March 2014, Mr Sparks sent an email to Mr Larkin of Southern Steel in similar terms to Mr Gent's email to CMC Steel referred to above.

1295 Mr Sparks's statement referred to a Salesforce record containing notes of a telephone conversation he had with Mr Lander on 17 March 2014. The record states that it was created on 23 March 2014. The "objective" of the discussion was recorded as including "RRP Processing". The "meeting summary" included the following statements:

Dave questions our motives with the RRP of Processing as he believes we are trying to sell more processed material and get rid of distributors altogether. It's an attempt to get them to increase processing rates and then sell more processed material directly to distributors and end customers. After discussing this he moved on and indicated the figures were not below what was being charged in SA currently.

1296 Mr Sparks's statement also referred to a Salesforce record containing notes of a meeting he had with Kerrie-Anne Gatt of Southern Steel on 20 March 2014. The record states that it was created on 23 March 2014. The "objective" of the discussion was recorded as including "RRP Processing". The "meeting summary" included the following statements:

Provided RRP of Processing rates. KAG provided significant feedback which has been given to marketing.

1297 On 20 March 2014, Mr Sparks sent an email to Messrs Hennessy, Gent and Kelso, copying Messrs Palermo, Bryers, Unicomb and Liddle, with the subject "Southern Feedback on RRP of Processing". The email stated:

Jim Larkin indicated the rates were higher than current processing rates in the market and that none of the indicated price points would be detrimental to any of the East Coast states.

Dave Lander is sceptical of us having a recommended resale price of wide coil let alone processing which he views as a threat to his business as in his belief we push to sell more processed coil into the market and do away with distributors all together. After working through this concern, he also agreed that the proposed pricing levels would not lower the processing price in the SA market.

Kerrie-Anne Gatt provided some more constructive feedback. Although acknowledging that large volume processing is significantly cheaper than our proposed prices in all states, lower volumes of processing are obviously charged higher to the end customer and some of our proposed prices were below what was charged in some instances.

...

Discussion with Apex Steel in March 2014

1298 On 19 March 2014, Mr Sparks sent an email to Mr Compagnino of Apex Steel, with the subject "Recommended Resale Price of Processing". The email attached CIPA's Distribution Market price list for sheet and coil products for April 2014 with the two additional pages (19 and 20). The email stated:

As discussed, please find attached the Draft Recommended Sheet & Coil Processing Resale Prices that would be situated on Pages 19 and 20 of the regular monthly BlueScope Distributor Price Schedule for Sheet & Coil products. I hope that you can provide feedback on the proposed pricing level.

This is intended to compliment [sic] our current Recommended Resale Price provided for wide coil within the price list, and once the pricing level is finalised the intent would be to include these additional prices within our June 2014 Distributor Price Schedule.

I look forward to your thoughts.

1299 Mr Sparks's statement referred to a Salesforce record containing his notes of a telephone conversation he had with Mr Compagnino on 20 March 2014. The record states that it was created on 23 March 2014. The "objective" of the discussion was recorded as including "RRP Processing". The "meeting summary" included the following statements:

- Discussed RRP of processing with Nello. Interested in the approach and didn't have any specific concerns with it. - Their slit line is desperate for volume. It was installed on the basis of them processing for Toyota which was expected to be 1,000t per month however they are currently only running at 400t. Need a further 5-6kt per annum to break even on the line

Discussion with OneSteel in March 2014

1300 On 20 March 2014, Mr Kelso sent an email to Messrs Hennessy, Sparks, Gent, Bryers, Unicomb and Palermo with the subject "OST comments – Processing charges", which recorded feedback from OneSteel. Amongst other things, the email stated: "[w]e have the charges about right."

The proposal does not proceed

1301 In his written statement, Mr Hennessy said that BlueScope received varied feedback from most of the distributors. Some distributors said that the recommended resale price was too high; others noted that CIPA needed to add more detail. Mr Hennessy said that his recollection was that the recommended resale price for processing sheet and coil was never implemented because of the complexity of all the responses.

Findings

1302 As stated earlier, the evidence shows that the attempt to introduce recommended prices for processing services emerged out of the introduction of recommended resale prices for flat steel products, being the benchmarking strategy. Mr Hennessy confirmed what is apparent from the documentary record that, by providing a recommended resale price for the processing of sheet and coil, CIPA was expanding the "recommended resale price concept" to include processed

products. The proposal was that the “recommended resale prices” for processing services were to be included in CIPA’s Distribution Market price list for sheet and coil products.

1303 The evidence indicates that the commercial intention of the strategy to introduce recommended prices for processing services was to assist or facilitate coordinated price increases in the supply of those services. The intention was that the distributor would set its prices for processed flat steel products by adding together the recommended resale prices for the steel and for the processing services to arrive at a final price. In my view, CIPA’s conduct with respect to the introduction of recommended prices for processing services provides support for the conclusion that the commercial intention of the benchmarking strategy was also to assist or facilitate coordinated price increases in the distribution market.

O. THE OVERSEAS MILL STRATEGY

Overview

1304 The ACCC alleged that, in the relevant period, Mr Ellis developed a strategy for addressing competition from overseas steel manufacturers whereby BlueScope would seek to:

- (a) restrict the volume of imported steel coming into Australia;
- (b) persuade overseas steel manufacturers to increase the price at which they sold flat steel products to distributors in Australia; and/or
- (c) threaten to make anti-dumping applications against jurisdictions in which overseas steel manufacturers were based unless the price at which they sold flat steel products to distributors in Australia was increased,

(the **overseas mill strategy**).

1305 The respondents denied those allegations.

1306 Ultimately, the existence of such a strategy is only relevant to the allegation that BlueScope attempted to induce Yieh Phui to arrive at a price fixing understanding, and provides context for that alleged attempt. The meeting in Taiwan between Mr Ellis and representatives of Yieh Phui at which the alleged attempt was made was recorded and the recording and a transcript of the recording was in evidence. The cogency of the ACCC’s allegations are to be assessed largely by reference to the words spoken at that meeting. Nevertheless, evidence was also adduced about Mr Ellis’s planning for that meeting, which was part of a broader commercial strategy implemented by Mr Ellis to respond to competition from imported flat steel products.

The evidence concerning the overseas mill strategy largely comprised internal BlueScope emails and other business documents between employees within IMG, including Mr Ellis. Evidence was also given by Messrs Ellis and Schulz about BlueScope's overseas mill strategy.

Evidence given by Mr Ellis

1307 Mr Ellis said that, in August 2013, before commencing at CIPA, he had identified some steps that he wanted CIPA's international steel trading business to explore. This involved developing a strategy of building commercial relationships with overseas mills that could assist CIPA's position in Australia in the following three ways:

- (a) first, Mr Ellis considered that relationships with overseas mills, and buying steel from overseas mills, could assist CIPA to ensure continuity of supply and guard against circumstances where it could not meet customer demand by reason of a mill outage;
- (b) second, Mr Ellis considered there was an opportunity for BlueScope to position itself as being able to meet customer demand by offering imported steel products that CIPA did not produce domestically; and
- (c) third, Mr Ellis considered that if CIPA purchased steel from overseas mills that otherwise would be exported to Australia, and sold it elsewhere in the world, this could reduce the amount of steel imported into Australia and maximise the opportunity for CIPA to sell domestically produced steel to Australian distributors.

1308 Mr Ellis's evidence concerning overseas supply initiatives finds some support in the documentary evidence. In an email from Mr Ellis to (amongst others) Mr Schulz copied to (amongst others) Mr Hennessy and Philip Boehme (who reported to Mr Schulz) and sent on 29 August 2013, Mr Ellis said that he wanted to explore a number of topics, including (emphasis in original):

1/ Sales of Material Ex Australia, NZS, Affiliate mills - and where that material is targeted

2/ **Pure** trading - and where that material is targeted ...

3/ **Strategic Trading** (ie/ protecting the Australian domestic market) - I would really like to spend some time exploring this. Understand what are the key mills that are currently importing into Australia (for HRC, CRC, Coated and Painted), which traders are being used, who are the end customers, what are the volumes Phil - can you please work with Matt (I am sure this already exists) to have a briefing document (no more than 2 pages) such that it can form part of the strategic review with the International team (give me a call if this is not clear).

Along with our AD/Safeguard work, steering the Asian mills away from the Australian

market to others will substantially help our domestic position + give another source of revenue for International trading.

1309 I infer that “AD” is an acronym for anti-dumping. Mr Ellis said that the phrase “steering the mills away from the Australian market” referred to Mr Ellis’s view at the time that, if CIPA could provide Asian mills with sales to BlueScope’s customers in countries other than Australia, or if BlueScope imported steel from Asian mills to Australia, the additional capacity which may otherwise be sold to import traders for supply in Australia could be “soaked up” by BlueScope. Mr Ellis said that this strategy was later formalised into a strategic initiative which formed one aspect of what was referred to within BlueScope as “Project Marlin”.

1310 On 22 March 2014, Mr Ellis sent an email to Mr Vassella, copied to (amongst others) Mr Schulz, attaching the “final draft of Project Marlin (International & Australian Trading Plan)”. The attached document was titled “BlueScope Global Trading Plan – BANZ Sales & Marketing – International Markets” and dated March 2014. On a page titled “International Trading – Executive Summary”, the document described an “opportunity” for BlueScope to engage in international trading of steel to gain both incremental EBIT and strategic benefits. The strategic benefits were stated to be leveraging longstanding mill and customer relationships, the ability to “place” BlueScope tonnes that became available at very short notice and adding profits that absorbed International Markets’ overheads. However, the page did not refer to a strategic objective of reducing the amount of steel imported into Australia. On a page titled “Australia Trading – Executive Summary”, the document described an “opportunity” for BlueScope to participate in the import trade of flat steel products into Australia (which at that time comprised 800kt per annum) to earn incremental EBIT and recognise strategic value. The document described four dimensions of the strategic value:

- (a) providing customers with mitigation against single supplier risk (the risk that CIPA would be unable to supply from domestic manufacture);
- (b) commencing a commercial relationship with customers that currently refused to buy from CIPA;
- (c) augmenting CIPA’s product range outside of its Australian manufacturing footprint; and
- (d) optimising BlueScope’s profitability in remote geographic locations (such as Darwin and Perth).

1311 I accept that the initiatives described above were considered by BlueScope.

1312 The controversial aspect of Mr Ellis’s evidence concerned his reasons for arranging visits to a number of steel mills throughout Asia and India in February 2014 with Mr Schulz. Mr Ellis said that he continued to develop the ideas concerning the overseas supply initiatives in the months following August 2013, and they ultimately prompted him to arrange the visits to overseas steel mills. Mr Ellis said that his purpose in undertaking those visits was to investigate the initiatives referred to above, as well as “to make it clear to certain mills that CIPA would not hesitate to make anti-dumping applications if it considered they were dumping their steel in Australia”.

1313 Almost no evidence was given about the visits to steel mills other than Yieh Phui in Taiwan, which is the subject of the ACCC’s allegations. It is unnecessary to make any findings about Mr Ellis’s purpose in visiting steel mills other than Yieh Phui. The purpose of Mr Ellis’s visit to Yieh Phui is in dispute between the parties.

Evidence given by Mr Kelso

1314 Mr Kelso said that he had some responsibility for Project Marlin, along with Mr Schulz. Mr Kelso said that Project Marlin had various objectives, including:

- (a) broadening BlueScope’s international third party trading footprint (where BlueScope purchased steel product from another overseas mill and then on-sold that steel to a customer, typically in a different country); and
- (b) making the lives of Australian import traders more difficult, by BlueScope purchasing the steel that import traders would otherwise purchase from the overseas steel mills and selling that steel to Australian customers.

1315 Mr Kelso said that, to his knowledge, BlueScope was unable to achieve the second objective and a decision was made by senior management at BlueScope to disband the project and allow staff to focus on their existing responsibilities in selling BlueScope steel.

Evidence given by Mr Schulz

1316 Mr Schulz gave evidence that, shortly after Mr Ellis commenced with CIPA, Mr Ellis spoke to Mr Schulz about “strategic” (or “defensive”) trading. Mr Ellis explained that concept to Mr Schulz as involving BlueScope buying from overseas mills the steel that the overseas mills would otherwise sell into Australia, and BlueScope selling that steel in other markets as part of its steel trading business.

1317 Mr Schulz said that, in a series of conversations over the period September 2013 to February 2014, Mr Ellis explained his strategy with respect to overseas mills as being to restrict the volume of imported steel coming into Australia by:

- (a) threatening future anti-dumping applications by BlueScope;
- (b) encouraging overseas mills to raise the prices at which they sold steel in Australia by telling them they were leaving profitability behind; and
- (c) offering to buy steel that would otherwise be imported into Australia and sell that steel to BlueScope's customers in Australia or as part of BlueScope's international and import trading desks.

1318 Mr Schulz also said that another strategy that Mr Schulz observed Mr Ellis use during their visits to overseas mills in February and March 2014 was to refer the mill to BlueScope's price list to use as a reference when pricing their steel into Australia as a way of avoiding dumping issues. Mr Schulz explained that this was a way of telling the mills that, if they did not raise their prices, BlueScope would launch anti-dumping applications against the particular mill and country in question.

1319 Mr Schulz was not challenged on that evidence and I accept Mr Schulz's evidence about the overseas mill strategy.

Mr Schulz's trip to Korea in September 2013

1320 Mr Schulz said that, prior to Mr Ellis commencing at CIPA, Mr Schulz had planned visits in late September 2013 to some of BlueScope's customers and suppliers in Korea including Hyundai and Dongkuk. Mr Schulz said he informed Mr Ellis of his plan to visit Korea.

1321 In September 2013, Mr Ellis asked Mr Hennessy to provide him with information about the anti-dumping duties being paid by overseas steel mills on their sales into Australia. On 19 September 2013, Mr Hennessy sent Mr Ellis an email listing various Asian steel mills (located in Korea, Taiwan, India, Japan and Vietnam), the types of flat steel products being produced, and the anti-dumping duties being paid in respect of the steel (or whether no duties were applicable). Where no duties were applicable to particular categories of flat steel products, Mr Hennessy highlighted that fact by inscribing in bold typeface "zero ADD". Mr Hennessy said that the Asian steel mills listed in the email were competitors to CIPA in Australia. In respect of the Taiwan mills, the email noted that Yieh Phui and China Steel exclusively supplied Wright Steel.

1322 On 19 September 2013, Mr Ellis forwarded Mr Hennessy’s email to Mr Schulz, informing Mr Schulz that Mr Ellis wished to discuss it before Mr Schulz’s upcoming trip. Mr Schulz said that, on 19 or 20 September 2013, he had a telephone conversation with Mr Ellis concerning the email in words to the following effect:

Mr Ellis: There is a problem with low-priced imports in Australia. You have seen the list of mills that I sent you. It identifies mills that are importing large volumes of steel into Australia and whether they have any anti-dumping duties imposed on them. We think they are all selling too cheap in Australia.

In your upcoming trip next week, who are you going to visit?

Mr Schulz: Two of the mills I am visiting are Hyundai Steel and Dongkuk.

Mr Ellis: Hyundai Steel is selling too cheap in the market and doesn’t have any anti-dumping duties. When you meet with Hyundai Steel, ask them to increase their prices for steel into Australia by telling them they are leaving profitability behind. If that doesn’t work, tell them that we are interested in buying the steel that they are otherwise selling into Australia and we will sell it ourselves, either within Australia or internationally.

Mr Schulz: Ok.

Mr Ellis: I would like to arrange a visit with the mills identified in my email, particularly those in Korea and Taiwan, probably early next year. Can you have a think about the mills you have an existing relationship with?

Mr Schulz: Ok. I will get back to you on that.

Generally twice a year, I do a tour of all of the overseas offices. I usually like to meet with our suppliers or customers on the same trip to get a good feel for the market.

Mr Ellis: That’s good. In fact, I would like to join you. It will be a good opportunity for me to meet them.

1323 On 20 September 2013, after the telephone conversation, Mr Schulz replied to Mr Ellis’s email stating:

From the list of the mills I would say that today we have a reasonable relationship with Hyundai, Union Steel, CSC, YP and Sysco as well as JSW. On this current trip I will only meet with Hyundai and will certainly have a discussion with them along the lines of our conversation.

I like your idea of you and I visiting the other mills (particularly the ones in Korea and Taiwan) – with existing travel commitments we have between the two of us, probably difficult to organize before Jan/Feb next year – but probably worthwhile to lock some dates in early.

1324 Mr Schulz said that preparations were then undertaken for Messrs Ellis and Schulz to visit a number of overseas mills throughout Asia in February 2014. Mr Schulz said that he came to

understand from discussions with Mr Ellis over the ensuing months leading up to the overseas trip that one of Mr Ellis's main purposes of the trip was to speak with the mills that were exporting large volumes of low priced steel into Australia with a view to encourage them to raise their prices or restrict the output into Australia.

1325 On 25 September 2013, Mr Schulz sent an email to Mr Ellis reporting on Mr Schulz's meeting with Hyundai in Korea. In the email, Mr Schulz reported that the following "key points" were discussed (amongst others):

- At the time of the Australian AD action against plate from Korea, Hyundai Steel by their account sold approx. 30kt into Australia. At that time that was also about 50% of their total exports.
- As far as channels are concerned – they are using two local Australian companies for their exports (believe CMC Steel is one of them)
- Hyundai feel they are not selling too cheap in Australia, but are competing on fair basis with other imports
- They would not be interested to do any business through a BSL unit into Australia (company policy not allowing them to do exports into a country with a company that produces steel in that country)
- ...
- ... the plate mill manager responded that they were open to do business with us for markets like EU and South America (we will investigate)
- ...

1326 The email confirms that, in accordance with Mr Ellis's instructions, Mr Schulz raised with Hyundai that they were selling into Australia at prices that were too low. However, Mr Schulz's report indicates that Hyundai did not agree and stated that they were competing in Australia on a fair basis.

BlueScope's preparations for the February 2014 visit to Asian steel mills

1327 Messrs Schulz and Inomata both gave evidence concerning the preparations that were made for the February 2014 visits to Asian steel mills by Messrs Ellis and Schulz. A number of people were involved in the organisation of the visits including Mr Inomata and Ms Wang. For the most part, the preparations do not bear upon the issues in dispute and need not be referred to. The matters referred to below afford evidence concerning the purposes of the visit.

1328 On 19 October 2013, Mr Ellis sent an email to Mr Vassella, Bronwyn Mitchell (Chief Financial Officer for BANZ) and David Maisey (Strategy Manager for BANZ), copied to Mr Schulz, attaching a document titled "Project Marlin (Strategic Trading) Task Brief – Oct 2013". The

email sought feedback on the document. Amongst other things, the document described an initiative for BlueScope to expand its international trading business both for “pure trading” and to include “strategic elements”. The strategic elements with respect to Australia were described as follows:

1. Defensive trading - engage offshore suppliers currently active in Australia by giving them more profitable outlets into our overseas markets where IM is actively trading. Could yield improved domestic market share and pricing in addition to increased trading commissions;
2. Strategic trading - insert a BSL entity to import product into Australia - could yield a variety of benefits:
 - Capture a share of the import channel, giving us better intelligence and additional leverage w/ the Asian importing mills (subject to consent from our domestic customers);
 - Currently a variety of BSL entities import via traders – instead we could buy direct from the mills and eliminate the middleman.
 - Improved value proposition - couple our domestic sales w/ imported products we can't produce, thereby minimizing the risk of customers buying from sources who can supply 100% of their needs.
 - Optimization of margins by importing to freight-intensive regions.
 - Additional EBIT and cash flow from trading commissions.

1329 Under the heading “Objectives”, the document recorded (amongst other things):

Analyze current volumes being imported into Australia & understand the channels.

Identify opportunities relating to Australia:

- What mills can we target to divert tonnes away from Australia and what strategies can we adopt to do it?
- Where do we have opportunities to insert BSL as importer? – quantify the value to BSL.
- Assess possible solutions for handling imports into Australia – need to consider organization structure (do we create an import desk in Australia? – if so under which legal entity?), resources & reporting lines, processes & systems, and risk management.

1330 In emails sent to Mr Vassella and BlueScope staff in November 2013, Mr Ellis stated that the objectives of the visits to Asian mills in February 2014 were to “understand volumes, rationale, strategy, alternatives, new products etc being targeted to the Australian market”.

1331 On 22 November 2013, Mr Gibbs (Development Manager International Trade Affairs – BANZ) sent an email to Mr Ellis attaching a table detailing volumes of various categories of flat steel products imported into Australia during the preceding 12 months by country of

manufacture and the change in volume over the previous 12 month period. Mr Ellis replied by email, copied to Messrs Hennessy and Schulz, stating: “[t]hanks for this – helps greatly in designing the ‘tour’ in Feb”. Mr Schulz said that he was aware from discussions with Mr Ellis that Mr Ellis was seeking to determine “who the worst perpetrators were, in the sense that such mills were exporting large volumes of cheap steel into Australia”.

1332 In early January 2014, Mr Schulz sought Mr Ellis’s approval for Mr Alencar, a member of IMG who reported to Mr Schulz, to undertake a trip to India, China, Taiwan and Korea in the second half of February 2014 or early March 2014. On 7 January 2014, Mr Ellis replied by email giving his approval and asked whether it made sense for Mr Alencar’s trip to precede the trip planned for Messrs Ellis and Schulz. Mr Schulz forwarded Mr Ellis’s email to Mr Alencar and advised that the “message” to the overseas mills was:

- BSL IM now a real trading company and we want to be taken seriously
- BSL really concerned about increased import volume in Australia. Obviously we cannot stop anyone but they should know that we will fight unfair trading practices (such as dumping) vigorously
- BSL is looking to import for our own needs in Australia.

1333 Mr Schulz said that he gave these instructions to Mr Alencar in accordance with Mr Ellis’s instructions to make sure that the overseas mills’ low prices of imports into Australia was discussed.

1334 On 8 January 2014, a representative of Yieh Phui sent an email to Mindi Tang (BlueScope IMG) noting the proposed visit from BlueScope representatives and enquiring about the purpose of the meeting. On 6 February 2014, Ms Tang replied stating:

Purpose of the visit is to discuss Trading business. BlueScope want to expand more trading activity using our network, not only to South America, maybe Europe, Australia, etc. This is initial start for our International Markets Management team to visit and get acquainted with our long standing partners and seek our collaboration together.

1335 On 30 January 2014, Mr Bolzan of OneSteel Metalcentre sent an email to Mr Kelso with the title “April IPP” stating the following in relation to Hyundai:

You’ll find that Hyundai have a new Boss and he is very aggressively targeting Australia – I suspect, as I did before Christmas, that they have opened a new Distributor and I believe it is Southern Steel.

Hyundai have requested some info from us and we have just replied essentially saying we are happy to help Hyundai be a responsible player in the Australian Market, but let’s discuss who now sells the material in Australia - I am of the opinion it is a done

deal with Southern.

Unfortunately, it's not happy news at the moment Brian and I think we are all going to need to dig our heels in for a long and hard fight!

1336 On the same day, Mr Kelso forwarded this email to Messrs Hennessy, Sparks and Gent with the note: "Matt maybe via Jason Asia trip he can execute the possible strategy we discussed last night". Mr Kelso said that he did not recall the strategy discussion he had had with Mr Hennessy which was referred to in the email. Mr Hennessy gave the same evidence. No findings can be made about the strategy discussion, but the email is further evidence of the pressure being faced by BlueScope from imported steel at that time.

1337 On 5 February 2014, Ms Wang sent Mr Schulz an email (copying Mr Inomata) stating:

As people who will visit in end of Feb is considered at top management level, so the time is limited, YP is asking if we can provide meeting agenda for their ref. in advance? They seem have some concerns about Fair Trade because both YP and BlueScope are key coated suppliers in some countries. They also asked for organization chart but we can't download it from intranet. Can you send me one you have? Thanks.

1338 It is apparent from the evidence that "YP" was a reference to Yieh Phui. Mr Schulz said that he understood that Yieh Phui's concern about "Fair Trade" was a concern about competition law issues. In my view, that is an obvious inference to draw from Ms Wang's email, given Ms Wang's explanation that the concern arose because "because both YP and BlueScope are key coated suppliers in some countries". In contrast, in cross-examination Mr Ellis said that he understood the reference to "Fair Trade" in the email to be a reference to anti-dumping. Mr Ellis was asked why he thought that, given Ms Wang's explanation for the concern was the fact that "both YP and BlueScope are key coated suppliers in some countries". Mr Ellis replied:

I don't know, Mr Hodge. This is an email that Ms Wang has created, not one from me.

1339 I consider the answer to be non-responsive and evasive. Mr Ellis was unable to provide a rational reason why the email should be understood as referring to anti-dumping.

1340 On 12 February 2014, Mr Schulz responded to Ms Wang's email, copying Mr Inomata, stating:

... for purposes of the agenda:

- Advertise ourselves as an aspiring international trading company
- Express our concerns about low priced imports in Australia

Hope that helps.

1341 In cross-examination, Mr Schulz confirmed that he discussed the agenda items with Mr Ellis and that he intended that Ms Wang would pass these agenda items on to Yieh Phui. In cross-

examination, Mr Ellis initially denied that Mr Schulz spoke to him about the agenda items before Mr Schulz sent this email to Ms Wang. Shortly thereafter, Mr Ellis altered his evidence, stating that: “I’m not saying that I didn’t speak to Mr Schulz about the visit to Yieh Phui”. Mr Ellis then said that he could not remember speaking to Mr Schulz about the agenda for the meeting, but said that he was very sure that he and Mr Schulz had a number of conversations regarding their overseas trip. He said he could not specifically recall whether they had had a conversation in respect of Yieh Phui, and what Mr Schulz should tell Ms Wang was the agenda for the meeting. I accept Mr Schulz’s evidence. The written communications from this time demonstrate that Mr Schulz sought Mr Ellis’s instructions on all aspects of the proposed trip. I consider it unlikely that Mr Schulz would have provided Ms Wang with the agenda for the Yieh Phui meeting without obtaining Mr Ellis’s instructions.

1342 On 14 February 2014, a half day business review of the BlueScope Sales & Marketing division occurred, attended by (amongst others) Messrs Vassella, Ellis and Hennessy. A presentation was given about Project Marlin. Evidence was given about a meeting between Messrs Vassella, Ellis and Hennessy following the half day business review. Mr Hennessy gave evidence that a discussion occurred between Messrs Vassella and Ellis in words to the following effect:

Mr Ellis: Mark I’ve got this trip coming up to the overseas mills. After what you have just heard, is it okay if I talk to them about international trading and trading into Australia?

Mr Vassella: I’m not comfortable for you to make commitments because I want to see a full proposal about both of those.

1343 Mr Hennessy said that, at some point, Mr Ellis said words to the following effect:

Mr Ellis: Is it okay if I talk to them about anti-dumping?

Mr Vassella: Yes, you should speak to them about anti-dumping

1344 Adduced in evidence was a handwritten file note prepared by Mr Ellis on 14 February 2014 titled “O/S trip review with Mark and Matt H”. The file note included the following statements attributed to Mr Vassella and Mr Ellis respectively:

→ MV → Go full bore on ad – “double barrel”

→ JE → Not sure this is appropriate given M Barron advice

1345 In cross-examination, Mr Ellis agreed that, in the meeting with Mr Vassella and Mr Hennessy, he had been encouraged by Mr Vassella to talk about anti-dumping with the overseas mills. Mr Ellis said that the expression “double barrel” was Mr Ellis putting into his own words what he

understood Mr Vassella to be saying. Mr Ellis said that the cautionary note he had written was a reference to legal advice he had received from “M Barron”. The advice was not adduced in evidence. Mr Ellis said that the cautionary note was not something that he said to Mr Vassella at the meeting, but a note he made to himself.

1346 Mr Vassella was asked about this note in his s 155 examination with the ACCC. Mr Vassella thought the expression “double-barrelled” was probably an expression he used. Mr Vassella said that, from his perspective, BlueScope’s Australian business was suffering from illegally dumped material in the market. In this conversation, Mr Vassella conveyed to Mr Ellis that, if during the visits to the Asian mills Mr Ellis received any criticisms or pushback, Mr Ellis had Mr Vassella’s imprimatur to let the mills know that anti-dumping was part of the strategy that BlueScope was putting in place to ensure the survival of the steel business in Australia. Mr Vassella disagreed with the proposition put to him in the examination that his statement to Mr Ellis was meant as a green light to Mr Ellis to threaten overseas manufacturers exporting into Australia that, if they did not raise their Australian prices, they would face anti-dumping measures instituted by BlueScope.

1347 On 21 February 2014, Mr Ellis sent an email to the BANZ management team, titled “Asia Trip Objectives”. In this email, Mr Ellis identified his three primary objectives for the trip, as follows:

1. Promote BSL IM as a more focused international trading company and hopefully resulting in support from these mills for some export markets
2. Explain our interest to participate in some imports to Australia (both for direct shipments to our customers as well as for further processing by BSL)
3. Explain our views on trade practices in countries where we manufacture steel

1348 Mr Ellis was taken to this email in cross-examination. He agreed that the statement in point 3 was a reference to the price at which overseas steel mills were selling into Australia.

Mr Wright’s communications with Yieh Phui and China Steel

1349 Mr Wright gave evidence that, in late January 2014, Steve Ling of Yieh Phui contacted Mr Wright and told him that BlueScope representatives proposed to visit Yieh Phui for a meeting. Mr Ling forwarded to Mr Wright copies of the emails that had been exchanged between Yieh Phui and BlueScope on 8 and 9 January 2014 concerning the proposed meeting. Mr Wright said that, given the nature of his own meeting with Mr Ellis on 12 September 2013, he was suspicious about the purpose of BlueScope’s meeting with Yieh Phui. Mr Wright was in

Taiwan in February 2014 and spoke to Robert Chen, Paul Yang, Steve Ling and Peter Huang of Yieh Phui, warning them to be cautious about meeting with Mr Ellis.

1350 Mr Wright said that he was also suspicious that, if Mr Ellis planned to travel to Taiwan to visit Yieh Phui, Mr Ellis may also seek to meet with representatives of other steel mills in Taiwan, specifically China Steel. On 17 February 2014, Mr Wright sent an email to Mr Kuo of China Steel in which he referred to the “pending meeting” with BlueScope and stated (formatting and grammatical errors in original):

...

Mr Kuo the only advise to you is to be very careful as what you convey to them regards CSGT / Wright Steel activities in Australian market (tonnages / sizes / prices etc) as frankly I do not trust their intentions. They have already indicated to the market That it is their intention to get CSC to supply them grades / sizes that they do not manufacture that we are currently supplying in order that they can control the market.

They are very much on a "fishing" expedition with a view to push CSC out of this market. Firstly they tried with an Anti Dumping enquiry (and failed) now they are trying to come in via the back door to suggest another method. They actually cannot believe that the Australian market is supporting us / YOU as solidly on a regular monthly basis as this market is. BSL is hoping to stop your / our activities in this market. but I don't believe that they are visiting Shang Shin ?

Please feel free to comment frankly as I can then give you a good understanding of what is their agenda. ...

1351 In cross-examination, Mr Wright agreed that his first concern was that China Steel might share volume or price information with BlueScope about its relationship with Wright Steel in Australia. Mr Wright was also concerned that BlueScope would seek to get China Steel to supply BlueScope with grades or sizes of steel that BlueScope did not manufacture and that China Steel currently supplied to Wright Steel.

1352 On 17 February 2014, Mr Wright received an email response from Mr Kuo stating (errors in original):

Thanks for your e-mail.

BSL has appointed with us on Feb 26, 2016, PM 15:30.

I don't know their topic yet, buut will be cautiously to discuss them.

1353 On 18 February 2014, Mr Wright sent an email to HWL Ebsworth Lawyers seeking the preparation of an advice, which could be provided by Mr Wright to Yieh Phui and China Steel, giving an outline of Australian competition law including with respect to “collusion”, “price setting”, “supply cartels”, “using market power to exclude reasonable competition” and

“supply agreements based on excluding competition”. Mr Wright explained in the email that (errors in original):

All they are looking for is some guidance from us to ensure that, if the meeting looks like it may be following a route that may cover these topics, they could then Refuse to continue with the discussions siting the ACCC laws as a reference.

1354 On 24 February 2014, HWL Ebsworth provided Mr Wright with legal advice in relation to Australian competition law as requested. The letter commenced as follows:

We understand that Wright Steel Sales Pty Ltd (Wright Steel) currently imports steel from Yieh Phui Enterprises and China Steel Corporation (collectively referred to as the Overseas Suppliers) for sale in Australia. In Australia, Wright Steel competes with a range of steel suppliers including BlueScope Steel Limited and its subsidiaries (BlueScope).

Wright Steel is aware that representatives from BlueScope will be meeting with the Overseas Suppliers on 26 February 2014. In this context, Wright Steel has asked us to provide it with an outline of provisions of Australia's competition laws that the Overseas Suppliers should be aware of in their discussions with BlueScope. We set out our advice below.

1355 The letter provided a brief summary of the competition law, particularly relating to the prohibition of cartel conduct.

1356 On the same day, Mr Wright forwarded a copy of the legal advice to each of Yieh Phui and China Steel. In cross-examination, Mr Wright agreed that the reason he paid for and provided Yieh Phui with the legal advice was because he was concerned to do whatever he could to ensure that the meeting with BlueScope did not damage Wright Steel's commercial interests and Yieh Phui's commercial interests.

1357 Mr Wright said that, on 24 February 2014, he was contacted by Mr Huang of Yieh Phui who asked Mr Wright for advice about what Yieh Phui should do about the proposed meeting with BlueScope in view of the legal advice Mr Wright had sent them. Mr Wright suggested to Mr Huang that Yieh Phui could record the meeting to protect itself. It is common ground that Yieh Phui recorded at least part of the meeting with Messrs Ellis and Schulz that occurred on 26 February 2014 and is the subject of the ACCC's allegations. The audio recording was produced to the ACCC pursuant to a s 155 notice issued to Yieh Phui. The audio recording was adduced in evidence, together with a transcript of the recording which is largely in an agreed form between the parties.

1358 On 24 February 2014, Mr Kuo of China Steel replied to Mr Wright's email (which had attached the advice from HWL Ebsworth Lawyers) stating:

Thanks for your e-mail.

The meeting this time is “international” dept of both parties, it is not related to steel mills.

I understand well about Anti-trust or Anti-competition.

Thank you very much for your advise [sic] anyhow.

The meeting with Yieh Phui on 26 February 2014

1359 Between 24 February 2014 and 4 March 2014, Messrs Ellis and Schulz visited a number of steel mills throughout Asia. Mr Schulz said that, at each of the meetings that he attended with Mr Ellis, Mr Ellis led the conversations. From time to time, Mr Schulz also spoke at these meetings. Mr Inomata also attended several of these meetings. The ACCC’s case at trial concerned only one of the meetings, being the meeting with Yieh Phui on 26 February 2014.

1360 Mr Schulz said that, at some stage before the visit to Yieh Phui, he had a conversation with Mr Ellis in words to the following effect:

Mr Schulz: Is there anything else, other than pricing of their steel, that you would like to talk about.

Mr Ellis: What strategies can we employ?

Mr Schulz: The carrot with Yieh Phui is small.

The amount of business we conduct with Yieh Phui is about 12,000 tonnes per annum at best whereas Yieh Phui makes 1,000,000 million [sic] tonnes of steel per annum.

We can try to grow our relationship with Yieh Phui by speaking to them about increased trading activities in Brazil.

Yieh Phui is not a customer of BlueScope.

Mr Ellis: Okay. Let’s see what we can do

1361 Mr Schulz explained that, at that time, Yieh Phui did not buy steel from BlueScope, while BlueScope carried out a small amount of trading on behalf of Yieh Phui.

1362 On 26 February 2014, Mr Ellis, Mr Schulz, Ms Wang and Mr Inomata had a meeting in Taiwan with the following representatives of Yieh Phui:

- (a) Lin-Maw Wu – the President of Yieh Phui;
- (b) Robert Chen – the Vice President of Yieh Phui; and
- (c) Messrs Huang, Jungle Chen and Bob Chang – Senior Managers at Yieh Phui.

1363 Prior to the meeting, Mr Ellis, Mr Schulz, Ms Wang and Mr Inomata met the Yieh Phui representatives at a Chinese restaurant in Kaohsiung, not far from Yieh Phui's offices. Mr Schulz and Mr Inomata said that, during this lunch meeting, introductions were made. To the best of both Mr Schulz and Mr Inomata's recollection, there were no substantive business discussions during this lunch meeting. Following lunch, they returned to Yieh Phui's offices and had their scheduled meeting.

1364 In his written evidence, Mr Ellis said that he had a number of purposes for meeting with Yieh Phui:

- (a) First, Mr Ellis wanted to explore whether Yieh Phui might supply BlueScope CIPA with steel for distribution in Australia, and therefore break its exclusive distribution channel with Wright Steel. Mr Ellis said he appreciated at the time, however, that it was unlikely that Yieh Phui would acquiesce and supply BlueScope CIPA in Australia, or even if it did do so, that it would do so immediately.
- (b) Secondly, Mr Ellis wanted to explore expanding the international trading relationship that BlueScope CIPA had already developed with Yieh Phui.
- (c) Thirdly, Mr Ellis wanted to encourage Yieh Phui to examine its pricing on steel it was exporting to Australia, by suggesting it review the recommended resale prices in BlueScope CIPA's price list. Mr Ellis thought that if Yieh Phui were to do this, it might realise that it was being effectively "taken for a ride" by its trader in Australia, Wright Steel.
- (d) Fourthly, Mr Ellis wanted to explore an opportunity for BlueScope CIPA to purchase pipe and tube products from Shin Yanh (a subsidiary of Yieh Phui) for supply to Orrcon (a BlueScope subsidiary).

1365 The evidence shows that items (b), (c) and (d) were discussed at the meeting with Yieh Phui, but not item (a). I do not reject Mr Ellis's evidence with respect to item (a) entirely; the BlueScope business records referred to above indicate that Mr Ellis contemplated a strategy whereby BlueScope would purchase steel from some overseas mills for supply into Australia, at least in respect of steel products that CIPA did not produce. However, I consider that Mr Ellis's reference to breaking Yieh Phui's exclusive distribution channel with Wright Steel is a reconstruction of his motives for meeting with Yieh Phui, seeking to provide a commercial justification for his discussions with Yieh Phui about price. It is the third purpose, item (c), that is relevant to the ACCC's allegation.

1366 In evidence is an audio recording of at least part of the meeting and a transcript of the recording. The transcript has a number of amendments marked which are largely agreed between the parties. For the purposes of this decision, I have listened to the audio recording with the benefit of the transcript. The audio recording lasts for around 51 minutes.

1367 There is no material dispute between the parties concerning the words spoken at the meeting, although four matters should be noted about the recording and the transcript.

- (a) First, Mr Ellis said that the recording does not begin at the start of the meeting; the first matter referred to in the transcript is Orrcon, which Mr Ellis believes was discussed about half way through the meeting. In contrast, Mr Inomata said that, to the best of his recollection, there were no substantial topics discussed either before the recording commences or after the recording concludes. Mr Ellis's evidence appears to be confirmed by statements he made which are transcribed at page 7 of the transcript, and which appear to be a recap or summary of the topics discussed to that point of the meeting. In that respect, Mr Ellis referred to the first topic discussed which concerned the Caribbean and South America. The discussion on that topic is not recorded. Mr Ellis then referred to a second topic which is somewhat indistinct on the recording, but appears to be the topic transcribed in the first seven pages of the transcript (being the supply of product to BlueScope's subsidiary Orrcon). Mr Ellis then referred to the third topic which he wished to discuss, describing it as "maybe a little bit more sensitive". The remainder of the recording and transcript is concerned with the third topic, being Yieh Phui's pricing to the Australian market.
- (b) Second, while most of the meeting was conducted in English, some parts of the meeting were conducted in a foreign language, which I assume is Mandarin. Those parts of the meeting were not translated. In some instances, it is apparent that Ms Wang (of BlueScope) translated statements made by Mr Ellis into (I assume) Mandarin.
- (c) Third, the Yieh Phui representatives who spoke in English at the meeting could not be described as fluent in the English language. With no disrespect, many of their statements were expressed in a halting and uncertain manner.
- (d) Fourth, the transcript records one of the participants in the meeting having the name "Ms Tang". Mr Schulz said that he believed the references in the transcript to Ms Tang

should be corrected to Ms Wang. He noted that Mindy Tang was the assistant to Ms Wang at BlueScope's Taiwan office, but Mr Schulz does not believe that Mindy Tang attended the Yieh Phui meeting. Having listened to the recording with the aid of the transcript, I am not satisfied that the correction should be made. The voice attributed to Ms Tang on the recording appears to differ from the voice attributed to Ms Wang. However, nothing turns on that issue.

1368 Mr Ellis gave evidence, which I accept, that he did not know or suspect at the time that the meeting, or any part of it, was being secretly recorded by representatives of Yieh Phui. Mr Ellis also said that, appreciating that English was a second language for his counterparts at the meeting, he spoke slowly and used simple phrases to ensure he was understood.

1369 It is necessary to reproduce the relevant parts of the discussion during the Yieh Phui meeting from the transcript.

1370 At pages 7 to 8 of the transcript, Mr Ellis referred to the "third topic" which he described as "maybe a little more sensitive" and continued:

... we would like to encourage Yieh Phui to, ah, extract more value from the sales you make to Australia. Ah, what I mean by this is what – we think that, ah, there is an opportunity for you to sell material at, ah, at better, ah, better prices than perhaps you're achieving today. So we would, um, we would be very happy to give you the real market information, ah, through Satina, and it's up to you whether you – you use or don't use, but, ah, we, ah, we – we feel that perhaps sometimes, um, the rates that are sold into Australia are - are lower than market and therefore you are leaving some profitability behind. Does that make sense?

1371 After Mr Ellis made these statements, a short conversation in Mandarin ensued which is not translated. Robert Chen then replied to Mr Ellis (on pages 8 to 9 of the transcript):

It's not proper for a discussion on the table. And so, I'd prefer that we discuss only the, ah, business ... ah, rather than we talk on that Australian market is normally a concern. That's the – the advice from our lawyer.

1372 Mr Ellis replied (at page 9 of the transcript):

Robert, before we came here, we also got a legal opinion. So general market pricing in Australia is quite transparent, ah, so ah, again that - that is for your independent decision as to what you do, ah, and your – your, ah, your - so we are not in any way attempting to influence or attempting to suggest, ah, but what we are saying is that, ah, from a number of countries there is opportunity to do other things. So we – we can leave it at that.

1373 Mr Huang then said (at pages 9 and 10 of the transcript):

Just that I – I guess – I guess in consideration of, like, ah, our vice-president said,

because, ah, we got some - there are some competition and the customers act, ah, like a cartel conduct and, ah, yeah, so we some advice, you know, ah, from our, ah, some attorney, this kind of the penalty maybe is huge, maybe three times of illegal benefit or 10 per cent of, ah, of the - the annual revenue or, you know, some - some, ah, 10 years in the gaol. So we are not - we are - it's very serious, so we are not, ah

1374 Mr Ellis replied (at page 10 of the transcript):

So Peter, we – we - please don't misunderstand us. We are not, ah, attempting to give you, ah, any instruction or any, ah, any what do you call, ah, direction.

1375 Mr Huang then said (at page 10 of the transcript):

But - but - but I guess, ah, this kind of the discussion, it will - some sensitive, so it will jeopardise some benefit from the consumer in Australia however. So I guess, so that's why we suggest that maybe we – it's good in some marketing information agenda out of Australia.

1376 Mr Ellis replied (at page 11 of the transcript):

So that's, ah - Peter, that's what we're trying to inform you. So the general market price in Australia is, ah, and this is based on published prices, so this is very public information, not private information, public information, and you should seek it independently of us, is, ah - is quite different to perhaps what you are providing. So because it is public information, it is not illegal.

If it was private information, ah, Mr Robert would be correct, but this is public information, ah, and, ah - and I would encourage you to access the public information. It is very much available, but I suspect that you don't see it or you don't get it, ah, you don't receive it I should say.

1377 After Mr Ellis made these statements, a conversation in Mandarin ensued between multiple speakers, which is not translated. Some English words were spoken in the midst of the conversation which I understand to be a statement to the effect that “this is a trading company, they don't want to create or form an understanding”.

1378 After a short time, Mr Ellis interjected and said (page 12 of the transcript):

Could - could I - Robert, if I could give you an example. And - and Inomata San is very correct, we are very, very sensitive and very, very careful for the correct, ah, legal discussion, ah, and, as a consequence, we have published – every month we publish, ah, what is called a recommended resale price. Now, that is perfectly legal in Australia, ah, like a recommended retail price that you buy in Taiwan. I would suggest that you get access to that document, very easy to find – it's published in Australia - it is not secret – and use that as a reference point, ah, for your business. There's absolutely no illegality about it.

1379 Robert Chen responded with the comment (at page 12 of the transcript) “I think we can get one” and asked “is it monthly or weekly?”, to which Mr Ellis replied “every month”.

1380 Ms Wang then stated (at page 13 of the transcript):

We believe that as long as the information is public, which means everyone can access, we shouldn't have any concerns about the trade practice. I believe so.

1381 Mr Ellis added "correct" and continued (at page 13 of the transcript):

So, Robert, please believe me. Before I had this conversation, my lawyer give me very strict instructions.

1382 After Mr Ellis made that statement, there was laughter in the room followed by a conversation in Mandarin which is not translated. Mr Ellis continued:

So, ah, as a mill provider, ah, we understand the role of the trader very well. Ah, the trading company will always try and push the mill for cheaper, cheaper, cheaper. As a mill, you want higher, higher, higher. We are a mill. You are a mill. So we want to at least make you aware of what is the published public information in Australia. So that's – that's what we're saying.

1383 Robert Chen then made the following observations regarding Mr Ellis's suggestion (at page 14 of the transcript):

Okay, but is that – that now is, ah, free trade market, it's not only YP getting to any country or markets. So – so that's – this is - we have to consider all of the competition - what's – they are acting on the, ah, selling price. This is for the – to the, ah, US market - even though that the US local price very high, very hard to get all the, ah, public information, but still we cannot sell as high as the local price. I guess there's certain – some, ah, barrier. Because most of the - the producer, you know, compete for entry in this market, so

1384 Mr Ellis replied (at pages 15 and 16 of the transcript):

So, Robert, you're – for Australia, you're half right and half wrong. For half right, you are correct that Australia is a very free economy, but you're also half wrong because a number of mills and a number of economies have been restricted from Australia due to, ah, dumping practice. So – so this is where I think, ah, it is in the interests of YP to – to recognise that a number of mills and a number of countries have been restricted from supply to Australia. The distance to Australia is very – very long. So the likelihood of supply from, ah, from Europe or from, ah, from, ah, Americas is - is not competitive. So it really is Asian region. And because Asian region has been restricted to a degree, there is more opportunity, in our opinion, ah, to – to extract more value from Australian market. So that – that's your decision not – not ours, right? And – and as I said before, we are very comfortable to legally suggest that you look at the publically available information, which perhaps you have not seen. So that's a – that's - maybe you can summarise that, Satina.

1385 A conversation in Mandarin then ensued which is not translated, but which I infer was Ms Wang translating into Mandarin the foregoing statements of Mr Ellis. Ms Wang then translated into English a question from Yieh Phui, stating:

First question is: for those prices, is it the list price, or just retail price, or -

1386 Mr Ellis interjected and replied (at pages 16 to 17 of the transcript):

What we call - so the published price list, and I'm being very careful with my words now, Robert.

1387 Again, laughter in the room followed that statement. Mr Ellis continued:

The published price list, the public document, is a recommended resale price. So this is a – this is a resale price for the distributors. So your – your customer, the trader, would sell to the distributor and the distributor would sell at a resale price. So it's not retail – resale. So you would expect that your – your customer, the trader would need to make some margin. But the price that the distributor sells is, yeah, on a basis of the recommended resale price.

1388 A Yieh Phui representative then asked if they get access to the information on BlueScope's site (which I infer means website), to which Mr Ellis replied (at page 17 of the transcript):

No, it's ... the information is – is publicly available.

1389 The Yieh Phui representative then asked whether the information is “free of charge”, to which Mr Ellis replied in the affirmative. The Yieh Phui representative then asked who generates the information, to which Mr Ellis replied “BlueScope”. A short conversation in Mandarin then ensued, before Mr Ellis stated (at page 17 of the transcript):

So, as you know, BlueScope has, say, 85 per cent of the market share. So when we set the, ah, when we set the, ah, recommended resale price, it – it establishes a market norm.

1390 Again, a short conversation in Mandarin ensued (which I infer was a translation of Mr Ellis's statement), and Mr Ellis continued (at pages 17 and 18 of the transcript):

So the company, ah, our – our customers or our competitors it's not compulsory to follow; it's up to them. So they can be – they can follow or not follow, but generally it's a reference point. Generally they are very close.

1391 A short conversation in Mandarin then ensued. Mr Ellis then added (at page 18 of the transcript):

No I, ah, I'm very sure that your - your trading customers would have access to this document, but I would also be very sure they'd not give it to you.

1392 That statement was again followed by laughter. Robert Chen then asked whether Yieh Phui could get the document from the internet. Both Mr Ellis and Ms Wang were hesitant in their response to that question, before Mr Ellis stated (at page 18 of the transcript):

Well, I'm not sure if we – I'm not sure if we are allowed to give it to you, but it's freely available from the market. Yeah. I - I'm not sure how we could do that, but you –we'll work – we'll work it out.

1393 Mr Huang then raised a concern that Yieh Phui supplied quality steel to the Australian market but, following dumping duties, second tier quality producers from India and

Vietnam were selling more steel into Australia. Mr Ellis replied (at pages 19 and 20 of the transcript):

So, Peter, I can assure you, ah, ah, that within the next three months those countries will also be facing some repercussions ... from BlueScope.

1394 A short conversation in Mandarin ensued (which I infer was a translation of Mr Ellis's statement). After a brief discussion about the dumping margin, Mr Ellis said (at page 20 of the transcript):

So, Peter, one of the reasons we came to talk to you is because we value your ethics, we value your quality and we value the way you sell. I think from our perspective your company is, ah, absolutely first tier and, ah, we - we also think that there is opportunity - your independent decision, ah, nothing to do with us - to - to extract more value from the Australian market. But your choice not - not - not - nothing to do with us.

1395 The above statement was followed by some brief laughter and then a longer conversation in Mandarin ensued involving a number of participants. At the end of that conversation, Mr Huang said (at page 21 of the transcript):

Yeah, yeah, so that's why we focus on the spirit of the ACCC. You know, it's a competitive market without any artificial restriction, so I guess this question is so sensitive, so that's why we - we - okay, we - you know, at least nobody can bear 10 million of the - the fine or - or 10 years in - in gaol.

1396 Mr Ellis interjected (at page 21 of the transcript):

I think you are confusing the conversation. I have been very careful with my words to make this, ah, very, very, ah, ah - very, ah, ah, legal and very allowable. So everything I've said today has been practised maybe 20 times before.

1397 That statement was again followed by laughter. Mr Ellis continued:

So, please, Robert, no, no, no, no - no concern, no. So again, I just reiterate we are, ah, we're not suggesting anything. Ah, we are not, ah, recommending any pricing setting or anything like that. All we are saying is there - there is publicly available information which you can access, which should enable YP to extract more value from the Australia market. What you do is up to you. So, ah, we - we are very comfortable for that.

1398 The above statement was followed by a lengthy conversation in Mandarin involving a number of participants. Robert Chen appeared to summarise Yieh Phui's intended actions by stating (at page 23 of the transcript) "so we get the information first" and trailed off with "and then if we have something". In a question which appeared to be directed to Mr Ellis, Ms Wang suggested: "...if I can have some information, maybe I can just stop by", Mr Ellis responded: "Of course". Ms Wang added: "[o]r just talk over the phone" to which

Mr Ellis responded: “[b]ut please, nothing illegal” and Robert Chen said “[n]o, not the phone, not the phone”.

1399 Shortly after those statements, Mr Ellis stated (at page 24 of the transcript):

So, ah, LM and, Robert and Peter, please - please be absolutely assured that the discussion we have is very, ah - from Australian law, I don't know about, ah, Taiwan, Australian law is very, ah, over - legitimate, yeah, if I can use that.

1400 I infer from the transcript that “LM” is the name used by Mr Ellis to address Mr Wu.

1401 Until this point, Mr Wu had said very little in English in the meeting. I infer from the recording and transcript that Mr Wu had limited facility with English. At this point, however, Mr Wu said in (halting) English (at page 24 of the transcript) that, when he was told that BlueScope representatives were visiting, he had understood that it was “just like a visitor” or “special visitor” but not for “any new business opportunity”. Mr Wu expressed either surprise or concern that the topics of anti-dumping and trade practices had been raised. Mr Ellis responded (at pages 24 and 25 of the transcript):

Well, I think, ah, ah, LM, that we have a legitimate desire, ah, to build our business in Caribbean and Latin America. And, as I said, Yieh Phui material is very well respected and the brand is very well, ah, understood and I think our position when we - when we position the products in Asia and Australia and New Zealand and China, we always target the top-tier customer. And, ah, Dieter's, um - Dieter's group in ah, Miami and Long Beach focus on high-end customer. So we would very much like to work with Yieh Phui for - for that. And for the pipe business, ah, we - we wait for you to - to respond. If - if - if that causes too much conflict with your channel, it's okay, we can - we can do something else, yeah.

1402 The remainder of the meeting involved a relatively high level conversation about the prospect of BlueScope working with Yieh Phui to sell steel into South American markets, and the relative price and quality differences across different steel producing countries.

1403 In his written evidence, Mr Ellis provided comments on certain of the statements made at the meeting with Yieh Phui. I have given those comments little weight. For reasons explained earlier, I considered Mr Ellis to be an unreliable witness.

1404 I make the following findings about the discussion at the meeting concerning BlueScope's recommended resale prices:

- (a) First, Mr Ellis stated that he was raising the topic because there was an opportunity for Yieh Phui to sell steel at “better prices” than they were currently achieving and BlueScope believed that the prices at which Yieh Phui's steel was sold into

Australia were lower than the market and that Yieh Phui was “leaving some profitability behind”. I conclude that the aim or object of raising the topic was to encourage Yieh Phui to increase its prices for supply into Australia.

- (b) Second, in response to Yieh Phui’s objection to having the discussion, Mr Ellis stated on a number of occasions that BlueScope was not attempting to influence, instruct or direct Yieh Phui as to its pricing. Mr Ellis also stated on a number of occasions that Yieh Phui’s pricing was its decision and not BlueScope’s decision. However, Mr Ellis then acted in a manner that was contrary to those statements. Rather than accepting Yieh Phui’s objection to having the discussion, Mr Ellis pressed the discussion. Mr Ellis insisted that the conversation was lawful under Australian law; stated that BlueScope published a recommended retail price in Australia; suggested that Yieh Phui get access to that document; and suggested that Yieh Phui use the document as a reference point for its business (implicitly, in respect of Australian imports).
- (c) Third, Mr Ellis stated that there was opportunity for Yieh Phui to extract more value from the Australian market. In context, it is apparent that Mr Ellis used that phrase as a euphemism for increasing prices. I also consider that those present at the meeting would have understood that intended meaning. Mr Ellis explained the “opportunity” as arising from the fact that a number of mills and a number of countries had been restricted from supply to Australia (implicitly, by anti-dumping action) and that transportation distance rendered supply to Australia from Europe or the Americas uncompetitive.
- (d) Fourth, Yieh Phui raised a concern that it supplied quality steel to the Australian market but was subject to anti-dumping duties, whereas second tier quality producers from India and Vietnam were selling more steel into Australia. Mr Ellis replied with an assurance that those countries would be facing “some repercussions” from BlueScope within the next three months. I infer that the reference to repercussions was a reference to anti-dumping action, and that that would have been understood at the meeting.
- (e) Fifth, Mr Ellis explained that BlueScope’s recommended resale prices were prices at the distribution level of the market. Therefore, Yieh Phui’s customer, the import trader, would sell to the distributor and the distributor would sell at the recommended resale price. I infer that, by this explanation, Mr Ellis sought to make

clear that he was suggesting that Yieh Phui base its prices on BlueScope's recommended resale prices, recognising that those prices were the prices at the distribution level of the market.

- (f) Sixth, Mr Ellis stated that BlueScope had a market share in Australia of about 85% and that, as a result, when BlueScope set the recommended resale price, it established a market norm. Mr Ellis also stated that, while distribution customers could choose whether or not to follow the recommended resale prices, generally they were very close to those prices.
- (g) Seventh, on a number of occasions, Mr Ellis stated that what he was suggesting to Yieh Phui was lawful in Australia because BlueScope's recommended resale price list was "public information" and not "private information". It is not entirely clear what Mr Ellis meant by that distinction, and the statement was not explained in his evidence. The statement has an echo of the price signalling prohibitions in what was Div 1A of Pt IV. Those prohibitions were introduced into the Act in June 2012 and were operative at the time of the Yieh Phui meeting (but they were subsequently repealed). The prohibitions drew a distinction between private disclosures of price information and public disclosures, although at all times the prohibitions were limited in their application to banking services. Whatever the source of Mr Ellis's belief that a reference to public information rendered his conduct lawful, the statement that BlueScope's recommended resale price list was "public information" was at best a half-truth, and that was known to Mr Ellis at the time of the meeting. As the ensuing conversation confirmed, BlueScope's recommended resale price list was not published on its website and not publically available. It was only provided to BlueScope's customers (although, as set out in these reasons, as part of the benchmarking strategy BlueScope had also provided it to non-aligned distributors). Yieh Phui would need to obtain a copy from such distributors. Mr Ellis stated in the meeting that he was not sure if BlueScope was allowed to give the document to Yieh Phui and he was not sure how he could give the document to Yieh Phui but "we'll work it out". Towards the end of the meeting, Ms Wang suggested to Mr Ellis that she might be provided with the information (I infer, the recommended resale price) and suggested "I can just stop by". The suggestion appeared to be that Ms Wang would personally deliver the

recommended resale price list to Yieh Phui in Taiwan. That course is confirmed by a subsequent email from Ms Wang, referred to below.

- (h) Eighth, Mr Ellis stated during the course of the discussion that he had received legal advice about the subject of the discussion, that his lawyer had given him “very strict instructions”, that he was being very careful with his words, and that everything Mr Ellis said had been practised maybe 20 times before. Those statements were generally followed by laughter in the room. It is apparent from listening to the recording that those statements were understood by those present as indicating that, under legal advice, Mr Ellis was using careful language in what he was seeking to convey. Further, given Yieh Phui’s repeated objections to the subject matter being discussed at all, I infer that Yieh Phui understood that Mr Ellis was seeking to persuade Yieh Phui to increase its prices into the Australian market. I also find that that was Mr Ellis’s intention.

Report of the meeting with Yieh Phui

1405 Mr Schulz said that, prior to their overseas tour, Mr Ellis instructed him that he wanted to prepare a report detailing their visits with the overseas mills, so as to report back to Mr Vassella on the outcome of the trip, and requested that Mr Schulz assist with its preparation.

1406 On 1 March 2014, Mr Schulz emailed Mr Ellis with the notes he had prepared of their meetings with Korean steel mills. On 3 March 2014, Mr Schulz sent those notes to Ms Wang by email, copying Mr Inomata, with a request that Ms Wang “write up some notes like this” in respect of their meetings with the Taiwanese steel mills. Later that day, Ms Wang sent an email to Messrs Ellis, Schulz and Inomata attaching notes she had prepared of the meetings with the Taiwanese steel mills. In respect of the Yieh Phui meeting, the notes recorded the following:

Date Feb 26, 2014 01.45pm
Customer **Yieh Phui Enterprise Co. Ltd.**
Website <http://www.yiehphui.com.tw/?lg=EN>
Attendees **Mr. L.M. Wu** – President
Mr. Robert Chen – Vice President - Marketing & Sales
Mr. Peter Huang – Senior Manager, Global Marketing & Sales Division
Mr. Jungle Chen – Senior Manager, America & Australia Export Section, Global Marketing & Sales Division
Mr. Bob Chang – Sales Representative, America & Australia Export

Section, Global Marketing & Sales Division

- Note
- 1) Interested to work with BlueScope to develop any new business opportunities especially Latin America, South America and South Africa as long as no channelize issue.
 - 2) BlueScope is interested to source Pipe and Tube for those out of spec/size Orrcon produce. Mr. L.M. Wu indicated currently they have two agents (CMC and GP) for this business, any new business will subject to no conflict with current channels.
 - 3) There are public market info with retail price can be a good ref. for YP to have further understanding of Australia market situation. YP expressed concerns of against Fair Trade practice for such market info exchange. BlueScope can provide such info and via Taiwan office to share as face to face discussion to avoid any legal concerns.
 - 4) Any chance to develop opportunity for export YP products to Japan? Chance is slim according to Ino.
 - 5) Any process under JV agreement for Lysaght operations to outsource from 3P suppliers? For any products Nippon Steel can't supply or not willing to supply (small quantity or tight supply, etc), Lysaght will have the green light to source from 3P suppliers.
 - 6) Any chance BlueScope can provide Brazil market info as ref. as YP still secured some orders from other customers but BlueScope has indicated YP's price is not competitive.

- Follow up**
- A) Check with Mr. L.M. Wu to ensure supply position for Orrcon
 - B) Set the time to visit Mr. L.M. Wu after obtain Australia local market info.

1407 It can be seen that item 3) contained a short summary of the discussion about CIPA's recommended resale prices and Ms Wang's understanding of the conclusion of the discussion: that BlueScope could provide the recommended resale price information to Yieh Phui in a face to face discussion in Taiwan "to avoid any legal concerns".

1408 Later that day, Mr Schulz sent an email to Ms Wang, attaching a revised form of the notes, with the message:

Hi Satina,

Compacted your notes as follows. Left one element off as you can see. Let me know if you agree with this in principal. Jason will advise Mark V and lead team.

1409 The revised form of the notes for the Yieh Phui meeting were as follows:

Yieh Phui Enterprise Co. Ltd.

Attendees: **Mr. L.M. Wu** – President

Mr. Robert Chen – Vice President - Marketing & Sales

Mr. Peter Huang – Senior Manager, Global Marketing & Sales Division

Mr. Jungle Chen – Senior Manager, America & Australia Export Section, Global Marketing & Sales Division

Mr. Bob Chang – Sales Representative, America & Australia Export Section, Global Marketing & Sales Division

YP are now a very substantial producer of metallic coated and painted products in the region. Their total capacity in Taiwan is 1 million tons – they also have a facility in mainland China that currently produces about 0.9 million tons, but capacity will double in the near future on account of strong business in mainly the automotive and white goods sectors. YP start with HRC (like SS and BST) and most of their feedstock comes from China Steel Corp. (Mr. Wu, their President, started his career at CSC). As to Taiwan, it was surprising to note that the export component of this facility was very high ranging from 70-80%.

BSL IM have purchased some 5000 tons in the last 12 months from YP, mainly for destination Brazil. YP are interested to grow our trading business particularly in CALA region as well as in Africa. YP however are believing in a very strict channel system (similar to Japan) – hence the disclaimer that there cannot be any conflict with existing channels.

YP are also a producer of industrial cranes as well as steel pipes. Our acquisition of Orrcon and potential interest to import steel pipes from YP to augment our own production and items that Orrcon do not produce brought up a good discussion. Mr. L.M. Wu indicated currently they have two agents (CMC and GP) for their pipe export business to Australia, any new business will subject to no conflict with current channels. Apart from exchanging general views on the Australian steel industry, it is noteworthy to point out that YP (similar to many of the other North Asian mills we visited) in their presentations put a lot of emphasize on the environment and being ‘green’

1410 In his written evidence, Mr Schulz explained that his message to Ms Wang, that he “left one element off as you can see”, was a reference to item 3) in Ms Wang’s version of the notes about so called “public market info” concerning retail prices in Australia. Mr Schulz said that he omitted that item because he believed it was sensitive information, that it was improper to talk with competitors about price, and that he wanted to leave that aspect to Mr Ellis to decide how much, if anything, to report to Senior Management. In cross-examination, Mr Schulz agreed that his version of the notes of the meeting are in a quite different format from Ms Wang’s notes, and contain both additional information that Ms Wang did not have in her notes and omitted certain matters that Ms Wang did have in her notes. Mr Schulz agreed that he had substantially rewritten Ms Wang’s notes. Mr Schulz explained that he had omitted items 4), 5) and 6) from Ms Wang’s notes because he considered that those matters “were going nowhere”. In my view, that conclusion is supported by the recording and transcript of the meeting. Mr Schulz maintained that he had omitted item 3) from Ms Wang’s notes because of its sensitive

nature and because he felt that Mr Ellis “probably did not want to share that in writing with his boss”. I accept that evidence.

1411 On 4 March 2014, Mr Schulz sent a copy of the revised notes to Mr Ellis. Mr Ellis said that he had the “master” version of the report for the mill visits on his laptop and that he copied Mr Schulz’s report in respect of Taiwan into that document. Mr Ellis then made some limited edits to the report. In his written evidence, Mr Ellis said that he did not instruct Mr Schulz to leave out of the report any reference to the discussions with Yieh Phui in relation to prices. Mr Ellis said that he did not add this into the report because he “did not want a summary written report to be forwarded about that matter because it could be misconstrued without the full context”, and because he “regarded it as a sensitive matter”.

1412 On 5 March 2014, Mr Ellis sent a draft of the report for the trip to Mr Vassella with the message:

Hi Mark,

Please find attached the visit report for the first 10 days of the International Tour.

Rather than sending it all at the end, Dieter and I thought it best to break up the visit into 2 halvesmakes it easier to read (and write!)

Please let me know if you want this shared with the wider BAZ team and I’ll send it on.

There are a couple of issues not reported that I would like to verbalise with you when you’re available

1413 In his written evidence, Mr Ellis said that he cannot now recall all of the issues that he had wanted to “verbalise” with Mr Vassella. In cross-examination, however, Mr Ellis agreed that the “couple of issues” that were not reported in the document were the discussions with Yieh Phui around the recommended resale price and Yieh Phui’s highlighting of ACCC issues. Mr Ellis agreed that, at some point in time, he would have had a discussion with Mr Vassella about those issues. A little later in cross-examination, the following exchange occurred in relation to the reason that Mr Ellis did not include any reference to the discussions with Yieh Phui around the recommended resale price:

Mr Ellis, you were trying to avoid a written record of a pricing discussion that you had had with a competitor mill, do you agree? --- Mr Hodge, within BlueScope we were relatively well trained to be sensitive with what went into writing, as all good business people should be. So when you say, “You were trying to avoid”, no, that’s not the case. I was being judicious and engaging with my boss as to what should or should not be in documents. So the way you put it makes it sound inappropriate. That’s not the case. Just being a judicious business person is how I would respond.

1414 As was typical of many answers given by Mr Ellis, I consider the above answer to be evasive. The assertion that “all good business people” are trained to be sensitive or “judicious” about what is put in writing is essentially meaningless; it avoids answering the question of why the omitted information required “sensitivity” and caution. I draw the obvious inference that Mr Ellis did not include any reference to the price discussion in his written report because he was conscious that the discussions with Yieh Phui may have involved unlawful conduct, or steps taken toward unlawful conduct.

P. FINDINGS WITH RESPECT TO THE ALLEGED ATTEMPTS TO INDUCE CONTRAVENTIONS OF S 44ZZRJ

Overview

1415 This section of the reasons states my ultimate findings on the ACCC’s allegations that BlueScope and Mr Ellis attempted to induce nine suppliers of flat steel products in Australia to arrive at separate understandings with BlueScope which contained cartel provisions within the meaning of s 44ZZRD(1). The suppliers were seven distributors (Selection Steel, Apex Steel, Southern Steel, Vulcan Steel, Selwood Steel, CMC Steel and OneSteel), one import trader (the Wright Steel-Citic JV) and one overseas steel mill (Yieh Phui).

1416 As discussed earlier in these reasons, the definition of a cartel provision within s 44ZZRD(1) (as in effect during the relevant period) has two elements which are described, relevantly, as a purpose/effect condition and a competition condition. The purpose/effect condition is satisfied if the provision has the purpose, or has or is likely to have the effect, of directly or indirectly, fixing, controlling or maintaining or providing for the fixing, controlling or maintaining of the price for, or a discount, allowance, rebate or credit in relation to, goods supplied, or likely to be supplied, by any or all of the parties to the understanding. The competition condition is satisfied if at least two of the parties to the understanding are or are likely to be, or but for the understanding, would be or would be likely to be in competition with each other in relation to the supply of the goods the subject of the provision. Those definitions must be applied as at the date of the alleged attempts and in respect of any understanding that was the object of the alleged attempts to induce.

1417 Accordingly, and as stated earlier, the ACCC’s allegations require it to establish that:

- (a) BlueScope and Mr Ellis attempted to induce those counterparties to arrive at understandings;

- (b) each contemplated understanding was to contain a provision that had the purpose, or had or was likely to have had the effect, of directly or indirectly, fixing, controlling or maintaining or providing for the fixing, controlling or maintaining of the price for, or a discount, allowance, rebate or credit in relation to, goods supplied, or likely to be supplied, by any or all of the parties to the understanding; and
- (c) at least two of the entities that were to be parties to each contemplated understanding were or were likely to have been, or but for the understanding, would have been or would be likely to have been in competition with each other in relation to the supply of the goods the subject of the provision.

1418 While the above deconstruction of the elements of s 76(1)(d) of the Act assists in the task of legal analysis, the statutory provision is to be applied in a holistic manner to the impugned conduct.

1419 The impugned conduct involved alleged attempts to induce the counterparties to arrive at understandings. It is not alleged that any understanding was arrived at. It is therefore necessary to consider whether:

- (a) BlueScope and Mr Ellis intended that their conduct would induce, or be inducements towards, each counterparty arriving at a price fixing understanding; and
- (b) the conduct of BlueScope and Mr Ellis constituted steps towards the inducement of a price fixing understanding being reached with each counterparty, which steps were more than merely preparatory of the inducement and which were immediately and not merely remotely connected with the inducement.

1420 A significant part of the respondents' closing submissions were seemingly directed to the question whether the evidence showed that BlueScope and Mr Ellis had attempted to reach a price fixing understanding, as opposed to whether they had attempted to induce a price fixing understanding being reached. As noted earlier in these reasons, the respondents submitted that the evidence showed that neither BlueScope nor Mr Ellis sought a commitment from the counterparties as to the prices they would charge for flat steel products, that the counterparties did not give any such commitment and the counterparties gave evidence that they could not give any such commitment, and that neither BlueScope nor Mr Ellis offered any quid pro quo for such a commitment. The respondents argued that the absence of such conduct was fatal to the ACCC's case.

1421 As stated earlier in these reasons, I do not accept those submissions. The categories or types of conduct that may constitute inducing or attempting to induce a person to reach a price fixing understanding within s 76(1)(d) cannot be defined in such a rigid or narrow manner. The conduct may involve a course of meetings, communications and other dealings in which inducements are proposed or offered and which are directed at reaching a consensus, or a meeting of minds, about the level of prices to be charged by the parties. While a consensus or meeting of minds requires some communication of assent from one party to the other whether by words or by conduct, an attempt to induce a price fixing understanding does not require assent to be achieved. It is also not necessary for the conduct to have reached an advanced stage or that the precise terms of the proposed understanding have been formulated. It necessarily follows that the fact that the counterparties did not agree to the proposal, and did not consider that the proposal was commercially feasible, affords no absolute defence.

1422 It is necessary, though, that an unlawful understanding be in contemplation and be the intended object of the attempts to induce. It is not sufficient to intend merely that the counterparty consider whether they should increase their prices. The intention must be directed to the ultimate end of inducing the reaching of an understanding containing a cartel provision (here, price fixing). In other words, by the acts that constitute the attempt to induce, promises must be offered or threats made or persuasive conduct engaged in that is intended to induce a consensus or meeting of minds on cartel conduct, however the ultimate assent may be communicated.

1423 It is necessary to express my ultimate findings in respect of each alleged attempt separately as, to some extent, each alleged attempt involved discrete conduct. However, I consider it appropriate to state my findings with respect to BlueScope's and Mr Ellis's intentions before considering each alleged attempt individually. That is because each of the alleged attempts was the outworking of the benchmarking strategy or, in the case of Yieh Phui, the overseas mill strategy, devised by Mr Ellis and implemented under his direction.

1424 As stated earlier, certain items of evidence were admitted in the case against BlueScope but not in the case against Mr Ellis. Those items of evidence are the two witness statements of Mr Sparks, the extracts of s 155 examinations of Messrs Vassella, Unicomb and Palermo and the handwritten notes of Mr Lander. The significance of those evidentiary rulings are considered below.

What did BlueScope and Mr Ellis intend by their conduct?

- 1425 During the trial the ACCC made clear that it alleged that, by the benchmarking strategy, BlueScope and Mr Ellis attempted to induce distributors to set their prices for flat steel products at or above BlueScope's recommended resale prices, being the list prices in CIPA's Distribution Market price lists. In other words, the recommended resale price would be the base or floor price for the supply of flat steel products by distributors, to which an additional amount might be added on account of processing costs.
- 1426 The benchmarking strategy was devised by Mr Ellis when he commenced as CIPA's General Manager of Sales and Marketing, and the strategy was implemented by CIPA's Sales and Marketing division under his direction. Given his position of responsibility for the strategy, I consider that Mr Ellis's intention with respect to the benchmarking strategy is to be attributed to BlueScope.
- 1427 The overseas mill strategy was also devised by Mr Ellis when he commenced as CIPA's General Manager of Sales and Marketing. Relevantly, the only conduct in issue with respect to the overseas mill strategy was Mr Ellis's meeting with Yieh Phui on 26 February 2014. Again, given his position of responsibility for the strategy, I consider that Mr Ellis's intention with respect to the overseas mill strategy is to be attributed to BlueScope.
- 1428 While the overseas mill strategy is in one sense discrete from the benchmarking strategy, it is apparent that it is a closely related strategy. In his meeting with Yieh Phui, Mr Ellis attempted to persuade Yieh Phui to increase its prices for the supply of flat steel products into Australia by reference to BlueScope's recommended resale prices at the distribution level of the market, as published in CIPA's Distribution Market price lists.
- 1429 I make the following findings with respect to Mr Ellis's intention based on his own words and conduct, as well as by way of inference from the words and conduct of the CIPA managers who reported to Mr Ellis, whether directly or indirectly, and from the evidence as to the market circumstances at the time.
- 1430 The evidence shows that a material aim or objective of the benchmarking strategy and the overseas mill strategy was to bring about an increase in prices for the supply of flat steel products both at the manufacture/import level of the market and at the distribution level of the market. That conclusion was not the subject of any real dispute and is supported by a wide range of evidence.

1431 It was uncontroversial that, following the global financial crisis in 2008, demand for steel world-wide had declined and remained depressed for a number of years. The reduction in demand had led to an over-supply of steel production and distribution capacity. CIPA's reported EBIT for FY2011 to FY2013 were losses of \$1,063 million, \$726 million and \$45 million respectively. CIPA's internal documents reported in 2013 that import competition was "intense" and CIPA had lowered domestic premiums to the import parity price in order to minimise market share decline. BlueScope's flat steel distribution business also faced vigorous competition from a number of distributors in each region in which it operated and flat steel distributors had substantial excess capacity. BlueScope Distribution's underlying EBIT for FY2011 to FY2013 were losses of \$34 million, \$36 million and \$27 million respectively, with a forecast loss for FY2014 of \$18 million. During 2013, distributors were experiencing poor profitability and there was significant price competition between distributors. CIPA received frequent complaints from distributors to the effect that their margins were being impacted by the prices being offered by other distributors and that they had to reduce margins to win business. Distributors also complained about their perception that BlueScope was selling steel to its own distributors (BSD, SMS and Impact Steel) at low prices.

1432 Mr Ellis was aware of the state of the market when he commenced and his business strategies were designed to address these problems. In an early communication from Mr Ellis to the BAZ Sales and Marketing Team, Mr Ellis stated that his objectives included to visit as many key customers as possible to understand their key issues and areas for opportunity and to focus on actionable ideas that could reduce the level of imports coming into Australia. In early meetings with distributors, Mr Ellis received complaints about low prices and lack of profitability caused by BlueScope offering too much tactical pricing to distributors, perceived unfair competition from BlueScope Distribution (which was offering low prices in competition with other distributors) and low prices being offered by NZSA.

1433 The benchmarking strategy involved revising the list prices in CIPA's Distribution Market price lists for flat steel products upwards and promoting those prices to distributors as "benchmark" prices or "recommended resale" prices. From the December 2013 price lists onwards, the list prices were revised upwards while distributors' discounts were increased so that distributors' net prices remained largely the same. The difference between the list prices and the net prices increased to approximately 13% to 15%. This was the gross margin able to be earned by distributors if the distributors set their prices at the level of the list prices. That was how the "recommended resale" prices were promoted by BlueScope to distributors. If the

benchmarking strategy was implemented successfully and distribution customers were able to earn higher gross margins on the sale of CIPA products, that would enable CIPA to maintain the level of its “net” prices (and avoid having to offer deeper discounts).

1434 It was an obvious commercial fact, appreciated by the relevant BlueScope employees and distributors, that the benchmarking strategy could only succeed if a significant number of distributors implemented the strategy by adopting the prices in CIPA’s price lists as a benchmark (or floor price) in setting their own prices. Unless the strategy was adopted by a significant number of distributors, including BlueScope Distribution, those distributors that followed the strategy faced the risk of losing sales to distributors that did not (and offered lower prices). In promoting the benchmarking strategy to distributors, BlueScope made clear that the strategy was being promoted to other distributors in the market and would be followed by BlueScope Distribution. The use of CIPA’s list prices as the benchmark (or base) prices and the wide distribution of the price lists were at the core of the benchmarking strategy.

1435 As already noted, the respondents did not dispute that the benchmarking strategy, involving the use of the “benchmark” or “recommended resale” prices, was promoted to distributors as a way of distributors increasing their prices and margins. But the respondents submitted that the benchmarking strategy was only ever intended to promote the prices in CIPA’s Distribution Market price lists as a price that distributors could take into account in setting their prices at the distribution level of the market. The respondents submitted that the benchmarking strategy was incapable of giving rise to a price fixing understanding containing a cartel provision, because it was not possible for distributors to set their prices by reference to CIPA’s list prices. In support of that submission, the respondents relied on evidence given by a number of distributors that they could never have agreed to use the CIPA price lists to set their prices, or to increase their prices based on the price lists, because they needed pricing flexibility for a variety of reasons, including that prices were typically negotiated with customers (particularly larger customers), the market was highly competitive and they had to recover processing and other service costs. I accept that evidence to that effect was given by distributors. However, the evidence does not contradict the ACCC’s case that BlueScope and Mr Ellis attempted to induce price fixing understandings being reached. The evidence merely explains some of the likely reasons why the attempt failed. Further, I do not consider that the evidence negatives the possibility that price fixing understandings were capable of being reached in this market. The market was highly competitive, and distributors engaged in individual negotiations with customers, but those facts would not have prevented cartel conduct in which distributors

reached a meeting of minds with BlueScope to use CIPA's list prices as their base or floor prices. Nor do processing costs prevent such cartel conduct occurring. CIPA's list prices allowed a gross margin over the cost of the steel of 13% to 15%, which would have allowed recovery of other costs of the distributors. The evidence indicates that processing costs were a relatively modest component of a distributor's costs and that the benchmarking strategy contemplated that distributors would, if they chose, add an additional amount for processing costs.

1436 I am satisfied on the evidence that the conduct undertaken by and on behalf of BlueScope and Mr Ellis pursuant to the benchmarking strategy and the overseas mill strategy, in the period from the beginning of September 2013 until at least April 2014, was intended by them to induce a consensus or meeting of minds between BlueScope on the one hand and each counterparty on the other that the list prices in CIPA's Distribution Market price lists for flat steel products should be used:

- (a) by distributors (both aligned and non-aligned) as a base or floor price for their supply of flat steel products; and
- (b) by Wright Steel (as an import trader) and Yieh Phui (as an overseas steel mill) as the reference point for prices at the distribution level of the market, such that each would increase their current level of pricing at the manufacture/import level of the market.

1437 I am satisfied that the promotion by BlueScope of "recommended resale prices" was a mechanism or device by which BlueScope and Mr Ellis sought to induce such understandings being reached. That conclusion is based on the totality of the factual findings expressed in these reasons. However, the following matters are highlighted by way of summary.

1438 First, the commercial and financial pressures facing BlueScope CIPA and BlueScope Distribution in 2013 were severe. Mr Ellis was aware of those pressures, including the fact that CIPA had experienced a substantial reduction in its share of steel sales in Australia between 2008 and 2012 and Mr Ellis believed that BlueScope wanted him to do his best to reverse that trend. Those pressures would be materially alleviated if BlueScope were able to persuade distributors (both aligned and non-aligned) to use CIPA's list prices as a base or floor price when setting their prices, and also persuade competing import traders and overseas mills to set their prices on the basis that distributors would price accordingly.

1439 Second, BlueScope’s managerial investment in the benchmarking strategy was significant. Internally, substantial work was carried out to revise (and increase) CIPA’s Distribution Market list prices and allow a greater discount to net prices. A large number of meetings were held with distributors to discuss the concept. The December 2013 Benchmark spreadsheet was developed to communicate detailed information about the recommended resale prices to distributors. Later, CIPA’s Distribution Market price list for sheet and coil products was reformulated to promote and facilitate the adoption of the recommended resale prices. The evidence shows that the benchmarking strategy was a significant project which continued for at least eight months and involved numerous meetings and discussions between CIPA and distributors. Those considerations run counter to Mr Ellis’s suggestion that he intended that CIPA’s price lists would serve merely as recommended prices which distributors could choose to take into account in making their own pricing decisions and might be used by them as a starting point or reference for their pricing. On Mr Ellis’s evidence, which I reject, the benchmarking strategy would have been unlikely to have made any change to the market conditions and commercial and financial pressures facing BlueScope. Such a strategy would not have warranted the managerial investment that was undertaken.

1440 Third, Mr Ellis intended that CIPA’s list prices would be used as a base or floor price not only by distributors that sold CIPA steel, but also by distributors that sold imported steel. Under Mr Ellis’s direction, BlueScope promoted the use of CIPA’s price lists by both aligned and non-aligned distributors and in respect of the supply of all flat steel products whether produced by CIPA or by overseas mills. This intention and conduct revealed that what was promoted by BlueScope as “recommended resale prices” were in fact “recommended sale prices”. The strategy was not based on the usual commercial considerations that underpin the use of recommended resale prices in trade and commerce. As noted earlier, the practice of a supplier recommending resale prices to its resellers (whether distributors or retailers) is well known in commerce. Recommended resale prices are often a valuable element of a supplier’s sales and marketing strategy. By publicising recommended resale prices to the ultimate consumers of its products, the supplier promotes its view of the value of its products in the market for its own benefit and the benefit of its distributors or retailers. However, that rationale for the conduct falls away when a supplier recommends “sale prices”, not “resale prices”, to distributors or retailers who do not buy and resell the supplier’s goods. Such a recommendation merely seeks to bring about a uniform sale price in the market. Mr Ellis acknowledged that he was “happy”

for CIPA’s price lists (as recommended prices) to be used widely in the market as a benchmark, including by distributors who imported flat steel products.

1441 Fourth, the conclusion that the benchmarking strategy was not based on the usual commercial considerations that underpin the use of recommended resale prices in trade and commerce is further supported by BlueScope’s attempt to develop and introduce a “recommended resale price” list for processing services. The use of the expression “recommended resale prices” by BlueScope in that context was also a misnomer because processing services were not resupplied by anyone. The attempt to introduce “recommended resale prices” for processing services emerged out of the introduction of recommended resale prices for flat steel products. The proposal was that the “recommended resale prices” for processing services were to be included in CIPA’s Distribution Market price list for sheet and coil products. The intention was that the distributor would set its prices for processed sheet and coil products by adding together the “recommended resale prices” for the steel and for the processing services to arrive at a final price.

1442 Fifth, Mr Ellis’s first meeting about the benchmarking strategy was the Melbourne Airport meeting which involved four distributors meeting together, being two aligned distributors (Southern Steel and Apex Steel) and two non-aligned distributors (Vulcan Steel and Selection Steel). That fact supports the finding that Mr Ellis’s intention was to attempt to induce distributors to reach a consensus with BlueScope about adopting CIPA’s list prices as a base or floor price. The inducements proffered at the meeting were statements by Mr Ellis that CIPA would tighten its tactical pricing and would also be increasing its prices to BSD and SMS. The “pushback” from Mr Gregory of Selection Steel at the meeting shows that Mr Gregory understood that BlueScope’s proposal was for distributors to adopt a common position of using the CIPA list prices as a base or floor in setting prices.

1443 Sixth, in the ensuing days and weeks, Mr Ellis met with numerous distributors. Mr Ellis promoted the benchmarking strategy as a response or solution to distributors’ concerns and complaints about the intense pressure in the market and prevailing low prices in a similar manner to the Melbourne Airport meeting. Mr Ellis promoted the benchmarking strategy as an “opportunity” for distributors to use CIPA’s list prices as a benchmark when setting their prices. Mr Ellis offered an inducement to follow that course by stating that CIPA would be tightening its tactical pricing so as to limit the amount of price discounting in the market. I consider that the “opportunity” that was intentionally conveyed by Mr Ellis was created by

BlueScope seeking to induce a significant number of distributors to reach a consensus with BlueScope that they would set their prices by reference to CIPA's price lists. If a significant number of distributors reached that consensus, it would create the set of circumstances in which the distributors could successfully implement the benchmarking strategy, without the commercial risk of losing sales to other distributors.

1444 Seventh, Mr Ellis's statements to Mr Wright at dinner on 12 September 2013 provide a clear indication that his intention with respect to the benchmarking strategy was to attempt to induce a consensus with distributors to use CIPA's list prices as a base or floor for their prices, and a consensus with Wright Steel as an import trader to support the price increase at the manufacture/import level of the market. At that dinner, Mr Ellis said that: he considered that the prices of flat steel products were undervalued in Australia and he wanted to restore value (in other words, increase prices); he considered that imports were driving prices down and BlueScope intended to use anti-dumping actions to diminish the effect of imports; part of his strategy to raise prices was to publish recommended resale price lists for distributors to adopt, but he needed importers to support the price increases; and Wright Steel should encourage its distribution customers to use CIPA's price lists as a benchmark for their prices - in that way market prices could be increased without loss of market shares. The inducement offered to Wright Steel was the threat of anti-dumping action against imported steel.

1445 Eighth, in an important email sent by Mr Unicomb to CIPA's senior pricing and sales managers at the time the December 2013 Benchmark spreadsheet was being created, Mr Unicomb explained the benchmarking (or RRP) strategy as being to set recommended retail prices in the market for distributors to use as a base for their pricing.

1446 Ninth, the creation and distribution of the December 2013 Benchmark spreadsheet supports a finding that Mr Ellis intended to induce a consensus with distributors about the adoption of CIPA's list prices as base or floor prices. The document contained considerable information explaining the derivation of CIPA's list prices for products to be delivered in December 2013, and calculated the sales margin that would be earned if BlueScope products were sold at the list prices and if imported products were bought at the stated import parity prices and sold at the list prices. Significantly, it was not a document that had been previously created for use by distributors, and the document was distributed to both aligned and non-aligned distributors.

1447 Tenth, the evidence discloses numerous conversations between CIPA sales managers (including Mr Ellis) and distributors attempting to persuade them to use CIPA's list prices as

a base or floor price in order to restore profitability at the distribution level of the market. A significant conversation occurred between Mr Ellis and Mr Lobb of CMC Steel in mid-September 2013. In that conversation, Mr Ellis said that CIPA would be increasing its list prices for flat steel products; that distributors such as CMC Steel could price to that level to their customers in the market; that the increase in the list prices would be offset by other rebates and discounts; that Mr Ellis had spoken to other distributors in the market and they were in agreement with such a process and that SMS would follow. Another significant conversation occurred between Mr Ellis and Mr Wood of Selwood Steel on 30 October 2013. In that conversation, Mr Ellis said: that he wanted to talk to Mr Wood about how low the prices were in the marketplace; that CIPA had increased its pricing in its price lists to be a recommended resale price; that Selwood Steel ought to base its prices on the “alto” price in the price lists; that if distributors based their prices on the price lists, “they would all be making money”; and that Mr Ellis had spoken to other distributors about the benchmarking strategy.

1448 Eleventh, the evidence discloses numerous communications from distributors to CIPA’s Distribution Markets sales managers expressing complaints that certain other distributors were not pricing at the level of the prices in CIPA’s Distribution Market price lists. Those complaints afford evidence that an expectation had arisen amongst distributors that those other distributors would set their prices at the level of CIPA’s price lists. The fact that the complaints were made to BlueScope affords evidence that the distributors believed that BlueScope should be informed of that fact. I readily infer that the expectation held by distributors, that other distributors would set their prices at the level of CIPA’s price lists, arose from BlueScope’s promotion of the benchmarking strategy. In other words, in promoting the benchmarking strategy, distributors understood that BlueScope was seeking to achieve a consensus with distributors that they would use the prices in CIPA’s price lists as a benchmark or base price when setting their own prices.

1449 Twelfth, BlueScope took steps to restrict the availability of tactical pricing, particularly with respect to SMS. Those steps implemented the inducements that had been offered to distributors by BlueScope to adopt CIPA’s list prices as benchmark or base prices.

1450 Thirteenth, BlueScope took steps to bring NZSA’s prices for flat steel products into line with CIPA’s list prices, including by the introduction of the terminology of “recommended resale prices”. This diminished NZSA’s ability to compete with CIPA in the Australian market on

price, which would otherwise have undermined the adoption of CIPA’s “recommended resale prices” as benchmark or base prices.

1451 Fourteenth, during the relevant period, the CIPA Sales and Marketing division reported internally from time to time in words to the effect that the “benchmarking concept is gaining some traction”. In such reports, BlueScope was observing that, at the distribution level of the market, distributors were beginning to set their prices using the prices in CIPA’s price lists as a benchmark or base level. This supports a finding that that was the intended outcome of the strategy.

1452 Fifteenth, in his meeting with Yieh Phui on 26 February 2014, Mr Ellis stated that there was an opportunity for Yieh Phui to sell steel at “better prices” than they were currently achieving and that Yieh Phui was “leaving some profitability behind”. Mr Ellis explained that BlueScope’s recommended resale price lists were prices at the distribution level of the market, suggesting that Yieh Phui base its (import) prices on BlueScope’s recommended resale prices. Mr Ellis told Yieh Phui that when BlueScope set the recommended resale price in Australia, it established a “market norm”. I consider that that statement reflected Mr Ellis’s belief and intention: that the benchmarking strategy would result in a consensus with distributors to adopt CIPA’s list prices as benchmark or base prices, thereby establishing a “market norm”.

1453 Sixteenth, in a presentation given by Mr Ellis to Mr Vassella on 17 April 2014, the objective of the benchmarking strategy was described as “to improve the profitability of our Distribution channel customers by attempting to set a price floor for each major product category within the sector”. The presentation also stated that BlueScope “had not yet measured success but anecdotal feedback has suggested that our Distributors have had some wins”. I consider that the presentation was an accurate reflection of Mr Ellis’s aim or objective, which was to attempt to set a floor price for flat steel products at the distribution level of the market. That aim or objective could only be achieved by BlueScope reaching a consensus or meeting of minds with distributors. It could not be achieved if distributors were merely encouraged to take CIPA’s price lists into account as a starting point in making their pricing decisions.

1454 Having regard to the whole of the evidence, I am satisfied that the respondents intended to induce a consensus or meeting of minds, being an understanding within the meaning of the Act. The consensus was for distributors to use the list prices in CIPA’s Distribution Market price lists for flat steel products as a base or floor price for their supply of flat steel products. I

do not consider that the understanding that was sought to be induced was intended to be adopted by distributors in an absolute manner, requiring strict adherence to CIPA's price lists as a base or floor price. Rather, the understanding that was sought to be induced was a more general adherence to a principal that distribution prices should be increased to the level of CIPA's price lists by way of a floor. CIPA's price lists provided a clear price level around which the understanding could cohere.

1455 In relation to Wright Steel and Yieh Phui, I am satisfied that the respondents intended to induce an understanding, although the provisions of the understanding were considerably less precise. The contemplated understanding was that Wright Steel and Yieh Phui would increase their prices at the manufacture/import level of the market in recognition that distributors would increase their prices to the level of CIPA's price lists by way of a floor. No particular level of pricing at the manufacture/import level of the market was proposed by BlueScope to either Wright Steel or Yieh Phui.

1456 I reach the above findings in the case against Mr Ellis without regard to the evidence that was ruled inadmissible in the case against him. While that evidence supports the above findings, it is unnecessary to rely on that evidence to make the above findings.

1457 Having reached those findings with respect to the intentions of BlueScope and Mr Ellis, it is necessary to state my findings with respect to each of the alleged attempts in turn.

Alleged attempt to induce Selection Steel understanding

1458 The ACCC alleged that BlueScope and Mr Ellis attempted to induce Selection Steel to arrive at an understanding with BlueScope which would have included one or more of the following provisions:

- (a) that Selection Steel would use CIPA's Distribution Market price lists as a benchmark when selling flat steel products to steel users in Australia;
- (b) that BlueScope would limit the use of tactical pricing;
- (c) that BlueScope would increase the price that it sold flat steel products to BlueScope Distribution and NZSA; and/or
- (d) that BlueScope Distribution and NZSA would sell flat steel products to steel users in Australia in accordance with CIPA's price lists.

1459 The provision alleged in para (a) is to be understood as a provision to the effect that Selection Steel would use the list prices in CIPA's price lists as the base or floor price for the sale of flat steel products.

1460 The provisions alleged in paras (b) and (c), and the provision alleged in para (d) in so far as it applied to NZSA, were not capable of constituting cartel provisions within s 44ZZRD(1) because the competition condition could not be satisfied for those provisions. The provisions concerned the price of supply of flat steel products at the manufacture/import level of the market (by BlueScope in the case of paras (b) and (c) and by NZSA in the case of para (d)). Selection Steel did not compete at that functional level of the market. However, to the extent that representations to that effect were made by BlueScope to Selection Steel, the representations were capable of constituting relevant inducements. By limiting the use of tactical pricing, increasing the price at which it sold flat steel products to BlueScope Distribution and NZSA, and by increasing the price at which NZSA sold flat steel products, BlueScope would confer advantages on distributors by reducing competition at the distribution level of the market.

1461 The provision alleged in para (a) and the provision alleged in para (d) in so far as it applied to BlueScope Distribution were capable of constituting cartel provisions within s 44ZZRD(1). In relation to the purpose/effect condition, the provision in para (a) and the provision in para (d) in so far as it applied to BlueScope Distribution each had the purpose and effect of controlling or maintaining the price of flat steel products supplied by Selection Steel and BlueScope Distribution respectively. A provision that requires list prices to be used as a base or floor price is a provision that controls prices in the sense of exercising restraint or direction over the setting of prices. It may also be a provision that maintains prices in the sense of keeping prices from declining. In relation to the competition condition, those provisions concerned the price of supply of flat steel products at the distribution level of the market. Selection Steel competed at that functional level of the market, as did BlueScope Distribution (which is deemed to be a party to any understanding reached by BlueScope).

1462 I find that the conduct of BlueScope and Mr Ellis with respect to Selection Steel relied upon by the ACCC, taken as a whole, constituted steps towards the inducement of an understanding being reached between BlueScope and Selection Steel containing cartel provisions, which steps were more than merely preparatory of the inducement and which were immediately and not merely remotely connected with the inducement. The cartel provisions were that:

- (a) Selection Steel would use the list prices in CIPA's Distribution Market price lists as a base or floor price when selling flat steel products to steel users in Australia; and
- (b) BlueScope Distribution would sell flat steel products to steel users in Australia in accordance with CIPA's Distribution Market price lists.

1463 The conduct of BlueScope and Mr Ellis that constituted the attempt comprised the following (which is a summary of factual findings made earlier in these reasons):

- (a) On the way to the Melbourne Airport meeting on 6 September 2013, Mr Ellis told Mr Hennessy that CIPA needed to increase its prices to BSD and SMS, tighten the controls around tactical pricing and encourage the distributors to use CIPA's list prices as a benchmark when they were setting their prices. Mr Ellis asked Mr Hennessy to contribute to the meeting by talking about price benchmarking.
- (b) At the Melbourne Airport meeting on 6 September 2013 which was attended by Mr Gregory of Selection Steel, and in response to distributor complaints that the prices they were selling at were very low, Mr Ellis said that CIPA would tighten its tactical pricing and would also be increasing its prices to BSD and SMS, and Mr Hennessy introduced the benchmarking strategy explaining that CIPA proposed to revise the prices in its December price lists and encourage distributors to use those prices as a benchmark when setting their own prices. Mr Hennessy communicated either expressly or implicitly that BSD and SMS would set their prices in accordance with CIPA's list prices.
- (c) At a meeting attended by Messrs Ellis and Hennessy of BlueScope and Messrs Collis and Gregory of Selection Steel on 13 September 2013, Mr Ellis made statements to the effect that margins in the industry were not sustainable; that BlueScope was proposing to provide all distributors with recommended resale prices which they could use as a guide or benchmark in setting their own prices to customers; and that if distributors sold at those prices they would be able to earn a 13% to 15% margin.
- (d) Prior to the CIPA pricing meeting held on 16 September 2013, Mr Ellis directed Mr Hennessy to release CIPA's price lists for December 2013 to distributors and to speak with distributors about using the price lists in setting their prices.
- (e) At the CIPA pricing meeting held on 16 September 2013, Mr Hennessy told the pricing and sales managers that Mr Ellis and he had spoken to distributors and told them that there was an opportunity to use CIPA's price lists as a benchmark when they were

setting their prices, to help the distributors to increase their prices and therefore improve their profitability. The December 2013 Benchmark spreadsheet was created for that purpose and included an increase in CIPA's list prices. The document explained the derivation of CIPA's list prices for flat steel products to be delivered in December 2013, and calculated the sales margin that would be earned if BlueScope products were sold at the list prices and if imported products were bought at the stated import parity prices and sold at the list prices. It was not a document that had been previously created for use by distributors. In an email sent to pricing and sales managers on 16 September 2013, Mr Unicomb explained the strategy as setting a recommended retail price in the market for distributors to use as a base for their pricing, and which would hopefully increase margins in the channel. This occurred with Mr Ellis's express or tacit approval. The senior sales managers understood that they were to communicate the benchmarking strategy in those terms. Mr Hennessy also encouraged the senior sales managers to inform distribution customers that they should have confidence to sell at the list prices because BlueScope was also reducing tactical pricing.

- (f) On 17 September 2013, Mr Hennessy sent an email to Messrs Gregory and Collis of Selection Steel, copying Mr Ellis, and attaching a version of the December 2013 Benchmark spreadsheet. The email referred to "our recent discussions". The email was sent with Mr Ellis's express or tacit approval. Sending the December 2013 Benchmark spreadsheet to distributors, and particularly a non-aligned distributor such as Selection Steel, represented a change from CIPA's previous practices. Prior to this, BlueScope's internal calculations of the kind contained in the December 2013 Benchmark spreadsheet (including the net price calculations) were not sent to distributors. Further, CIPA did not send its monthly price lists to non-aligned distributors such as Selection Steel, let alone information concerning the calculation of the import parity prices and net prices.
- (g) After sending the email on 17 September 2013, Mr Hennessy had a conversation with Mr Collis in which Mr Hennessy told Mr Collis that the December 2013 Benchmark spreadsheet contained changes that BlueScope was making, including an increase to the list prices, and there was an opportunity for Mr Collis to use CIPA's list prices as a benchmark when setting prices.

- (h) On 19 September 2013, Mr Hennessy sent an email to Messrs Gregory and Collis of Selection Steel attaching a copy of the Distribution Market price list for sheet and coil products for December 2013 and referencing their “recent discussions”.
- (i) On 8 January 2014, Mr Hennessy sent an email to Messrs Gregory and Collis of Selection Steel attaching a price notification letter, CIPA’s Distribution Market price list for sheet and coil products for March 2014 and the presentation titled “Distribution Sheet & Coil Price List Changes”. These documents contained an express reference to recommended resale prices.

1464 I find that the conduct of Messrs Ellis and Hennessy was engaged in on behalf of BlueScope and was within the scope of their actual or apparent authority. Their conduct is therefore to be attributed to BlueScope. I also find that the conduct of Mr Hennessy was engaged in at the direction of Mr Ellis.

1465 The evidence makes clear that, at all times, Selection Steel either rebuffed BlueScope’s proposals or at least never indicated any assent to them. Mr Gregory reacted adversely to Mr Hennessy’s proposal about price benchmarking at the Melbourne Airport meeting. Both Mr Gregory and Mr Collis ignored the December 2013 Benchmark spreadsheet and the subsequent Distribution Market price lists sent to them. It can be concluded that BlueScope’s attempt with respect to Selection Steel went nowhere.

1466 However, that does not negative a conclusion that the conduct of BlueScope and Mr Ellis was sufficient to constitute an attempt to induce an understanding containing the cartel provisions referred to above, and I find that it did. The critical fact is that BlueScope’s proposals to Selection Steel were capable of assent. The evidence shows that, at the Melbourne Airport meeting, Mr Gregory understood that Mr Ellis was seeking a consensus about distributors setting their prices in accordance with CIPA’s price lists and BlueScope Distribution doing likewise. The inducement offered by Mr Ellis was that CIPA would tighten its tactical pricing and would also be increasing its prices to BSD and SMS. Each of those actions by BlueScope would confer advantages on distributors by reducing competition at the distribution level of the market.

1467 The only elements of the ACCC’s allegation which I find are not proved are the elements relating to NZSA. The evidence does not support a finding that the respondents attempted to induce an understanding containing provisions to the effect that BlueScope would increase the price that it sold flat steel products to NZSA or that NZSA would sell flat steel products to steel

users in Australia in accordance with CIPA's price lists. The evidence showed that BlueScope did in fact require NZSA to align its prices with CIPA's price lists, but the evidence does not show that BlueScope's intentions in that regard were communicated to Selection Steel as an inducement.

1468 I also find that BlueScope and Mr Ellis had knowledge of the essential facts that would have rendered the contemplated understanding unlawful. I have earlier found that BlueScope and Mr Ellis knew that Selection Steel and BlueScope Distribution were in competition with each other in relation to the supply of flat steel products at the distribution level of the market. It follows from my findings with respect to intention that BlueScope and Mr Ellis knew that the understanding sought to be induced with Selection Steel contained provisions that had the purpose and effect of controlling or maintaining the price at which flat steel products would be sold by Selection Steel and BlueScope Distribution in competition with each other.

1469 For those reasons, I find that the respondents attempted to induce Selection Steel to contravene s 44ZZRJ by arriving at an understanding with BlueScope that contained cartel provisions, being provisions to the effect that:

- (a) Selection Steel would use the list prices in CIPA's Distribution Market price lists as a base or floor price when selling flat steel products to steel users in Australia; and
- (b) BlueScope Distribution would sell flat steel products to steel users in Australia in accordance with CIPA's Distribution Market price lists,

within the meaning of s 76(1)(d) of the Act.

Alleged attempt to induce Apex Steel understanding

1470 The ACCC alleged that BlueScope and Mr Ellis attempted to induce Apex Steel to arrive at an understanding with BlueScope which contained the same provisions as for Selection Steel. My conclusions about those alleged provisions in the context of the Selection Steel attempt are also applicable to the Apex Steel attempt.

1471 I find that the conduct of BlueScope and Mr Ellis with respect to Apex Steel relied upon by the ACCC, taken as a whole, constituted steps towards the inducement of an understanding being reached between BlueScope and Apex Steel containing cartel provisions, which steps were more than merely preparatory of the inducement and which were immediately and not merely remotely connected with the inducement. The cartel provisions were that:

- (a) Apex Steel would use the list prices in CIPA’s Distribution Market price lists as a base or floor price when selling flat steel products to steel users in Australia; and
- (b) BlueScope Distribution would sell flat steel products to steel users in Australia in accordance with CIPA’s Distribution Market price lists.

1472 The conduct of BlueScope and Mr Ellis that constituted the attempt comprised the following (which is a summary of factual findings made earlier in these reasons):

- (a) The conduct referred to in para 1463(a).
- (b) The conduct referred to in para 1463(b), noting that the Melbourne Airport meeting was attended by Mr Calleja of Apex Steel.
- (c) The conduct referred to in paras 1463(d) and (e).
- (d) On 17 September 2013, Mr Hennessy sent an email to Mr Calleja of Apex Steel, copying Mr Ellis, and attaching a version of the December 2013 Benchmark spreadsheet. The email referred to “our recent discussions”. The email was sent with Mr Ellis’s express or tacit approval. Sending the December 2013 Benchmark spreadsheet to distributors represented a change from CIPA’s previous practices. Prior to this, BlueScope’s internal calculations of the kind contained in the December 2013 Benchmark spreadsheet (including the net price calculations) were not sent to distributors.
- (e) After sending the email on 17 September 2013, Mr Hennessy had a conversation with Mr Calleja in which Mr Hennessy told Mr Calleja that the December 2013 Benchmark spreadsheet contained changes that BlueScope was making, including an increase to the list prices, and there was an opportunity for Mr Calleja to use CIPA’s list prices as a benchmark when setting prices. Mr Hennessy encouraged Mr Calleja to raise Apex Steel’s prices to that level.
- (f) On 23 September 2013, Mr Sparks sent an email to Mr Compagnino of Apex Steel attaching a copy of the Distribution Market price list for sheet and coil products for December 2013.
- (g) On 23 December 2014, Ms Arzoumanian sent an email to Mr Compagnino of Apex Steel attaching a price notification letter, CIPA’s Distribution Market price list for sheet and coil products for March 2014 and the presentation titled “Distribution Sheet & Coil Price List Changes”. As noted in respect of Selection Steel above, for the first time these documents contained an express reference to recommended resale prices.

- (h) On 5 February 2014, Ms Arzoumanian sent an email to Mr Compagnino of Apex Steel attaching a price notification letter and CIPA’s Distribution Market price list for sheet and coil products for April 2014. The price notification letter and the Distribution Market price list for sheet and coil products were in the same format as March 2014, including particularly the references to “recommended resale price” in both the price notification letter and the price list.
- (i) On 7 March 2014, Ms Arzoumanian sent an email to Mr Compagnino of Apex Steel attaching a price notification letter and CIPA’s Distribution Market price list for sheet and coil products for May 2014. The price notification letter and the Distribution Market price list for sheet and coil products were in the same format as March 2014, including particularly the references to “recommended resale price” in both the price notification letter and the price list.
- (j) On 2 April 2014, Ms Arzoumanian sent an email to Mr Compagnino of Apex Steel attaching a price notification letter and CIPA’s Distribution Market price list for sheet and coil products for June 2014. The price notification letter and the Distribution Market price list for sheet and coil products were in the same format as March 2014, including particularly the references to “recommended resale price” in both the price notification letter and the price list.
- (k) On 6 May 2014, Ms Arzoumanian sent an email to Mr Compagnino of Apex Steel attaching a price notification letter and CIPA’s Distribution Market price list for sheet and coil products for July 2014. The price notification letter and the Distribution Market price list for sheet and coil products were largely in the same format as the versions since March 2014, including particularly the references to “recommended resale price” in both the price notification letter and the price list.
- (l) On 2 June 2014, Ms Arzoumanian sent an email to Mr Compagnino of Apex Steel attaching a price notification letter and CIPA’s Distribution Market price list for sheet and coil products for August 2014. The price notification letter and the Distribution Market price list for sheet and coil products were largely in the same format as the versions since March 2014, including particularly the references to “recommended resale price” in both the price notification letter and the price list.

1473 I find that the conduct of Mr Ellis, Mr Hennessy, Mr Sparks and Ms Arzoumanian was engaged in on behalf of BlueScope and was within the scope of their actual or apparent authority. Their conduct is therefore to be attributed to BlueScope. I also find that the conduct of Mr Hennessy,

Mr Sparks and Ms Arzoumanian was engaged in at the ultimate direction of Mr Ellis. In the case against Mr Ellis, the conduct of Mr Sparks is proved by documentary evidence without reliance on Mr Sparks's witness statements.

1474 As with the case for Selection Steel, I find that the conduct of BlueScope and Mr Ellis was sufficient to constitute an attempt to induce an understanding containing the cartel provisions referred to above, and I find that it did. The critical fact is that BlueScope's proposals to Apex Steel at the Melbourne Airport meeting were capable of assent. The inducement offered by Mr Ellis was that CIPA would tighten its tactical pricing and would also be increasing its prices to BSD and SMS. Each of those actions by BlueScope would confer advantages on distributors by reducing competition at the distribution level of the market.

1475 Again, as with the case for Selection Steel, the only elements of the ACCC's allegation which I find are not proved are the elements relating to NZSA.

1476 I also find that BlueScope and Mr Ellis had knowledge of the essential facts that would have rendered the contemplated understanding unlawful. I have earlier found that BlueScope and Mr Ellis knew that Apex Steel and BlueScope Distribution were in competition with each other in relation to the supply of flat steel products at the distribution level of the market. It follows from my findings with respect to intention that BlueScope and Mr Ellis knew that the understanding sought to be induced with Apex Steel contained provisions that had the purpose and effect of controlling or maintaining the prices at which flat steel products would be sold by Apex Steel and BlueScope Distribution in competition with each other.

1477 For those reasons, I find that the respondents attempted to induce Apex Steel to contravene s 44ZZRJ by arriving at an understanding with BlueScope that contained cartel provisions, being provisions to the effect that:

- (a) Apex Steel would use the list prices in CIPA's Distribution Market price lists as a base or floor price when selling flat steel products to steel users in Australia; and
- (b) BlueScope Distribution would sell flat steel products to steel users in Australia in accordance with CIPA's Distribution Market price lists,

within the meaning of s 76(1)(d) of the Act.

Alleged attempt to induce Southern Steel understanding

1478 The ACCC alleged that BlueScope and Mr Ellis attempted to induce Southern Steel to arrive at an understanding with BlueScope which contained the same provisions as for Selection Steel. My conclusions about those alleged provisions in the context of the Selection Steel attempt are also applicable to the Southern Steel attempt.

1479 I find that the conduct of BlueScope and Mr Ellis with respect to Southern Steel relied upon by the ACCC, taken as a whole, constituted steps towards the inducement of an understanding being reached between BlueScope and Southern Steel containing cartel provisions, which steps were more than merely preparatory of the inducement and which were immediately and not merely remotely connected with the inducement. The cartel provisions were that:

- (a) Southern Steel would use the list prices in CIPA's Distribution Market price lists as a base or floor price when selling flat steel products to steel users in Australia; and
- (b) BlueScope Distribution would sell flat steel products to steel users in Australia in accordance with CIPA's Distribution Market price lists.

1480 The conduct of BlueScope and Mr Ellis that constituted the attempt comprised the following (which is a summary of factual findings made earlier in these reasons):

- (a) On 2 September 2013, Messrs Ellis and Hennessy met with Mr Larkin of Southern Sheet & Coil at Southern Steel's office in Bankstown, New South Wales. At the meeting, Mr Ellis asked Mr Larkin what CIPA needed to do for Southern Sheet & Coil to buy more steel from CIPA. Mr Larkin responded with the following complaints: that CIPA was offering too much tactical pricing that did not need to be provided, with the result that CIPA was increasing competition between distributors selling BlueScope products, rather than competing against imported products; that the prices at which SMS was selling to customers were very low, and in Mr Larkin's view, there was a big differential between the prices at which CIPA sold steel to SMS and the prices at which CIPA sold steel to Southern Steel; and the price at which NZSA was selling steel in Australia was very low and contributing to the low price of steel in the market.
- (b) On 4 September 2013, Messrs Ellis and Hennessy met with Peter and Kevin Smaller of Southern Steel at a coffee shop in Double Bay in Sydney. Mr Ellis asked Peter Smaller what BlueScope needed to do to gain more sales from Southern Steel. Peter Smaller replied by stating that the biggest issue that Southern Steel had was the low prices

offered by BSD and SMS in the market, and that Southern Steel was unable to compete with the prices offered by BSD and SMS when it bought steel from BlueScope. Mr Ellis said that the solution would be for CIPA to increase its prices to BSD and SMS, and there was a discussion about bringing together a small group of distributors to discuss that issue.

- (c) The conduct referred to in para 1463(a).
- (d) The conduct referred to in para 1463(b), noting that the Melbourne Airport meeting was attended by Peter Smaller of Southern Steel.
- (e) The conduct referred to in paras 1463(d) and (e).
- (f) On 16 September 2013, Mr Sparks had a conversation with Mr Lander of Southern Steel in which Mr Sparks communicated that: BlueScope would provide price lists to distributors which would provide distributors with recommended resale prices; that would give everybody in the market confidence to sell above the prices in the price lists; and the list prices were recommended resale prices and BlueScope expected distributors to capture some increased price.
- (g) On a date before 17 September 2013, Mr Ellis communicated to Mr Larkin that NZSA would be increasing its prices in the market.
- (h) On 17 September 2013, Mr Hennessy sent an email to Kevin Smaller, Mr Larkin and Mr Lander of Southern Steel, copying Peter Smaller and Messrs Ellis and Sparks, and attaching a version of the December 2013 Benchmark spreadsheet. The email referred to “our recent discussions”. The email was sent with Mr Ellis’s express or tacit approval. Sending the December 2013 Benchmark spreadsheet to distributors represented a change from CIPA’s previous practices. Prior to this, BlueScope’s internal calculations of the kind contained in the December 2013 Benchmark spreadsheet (including the net price calculations) were not sent to distributors.
- (i) On 19 September 2013, Mr Sparks sent an email to Peter Smaller, Kevin Smaller, Mr Larkin and Mr Lander of Southern Steel attaching a copy of CIPA’s Distribution Market price list for sheet and coil products for December 2013.
- (j) On 20 December 2014, Mr Sparks sent an email to (amongst others) Peter Smaller, Kevin Smaller, Mr Larkin and Mr Lander of Southern Steel attaching a price notification letter, CIPA’s Distribution Market price list for sheet and coil products for March 2014 and the presentation titled “Distribution Sheet & Coil Price List Changes”.

As noted in respect of Selection Steel above, for the first time these documents contained an express reference to recommended resale prices.

- (k) On 5 February 2014, Mr Sparks sent an email to (amongst others) Peter Smaller, Kevin Smaller, Mr Larkin and Mr Lander of Southern Steel attaching a price notification letter and CIPA's Distribution Market price list for sheet and coil products for April 2014. The price notification letter and the Distribution Market price list for sheet and coil products were in the same format as March 2014, including particularly the references to "recommended resale price" in both the price notification letter and the price list.
- (l) On 5 March 2014, Mr Sparks sent an email to (amongst others) Peter Smaller, Kevin Smaller, Mr Larkin and Mr Lander of Southern Steel attaching a price notification letter and CIPA's Distribution Market price list for sheet and coil products for May 2014. The price notification letter and the Distribution Market price list for sheet and coil products were in the same format as March 2014, including particularly the references to "recommended resale price" in both the price notification letter and the price list.
- (m) On 1 April 2014, Mr Sparks sent an email to (amongst others) Peter Smaller, Kevin Smaller, Mr Larkin and Mr Lander of Southern Steel attaching a price notification letter and CIPA's Distribution Market price list for sheet and coil products for June 2014. The price notification letter and the Distribution Market price list for sheet and coil products were in the same format as March 2014, including particularly the references to "recommended resale price" in both the price notification letter and the price list.
- (n) On 30 April 2014, Gareth Hirst of BlueScope sent an email to (amongst others) Peter Smaller, Kevin Smaller, Mr Larkin and Mr Lander of Southern Steel attaching a price notification letter and CIPA's Distribution Market price list for sheet and coil products for July 2014. The price notification letter and the Distribution Market price list for sheet and coil products were largely in the same format as the versions since March 2014, including particularly the references to "recommended resale price" in both the price notification letter and the price list.
- (o) On 30 May 2014, Mr Hirst sent an email to (amongst others) Peter Smaller, Kevin Smaller, Mr Larkin and Mr Lander of Southern Steel attaching a price notification letter and CIPA's Distribution Market price list for sheet and coil products for August 2014. The price notification letter and the Distribution Market price list for sheet and coil products were largely in the same format as the versions since March 2014, including

particularly the references to “recommended resale price” in both the price notification letter and the price list.

1481 I find that the conduct of Messrs Ellis, Hennessy, Sparks and Hirst was engaged in on behalf of BlueScope and was within the scope of their actual or apparent authority. Their conduct is therefore to be attributed to BlueScope. I also find that the conduct of Messrs Hennessy, Sparks and Hirst was engaged in at the ultimate direction of Mr Ellis.

1482 In the case against Mr Ellis, I have not relied on Mr Sparks’s witness statements or the handwritten note of Mr Lander. The conduct of Mr Sparks referred to in paras (i) to (m) above is proved by documentary evidence without reliance on Mr Sparks’s witness statements. With respect to the conduct of Mr Sparks referred to in para (f) above, the fact that Mr Sparks had a conversation with Mr Lander at that time is proved by a Salesforce record and an email sent by Mr Sparks to Messrs Hennessy and Kelso (and copied to the CIPA pricing team) on 17 September 2013. The Salesforce record and the email confirms that Mr Sparks discussed BlueScope’s December pricing including the increase in the list prices and the change in rebates. The email records that Messrs Lander and Larkin of Southern Steel both had positive feedback on BlueScope’s approach. I have taken those documents into account in the case against Mr Ellis rather than the finding in para (f) above.

1483 As with the case for Selection Steel, I find that the conduct of BlueScope and Mr Ellis was sufficient to constitute an attempt to induce an understanding containing the cartel provisions referred to above, and I find that it did. The critical fact is that BlueScope’s proposals to Southern Steel at the Melbourne Airport meeting were capable of assent. The inducement offered by Mr Ellis was that CIPA would tighten its tactical pricing and would also be increasing its prices to BSD and SMS, and that NZSA would be increasing its prices in the market. Each of those actions by BlueScope would confer advantages on distributors by reducing competition at the distribution level of the market.

1484 I also find that BlueScope and Mr Ellis had knowledge of the essential facts that would have rendered the contemplated understanding unlawful. I have earlier found that BlueScope and Mr Ellis knew that Southern Steel and BlueScope Distribution were in competition with each other in relation to the supply of flat steel products at the distribution level of the market. It follows from my findings with respect to intention that BlueScope and Mr Ellis knew that the understanding sought to be induced with Southern Steel contained provisions that had the

purpose and effect of controlling or maintaining the price at which flat steel products would be sold by Southern Steel and BlueScope Distribution in competition with each other.

1485 For those reasons, I find that the respondents attempted to induce Southern Steel to contravene s 44ZZRJ by arriving at an understanding with BlueScope that contained cartel provisions, being provisions to the effect that:

- (a) Southern Steel would use the list prices in CIPA's Distribution Market price lists as a base or floor price when selling flat steel products to steel users in Australia; and
- (b) BlueScope Distribution would sell flat steel products to steel users in Australia in accordance with CIPA's Distribution Market price lists,

within the meaning of s 76(1)(d) of the Act.

Alleged attempt to induce Vulcan Steel understanding

1486 The ACCC alleged that BlueScope and Mr Ellis attempted to induce Vulcan Steel to arrive at an understanding with BlueScope which contained the same provisions as for Selection Steel. My conclusions about those alleged provisions in the context of the Selection Steel attempt are also applicable to the Vulcan Steel attempt.

1487 I find that the conduct of BlueScope and Mr Ellis with respect to Vulcan Steel relied upon by the ACCC, taken as a whole, constituted steps towards the inducement of an understanding being reached between BlueScope and Vulcan Steel containing cartel provisions, which steps were more than merely preparatory of the inducement and which were immediately and not merely remotely connected with the inducement. The cartel provisions were that:

- (a) Vulcan Steel would use the list prices in CIPA's Distribution Market price lists as a base or floor price when selling flat steel products to steel users in Australia; and
- (b) BlueScope Distribution would sell flat steel products to steel users in Australia in accordance with CIPA's Distribution Market price lists.

1488 The conduct of BlueScope and Mr Ellis that constituted the attempt comprised the following (which is a summary of factual findings made earlier in these reasons):

- (a) The conduct referred to in para 1463(a).
- (b) The conduct referred to in para 1463(b), noting that the Melbourne Airport meeting was attended by Mr Wells of Vulcan Steel.

- (c) On 9 September 2013, Messrs Ellis and Hennessy met with Messrs Gousmett and Casey of Vulcan Steel during the Australian Steel Institute Conference on the Gold Coast. Mr Ellis asked how CIPA could win more of Vulcan Steel’s business. Mr Casey replied that Vulcan Steel had long established import supply channels and it would need to think carefully about changing that and buying a lot more from BlueScope. Mr Ellis replied with words to the effect that: there was an opportunity for Vulcan Steel to use CIPA’s list prices as a pricing benchmark when setting its prices to its customers and BlueScope was working on its December price lists. Mr Casey replied by saying that an acceptable margin would be 15% from list to net price.
- (d) The conduct referred to in paras 1463(d) and (e).
- (e) On 17 September 2013, Mr Hennessy sent an email to Mr Casey of Vulcan Steel, copying Mr Ellis, and attaching a version of the December 2013 Benchmark spreadsheet. The email referred to “our recent discussions”. The email was sent with Mr Ellis’s express or tacit approval. Sending the December 2013 Benchmark spreadsheet to distributors, and particularly a non-aligned distributor such as Vulcan Steel, represented a change from CIPA’s previous practices. Prior to this, BlueScope’s internal calculations of the kind contained in the December 2013 Benchmark spreadsheet (including the net price calculations) were not sent to distributors. Further, CIPA did not send its monthly price lists to non-aligned distributors such as Vulcan Steel, let alone information concerning the calculation of the import parity prices and net prices.
- (f) After sending the email on 17 September 2013, Mr Hennessy had a conversation with Mr Casey in which Mr Hennessy told Mr Casey that the December 2013 Benchmark spreadsheet contained changes that BlueScope was making, including an increase to the list prices, and there was an opportunity for Mr Casey to use CIPA’s list prices as a benchmark when setting prices.
- (g) At about this time, Mr Kelso communicated the RRP strategy to Vulcan Steel as an opportunity to make a better profit margin, if they sold their flat steel products to their end customers at CIPA’s list prices, using words to the effect that “the RRP is the price point where a desirable distributor margin is achievable”.
- (h) On 19 September 2013, Mr Hennessy sent an email to Mr Casey attaching a copy of the Distribution Market price list for sheet and coil products for December 2013 and referencing their “recent discussions”.

- (i) On or about 25 September 2013, Mr Kelso had a discussion with Messrs Moss and Millard of Vulcan Steel in which Mr Kelso said that: BlueScope was implementing a strategy to provide distributors, like Vulcan Steel, with an opportunity to make a better margin on the sale of steel; the strategy was to set a RRP in the market allowing distributors to use this as a base for their pricing; the RRP was in the form of a list price; the RRP had been set internally to allow Vulcan Steel to buy steel at a net net price and sell that steel at the list price that had been increased; and the increased list price allowed Vulcan Steel to make a 15% margin, approximately, across a range of products, if the list price was used as a baseline or benchmark for pricing. Mr Moss or Mr Millard responded by saying that the principles were sound.
- (j) On 6 January 2014, Mr Cooper of BlueScope sent an email to Mr Kroon of Vulcan Steel (copying, amongst others, Messrs Millard and Moss) attaching a price notification letter and CIPA's price lists for a number of steel plate products for March 2014. In contrast to CIPA's Distribution Market price list for sheet and coil products which had at that time been reformulated to refer to "recommended resale prices", the price notification letter and price lists for steel plate products did not use that expression. However, the covering email listed standard plate products with "recommended resale prices".
- (k) On 13 February 2014, Mr Cooper of BlueScope sent an email to Mr Kroon of Vulcan Steel (copying, amongst others, Messrs Millard and Moss) attaching a price notification letter and CIPA's price lists for a number of steel plate products for April 2014. The covering email listed standard plate products with "recommended resale prices".
- (l) On 13 March 2014, Mr Kelso of BlueScope sent an email to Mr Kroon of Vulcan Steel attaching a price notification letter and CIPA's price lists for a number of steel plate products for May 2014. Again, the covering email listed standard plate products with "recommended resale prices". Later that day, Mr Kelso forwarded the email to Messrs Millard and Moss.
- (m) On 7 April 2014, Mr Cooper of BlueScope sent an email to Mr Kroon of Vulcan Steel (copying, amongst others, Messrs Millard and Moss) attaching a price notification letter and CIPA's price lists for a number of steel plate products for June 2014. Again, the covering email listed standard plate products with "recommended resale prices".
- (n) On 6 May 2014, Mr Cooper of BlueScope sent an email to Mr Kroon of Vulcan Steel (copying, amongst others, Messrs Millard and Moss) attaching a price notification letter

and CIPA's price lists for a number of steel plate products for July 2014. Again, the covering email listed standard plate products with "recommended resale prices".

- (o) On 5 June 2014, Mr Cooper of BlueScope sent an email to Mr Kroon of Vulcan Steel (copying, amongst others, Messrs Millard and Moss) attaching a price notification letter and CIPA's price lists for a number of steel plate products for August 2014. Again, the covering email listed standard plate products with "recommended resale prices".

1489 I find that the conduct of Messrs Ellis, Hennessy, Kelso and Cooper was engaged in on behalf of BlueScope and was within the scope of their actual or apparent authority. Their conduct is therefore to be attributed to BlueScope. I also find that the conduct of Messrs Hennessy, Kelso and Cooper was engaged in at the ultimate direction of Mr Ellis.

1490 As with the case for Selection Steel, I find that the conduct of BlueScope and Mr Ellis was sufficient to constitute an attempt to induce an understanding containing the cartel provisions referred to above, and I find that it did. The critical fact is that BlueScope's proposals to Vulcan Steel at the Melbourne Airport meeting were capable of assent. The inducement offered by Mr Ellis was that CIPA would tighten its tactical pricing and would also be increasing its prices to BSD and SMS. Each of those actions by BlueScope would confer advantages on distributors by reducing competition at the distribution level of the market.

1491 Again, as with the case for Selection Steel, the only elements of the ACCC's allegation which I find are not proved are the elements relating to NZSA.

1492 I also find that BlueScope and Mr Ellis had knowledge of the essential facts that would have rendered the contemplated understanding unlawful. I have earlier found that BlueScope and Mr Ellis knew that Vulcan Steel and BlueScope Distribution were in competition with each other in relation to the supply of flat steel products at the distribution level of the market. It follows from my findings with respect to intention that BlueScope and Mr Ellis knew that the understanding sought to be induced with Vulcan Steel contained provisions that had the purpose and effect of controlling or maintaining the price at which flat steel products would be sold by Vulcan Steel and BlueScope Distribution in competition with each other.

1493 For those reasons, I find that the respondents attempted to induce Vulcan Steel to contravene s 44ZZRJ by arriving at an understanding with BlueScope that contained cartel provisions, being provisions to the effect that:

- (a) Vulcan Steel would use the list prices in CIPA's Distribution Market price lists as a base or floor price when selling flat steel products to steel users in Australia; and
- (b) BlueScope Distribution would sell flat steel products to steel users in Australia in accordance with CIPA's Distribution Market price lists,

within the meaning of s 76(1)(d) of the Act.

Alleged attempt to induce Selwood Steel understanding

1494 The ACCC alleged that BlueScope and Mr Ellis attempted to induce Selwood Steel to arrive at an understanding with BlueScope which included one or more of the following provisions:

- (a) that Selwood Steel would sell flat steel products to steel users in Australia at a higher price than it was doing at that time;
- (b) that Selwood Steel would benchmark its prices based on CIPA's price lists;
- (c) that BlueScope would provide Selwood Steel with the opportunity to purchase BlueScope's flat steel products on a transactional basis; and/or
- (d) that BlueScope Distribution and NZSA would sell flat steel products to steel users in Australia in accordance with CIPA's price lists.

1495 The provisions alleged in paras (a), (b) and (d) (in so far as it applied to BlueScope Distribution) were capable of constituting cartel provisions within s 44ZZRD(1). In relation to the purpose/effect condition, the provision in para (a) is a provision that maintains prices in the sense of keeping prices from declining. The provision in para (b) is to be understood as a provision to the effect that Selwood Steel would use CIPA's list prices as the base or floor price for the sale of flat steel products. The provisions in paras (b) and (d) (in so far as it applied to BlueScope Distribution) each had the purpose and effect of controlling or maintaining the price of flat steel products supplied by Selwood Steel and BlueScope Distribution respectively. A provision that requires list prices to be used as a base or floor price is a provision that controls prices in the sense of exercising restraint or direction over the setting of prices. It may also be a provision that maintains prices in the sense of keeping prices from declining. In relation to the competition condition, those provisions concerned the price of supply of flat steel products at the distribution level of the market. Selwood Steel competed at that functional level of the market, as did BlueScope Distribution (which is deemed to be a party to any understanding reached by BlueScope).

1496 The provision alleged in para (c) was not capable of constituting a cartel provision within s 44ZZRD(1) because the purpose/effect condition could not be satisfied. However, to the extent that representations to that effect were made by BlueScope to Selwood Steel, the representations were capable of constituting relevant inducements. The opportunity for Selwood Steel to purchase BlueScope's flat steel products on a transactional basis was a commercial advantage or benefit for Selwood Steel.

1497 The provision alleged in para (d), in so far as it applied to NZSA, was not capable of constituting a cartel provision within s 44ZZRD(1) because the competition condition could not be satisfied for that provision. The provision concerned the price of supply of flat steel products at the manufacture/import level of the market by NZSA. Selwood Steel did not compete at that functional level of the market. However, to the extent that representations to that effect were made by BlueScope to Selwood Steel, the representations were capable of constituting relevant inducements. By increasing the price at which it sold flat steel products to NZSA, BlueScope would confer advantages on distributors by reducing competition at the distribution level of the market.

1498 I find that the conduct of BlueScope and Mr Ellis with respect to Selwood Steel at the meeting on 30 October 2013 constituted a step towards the inducement of an understanding being reached between BlueScope and Selwood Steel containing a cartel provision, which step was more than merely preparatory of the inducement and which was immediately and not merely remotely connected with the inducement. The cartel provision was that Selwood Steel would use the list prices in CIPA's Distribution Market price lists as a base or floor price when selling flat steel products to steel users in Australia.

1499 The conduct of BlueScope and Mr Ellis that constituted the attempt comprised the statements made by Mr Ellis at the meeting held at Selwood Steel's premises in Victoria on 30 October 2013 attended by Messrs Ellis and Whitfield of BlueScope and Mr Wood of Selwood Steel. My findings with respect to those statements are set out earlier in these reasons. By way of summary, at that meeting:

- (a) Mr Ellis asked Mr Wood whether he was interested in acquiring products from CIPA on a transactional basis; and
- (b) Mr Ellis raised the benchmarking strategy with Selwood Steel and made statements to the effect that: Mr Ellis wanted to talk to Mr Wood about how low the prices were in the marketplace; that CIPA had increased its pricing in its price list to be a

recommended resale price; that Selwood Steel ought to base its prices on the “alto” price in the price list; and that if distributors based their prices on the price list, “they would all be making money”.

1500 I find that the conduct of Mr Ellis was engaged in on behalf of BlueScope and was within the scope of his actual or apparent authority. His conduct is therefore to be attributed to BlueScope.

1501 The evidence makes clear that Mr Wood of Selwood Steel rebuffed Mr Ellis’s benchmarking proposal. The meeting ended up being somewhat hostile. It can be concluded that BlueScope’s attempt with respect to Selwood Steel never got off the ground. While Mr Whitfield subsequently sent CIPA’s Distribution Market price lists to Mr Wood (on 12 November 2013), I do not consider that that conduct was in furtherance of any attempt to induce a price fixing understanding with Selwood Steel. The documentary record indicates that Mr Whitfield’s (personal) focus was on pursuing incremental sales of flat steel products for CIPA.

1502 However, the fact that Mr Wood immediately rebuffed Mr Ellis’s benchmarking proposal does not negative a conclusion that the conduct of BlueScope and Mr Ellis was sufficient to constitute an attempt to induce an understanding containing the cartel provision referred to above, and I find that it did. The critical fact is that BlueScope’s proposals to Selwood Steel were capable of assent. Mr Wood understood that Mr Ellis was seeking a consensus about Selwood Steel setting its prices in accordance with CIPA’s price lists. The inducement offered by Mr Ellis was to offer Selwood Steel a transactional account with BlueScope. The fact that the conduct occurred at only one meeting does not prevent the conduct constituting an attempt to induce a price fixing understanding.

1503 I find that BlueScope and Mr Ellis had knowledge of the essential facts that would have rendered the contemplated understanding unlawful. I have earlier found that BlueScope and Mr Ellis knew that Selwood Steel and BlueScope Distribution were in competition with each other in relation to the supply of flat steel products at the distribution level of the market. It follows from my findings with respect to intention that BlueScope and Mr Ellis knew that the understanding sought to be induced with Selwood Steel contained provisions that had the purpose and effect of controlling or maintaining the price at which flat steel products would be sold by Selwood Steel in competition with BlueScope Distribution.

1504 For those reasons, I find that the respondents attempted to induce Selwood Steel to contravene s 44ZZRJ by arriving at an understanding with BlueScope that contained a cartel provision,

being a provision to the effect that Selwood Steel would use the list prices in CIPA's Distribution Market price lists as a base or floor price when selling flat steel products to steel users in Australia, within the meaning of s 76(1)(d) of the Act.

Alleged attempt to induce CMC Steel understanding

1505 The ACCC alleged that BlueScope and Mr Ellis attempted to induce CMC Steel to arrive at an understanding with BlueScope which included one or more of the following provisions:

- (a) that CMC Steel would use CIPA's Distribution Market price lists as a benchmark for setting prices for the sale by CMC Steel of flat steel products to steel users in Australia;
- (b) that BlueScope would reduce its tactical pricing; and/or
- (c) that BlueScope Distribution and NZSA would sell flat steel products to steel users in Australia in accordance with CIPA's price lists.

1506 The provision alleged in para (a) is to be understood as a provision to the effect that CMC Steel would use CIPA's list prices as the base or floor price for the sale of flat steel products.

1507 The provision alleged in para (b) and the provision alleged in para (c) in so far as it applied to NZSA were not capable of constituting cartel provisions within s 44ZZRD(1) because the competition condition could not be satisfied for those provisions. The provisions concerned the price of supply of flat steel products at the manufacture/import level of the market (by BlueScope in the case of para (b) and by NZSA in the case of para (c)). CMC Steel did not compete at that functional level of the market. However, to the extent that representations to that effect were made by BlueScope to CMC Steel, the representations were capable of constituting relevant inducements. By limiting the use of tactical pricing and increasing the price at which NZSA sold flat steel products, BlueScope would confer advantages on distributors by reducing competition at the distribution level of the market.

1508 The provision alleged in para (a) and the provision alleged in para (c) in so far as it applied to BlueScope Distribution were capable of constituting cartel provisions within s 44ZZRD(1). In relation to the purpose/effect condition, the provision in para (a) and the provision in para (c) in so far as it applied to BlueScope Distribution each had the purpose and effect of controlling or maintaining the price of flat steel products supplied by CMC Steel and BlueScope Distribution respectively. A provision that requires list prices to be used as a base or floor price is a provision that controls prices in the sense of exercising restraint or direction over the setting of prices. It may also be a provision that maintains prices in the sense of keeping prices from

declining. In relation to the competition condition, those provisions concerned the price of supply of flat steel products at the distribution level of the market. CMC Steel competed at that functional level of the market, as did BlueScope Distribution (which is deemed to be a party to any understanding reached by BlueScope).

1509 I find that the conduct of BlueScope and Mr Ellis with respect to CMC Steel relied upon by the ACCC, taken as a whole, constituted steps towards the inducement of an understanding being reached between BlueScope and CMC Steel containing cartel provisions, which steps were more than merely preparatory of the inducement and which were immediately and not merely remotely connected with the inducement. The cartel provisions were that:

- (a) CMC Steel would use the list prices in CIPA’s Distribution Market price lists as a base or floor price when selling flat steel products to steel users in Australia; and
- (b) BlueScope Distribution would sell flat steel products to steel users in Australia in accordance with CIPA’s Distribution Market price lists.

1510 The conduct of BlueScope and Mr Ellis that constituted the attempt comprised the following (which is a summary of factual findings made earlier in these reasons):

- (a) On 9 September 2013, Messrs Ellis and Hennessy met with Messrs Stedman and Simpkin of CMC Steel during the Australian Steel Institute Conference on the Gold Coast. Mr Ellis asked how CIPA could win more of CMC Steel’s business. Mr Simpkin replied by saying that CMC Steel was under a lot of financial pressure, needed a major increase in volume and wanted BlueScope’s help to win some large customers. Mr Ellis replied with words to the effect that: there was another way for CMC Steel to improve its profitability; BlueScope would be substantially tightening its tactical pricing so as to limit the amount of price discounting and would also be working on its December price list which CMC Steel could use as a benchmark for setting its prices.
- (b) The conduct referred to in paras 1463(d) and (e).
- (c) On 17 September 2013, Mr Hennessy sent an email to Mr Simpkin of CMC Steel, copying Mr Stedman of CMC Steel and Messrs Ellis and Gent of BlueScope, attaching a version of the December 2013 Benchmark spreadsheet. The email referred to “our recent discussions” and also stated that Mr Hennessy had left “a voice mail message to discuss”. The email was sent with Mr Ellis’s express or tacit approval. Sending the December 2013 Benchmark spreadsheet to distributors represented a change from

CIPA's previous practices. Prior to this, BlueScope's internal calculations of the kind contained in the December 2013 Benchmark spreadsheet (including the net price calculations) were not sent to distributors. Late in the day on 17 September 2013, Mr Gent sent an email to Mr Hennessy and the Distribution Markets sales team summarising his feedback from distributors, including CMC Steel. In respect of CMC Steel, Mr Gent's email stated, amongst other things: "OK with all suggested benchmarks and movements and also pricing strategy".

- (d) On 19 September 2013, Mr Gent sent an email to Messrs Simpkin, Klingos and Smith of CMC Steel attaching a copy of CIPA's Distribution Market price list for sheet and coil products for December 2013.
- (e) In mid-September 2013, Mr Ellis had a telephone conversation or conversations with Mr Lobb, the CMC Steel State Manager for NSW, in which Mr Ellis said: that there would be an increase in CIPA's list prices for flat steel products; that distributors such as CMC Steel could price to that level to their customers in the market; the increase in the list price would be offset by other rebates and discounts; that Mr Ellis had spoken to other distributors in the market and they were in agreement with such a process, with Mr Ellis mentioning Mr Larkin of Southern Sheet & Coil specifically; that BlueScope's subsidiary SMS "will follow"; and that other traditional import distributors had also agreed to price to those levels.
- (f) On 27 November 2013, Mr Lobb sent an email to Mr Gent (of BlueScope) attaching a copy of a letter issued by CMC Steel on 26 November 2013 notifying its customers of CMC Steel's prices for December 2013 and January 2014. Mr Gent replied by email to Mr Lobb in words to the effect that other aligned distributors had already implemented the price increases, thereby reassuring Mr Lobb that competitors had already implemented the price increases. That exchange followed a meeting between Messrs Vassella and Ellis and Messrs Stedman and Simpkin of CMC Steel on 14 November 2013 in which Mr Ellis had spoken about the benchmarking strategy.
- (g) On 20 December 2014, Mr Gent sent an email to (amongst others) Messrs Simpkin and Klingos of CMC Steel attaching a price notification letter, CIPA's Distribution Market price list for sheet and coil products for March 2014 and the presentation titled "Distribution Sheet & Coil Price List Changes". As noted in respect of Selection Steel above, for the first time these documents contained an express reference to recommended resale prices.

- (h) On 4 February 2014, Mr Gent sent an email to (amongst others) Messrs Simpkin and Klingos of CMC Steel attaching a price notification letter and CIPA’s Distribution Market price list for sheet and coil products for April 2014. The price notification letter and the Distribution Market price list for sheet and coil products were in the same format as March 2014, including particularly the references to “recommended resale price” in both the price notification letter and the price list.
- (i) On 7 March 2014, Mr Gent sent an email to (amongst others) Messrs Simpkin and Klingos of CMC Steel attaching a price notification letter and CIPA’s Distribution Market price list for sheet and coil products for May 2014. The price notification letter and the Distribution Market price list for sheet and coil products were in the same format as March 2014, including particularly the references to “recommended resale price” in both the price notification letter and the price list.
- (j) On 7 March 2014, Mr Gent sent an email to (amongst others) Messrs Simpkin and Klingos of CMC Steel attaching a price notification letter and CIPA’s Distribution Market price lists for a number of steel plate products for May 2014. The covering email listed standard plate products with “recommended resale prices”.
- (k) On 21 March 2014, Mr Gent sent an email to Messrs Lobb and Klingos of CMC Steel attaching pro forma letters from SMS to customers dated 21 February 2014 and 21 March 2014 advising SMS’s percentage price increases for flat steel products. The purpose of the communication was to validate the price increases that CIPA had put through and to give Mr Lobb comfort that SMS was implementing those increases.
- (l) On 1 April 2014, Mr Gent sent an email to (amongst others) Messrs Simpkin and Klingos of CMC Steel attaching a price notification letter and CIPA’s Distribution Market price list for sheet and coil products for June 2014. The price notification letter and the Distribution Market price list for sheet and coil products were in the same format as March 2014, including particularly the references to “recommended resale price” in both the price notification letter and the price list.
- (m) On 30 April 2014, Mr Gent sent an email to (amongst others) Messrs Simpkin and Klingos of CMC Steel attaching a price notification letter and CIPA’s Distribution Market price list for sheet and coil products for July 2014. The price notification letter and the Distribution Market price list for sheet and coil products were largely in the same format as the versions since March 2014, including particularly the references to “recommended resale price” in both the price notification letter and the price list.

- (n) On 30 May 2014, Mr Gent sent an email to (amongst others) Messrs Simpkin and Klingos of CMC Steel attaching a price notification letter and CIPA’s Distribution Market price list for sheet and coil products for August 2014. The price notification letter and the Distribution Market price list for sheet and coil products were largely in the same format as the versions since March 2014, including particularly the references to “recommended resale price” in both the price notification letter and the price list.
- (o) On 11 June 2014, Mr Gent sent an email to Mr Lobb which forwarded an email that Mr Gent had received from Mr Gerada, the NSW Manager for SMS. Mr Gerada’s email to Mr Gent had stated that SMS had issued price increase letters and had not had “too much back lash”. The purpose of Mr Gent’s email was to provide Mr Lobb with some assurance about SMS’s pricing approach in the market.

1511 I find that the conduct of Messrs Ellis, Hennessy and Gent was engaged in on behalf of BlueScope and was within the scope of their actual or apparent authority. Their conduct is therefore to be attributed to BlueScope. I also find that the conduct of Messrs Hennessy and Gent was engaged in at the direction of Mr Ellis.

1512 I find that the conduct of BlueScope and Mr Ellis was sufficient to constitute an attempt to induce an understanding containing the cartel provisions referred to above. The critical fact is that BlueScope’s proposals to CMC Steel were capable of assent. The inducement offered by BlueScope and Mr Ellis was that CIPA would be substantially tightening its tactical pricing so as to limit the amount of price discounting and that SMS would follow the price increases in CIPA’s Distribution Market price lists. Each of those actions by BlueScope would confer advantages on distributors by reducing competition at the distribution level of the market.

1513 The only elements of the ACCC’s allegation which I find are not proved are the elements relating to NZSA. The evidence does not support a finding that the respondents attempted to induce an understanding containing provisions to the effect that NZSA would sell flat steel products to steel users in Australia in accordance with CIPA’s price lists. The evidence showed that BlueScope did in fact require NZSA to align its prices with CIPA’s price lists, but the evidence did not show that BlueScope’s intentions in that regard were communicated to CMC Steel as an inducement.

1514 I also find that BlueScope and Mr Ellis had knowledge of the essential facts that would have rendered the contemplated understanding unlawful. I have earlier found that BlueScope and Mr Ellis knew that CMC Steel and BlueScope Distribution were in competition with each in

relation to the supply of flat steel products at the distribution level of the market. It follows from my findings with respect to intention that BlueScope and Mr Ellis knew that the understanding sought to be induced with CMC Steel contained provisions that had the purpose and effect of controlling or maintaining the price at which flat steel products would be sold by CMC Steel and BlueScope Distribution in competition with each other.

1515 For those reasons, I find that the respondents attempted to induce CMC Steel to contravene s 44ZZRJ by arriving at an understanding with Bluescope that contained cartel provisions, being provisions to the effect that:

- (a) CMC Steel would use the list prices in CIPA's Distribution Market price lists as a base or floor price when selling flat steel products to steel users in Australia; and
- (b) BlueScope Distribution would sell flat steel products to steel users in Australia in accordance with CIPA's Distribution Market price lists,

within the meaning of s 76(1)(d) of the Act.

Alleged attempt to induce OneSteel understanding

1516 The ACCC alleged that BlueScope and Mr Ellis attempted to induce OneSteel to arrive at an understanding with BlueScope which included one or more of the following provisions:

- (a) that OneSteel would use CIPA's Distribution Market price lists as a benchmark when selling flat steel products to steel users in Australia; and/or
- (b) that BlueScope Distribution and NZSA would sell flat steel products to steel users in Australia in accordance with CIPA's price lists.

1517 The provision alleged in para (a) is to be understood as a provision to the effect that OneSteel would use CIPA's list prices as the base or floor price for the sale of flat steel products.

1518 The provision alleged in para (b) in so far as it applied to NZSA was not capable of constituting a cartel provision within s 44ZZRD(1) because the competition condition could not be satisfied for those provisions. The provision concerned the price of supply of flat steel products at the manufacture/import level of the market by NZSA. OneSteel did not compete at that functional level of the market. However, to the extent that representations to that effect were made by BlueScope to OneSteel, the representations were capable of constituting relevant inducements. By increasing the price at which NZSA sold flat steel products, BlueScope would confer advantages on distributors by reducing competition at the distribution level of the market.

1519 The provision alleged in para (a) and the provision alleged in para (b) in so far as it applied to BlueScope Distribution were capable of constituting cartel provisions within s 44ZZRD(1). In relation to the purpose/effect condition, the provision in para (a) and the provision in para (b) in so far as it applied to BlueScope Distribution each had the purpose and effect of controlling or maintaining the price of flat steel products supplied by OneSteel and BlueScope Distribution respectively. A provision that requires list prices to be used as a base or floor price is a provision that controls prices in the sense of exercising restraint or direction over the setting of prices. It may also be a provision that maintains prices in the sense of keeping prices from declining. In relation to the competition condition, those provisions concerned the price of supply of flat steel products at the distribution level of the market. OneSteel competed at that functional level of the market, as did BlueScope Distribution (which is deemed to be a party to any understanding reached by BlueScope).

1520 I find that the conduct of BlueScope and Mr Ellis with respect to OneSteel relied upon by the ACCC, taken as a whole, constituted steps towards the inducement of an understanding being reached between BlueScope and OneSteel containing a cartel provision, which steps were more than merely preparatory of the inducement and which were immediately and not merely remotely connected with the inducement. The cartel provision was that OneSteel would use the list prices in CIPA's Distribution Market price lists as a base or floor price when selling flat steel products to steel users in Australia.

1521 The evidence does not support a finding that the respondents attempted to induce an understanding being reached between BlueScope and OneSteel containing a cartel provision to the effect that BlueScope Distribution would sell flat steel products to steel users in Australia in accordance with CIPA's Distribution Market price lists. The communications between BlueScope and OneSteel representatives that were the subject of evidence in the proceeding do not refer to the prices being charged by BlueScope Distribution.

1522 The conduct of BlueScope and Mr Ellis that constituted the attempt comprised the following (which is a summary of factual findings made earlier in these reasons):

- (a) On 10 September 2013, Messrs Ellis and Hennessy met with Mr Lewin of OneSteel during the Australian Steel Institute Conference on the Gold Coast. Mr Ellis asked how CIPA could win more of OneSteel's business. Mr Lewin said that BlueScope would need to have a more competitive price. Mr Ellis responded with words to the effect that

there was an opportunity for OneSteel to use CIPA's list prices as a pricing benchmark when setting its prices to customers.

- (b) On 12 September 2013, Mr Kelso had a conversation with Mr Bolzan, the National Procurement Manager for OneSteel Metalcentre, in relation to the benchmarking strategy. Mr Kelso explained the strategy in words to the effect that: BlueScope was looking to re-jig its price lists so that they were easier to use and increase the upfront list price so that the gap between the import parity price and the list price was increased; and the list price would be set at a level which would allow OneSteel to achieve sufficient margins if it sold to that price. Mr Bolzan indicated that he agreed that if the OneSteel business could use the price list as the "rock bottom price" that they would sell at, their business health would be significantly better going forward. During the conversation, Mr Bolzan asked how he could be sure that the other distributors would do the same, confirming that Mr Bolzan understood that the strategy involved other distributors setting their prices in the same manner. Either during this conversation or a later conversation with Mr Bolzan, Mr Kelso explained that the list price was a baseline or benchmark that OneSteel could use when pricing their products to their end customers.
- (c) On 13 September 2013, Messrs Ellis and Hennessy met with Messrs Lambourne and Birchall, the General Manager and National Manager respectively of OneSteel, at the Qantas meeting rooms at Sydney Airport. Mr Ellis asked what BlueScope could do to increase sales to OneSteel. Mr Birchall said that BlueScope needed to lower its prices. Mr Ellis replied by saying words to the effect that there was an opportunity for OneSteel to raise its prices by using CIPA's list prices as a benchmark and that CIPA was currently working on its December price list.
- (d) The conduct referred to in paras 1463(d) and (e).
- (e) On 17 September 2013, Mr Kelso had a discussion with OneSteel Sheet & Coil about CIPA's proposed Distribution Market list prices for sheet and coil products in which OneSteel Sheet & Coil indicated that they were comfortable with the proposed prices.
- (f) On 17 September 2013, Mr Hennessy sent an email to Messrs Birchall and Szecsodi of OneSteel Sheet & Coil, copying Mr Lambourne of OneSteel and Messrs Ellis and Kelso of BlueScope, attaching a version of the December 2013 Benchmark spreadsheet. The email referred to "our recent discussions". The email was sent with Mr Ellis's express or tacit approval. Sending the December 2013 Benchmark spreadsheet to distributors

represented a change from CIPA's previous practices. Prior to this, BlueScope's internal calculations of the kind contained in the December 2013 Benchmark spreadsheet (including the net price calculations) were not sent to distributors.

- (g) On 17 September 2013, Mr Kelso sent an email to Messrs Lewin and Bolzan of OneSteel Metalcentre, copying Mr Hennessy, and attaching an extract of the December 2013 Benchmark spreadsheet limited to plate products (which were distributed by OneSteel Metalcentre). The email referenced earlier discussions, including those at the Australian Steel Institute conference on the Gold Coast, and expressed the hope that OneSteel would "find that this is the right step in bringing some value back to Distributors in the market".
- (h) On 19 September 2013, Mr Kelso sent an email to Messrs Birchall and Szecsodi of OneSteel Sheet & Coil attaching a copy of CIPA's Distribution Market price list for sheet and coil products for December 2013. On 20 September 2013, Mr Kelso also sent an email to, amongst others, Messrs Bolzan and Lewin of OneSteel Metalcentre attaching CIPA's Distribution Market price lists for a range of steel plate products for December 2013.
- (i) On 20 December 2014, Mr Cooper (in the absence of Mr Kelso) sent an email to (amongst others) Messrs Birchall and Szecsodi of OneSteel Sheet & Coil attaching a price notification letter, CIPA's Distribution Market price list for sheet and coil products for March 2014 and the presentation titled "Distribution Sheet & Coil Price List Changes". As noted in respect of Selection Steel above, for the first time these documents contained an express reference to recommended resale prices. On the same day, Mr Cooper also sent an email to, amongst others, Messrs Bolzan and Lewin of OneSteel Metalcentre attaching CIPA's Distribution Market price lists for a range of steel plate products for March 2014. In contrast to CIPA's Distribution Market price list for sheet and coil products which had at that time been reformulated to refer to "recommended resale prices", the price notification letter and price lists for steel plate products did not use that expression. However, the covering email listed standard plate products with "recommended resale prices".
- (j) On 4 February 2014, Mr Kelso sent an email to Messrs Bolzan and Lewin of OneSteel Metalcentre attaching a price notification letter and CIPA's Distribution Market price lists for a number of steel plate products for April 2014. Again, the covering email listed standard plate products with "recommended resale prices".

- (k) On 6 March 2014, Mr Kelso sent an email to (amongst others) Messrs Birchall and Szecsodi of OneSteel attaching a price notification letter and CIPA’s Distribution Market price list for sheet and coil products for May 2014. The price notification letter and the Distribution Market price list for sheet and coil products were in the same format as March 2014, including particularly the references to “recommended resale price” in both the price notification letter and the price list.
- (l) On 2 April 2014, Mr Kelso sent an email to (amongst others) Messrs Bolzan and Lewin of OneSteel Metalcentre attaching a price notification letter and CIPA’s Distribution Market price lists for a number of steel plate products for June 2014. Again, the covering email listed standard plate products with “recommended resale prices”.
- (m) On 30 April 2014, Mr Kelso sent an email to (amongst others) Mr Bolzan attaching a price notification letter and CIPA’s Distribution Market price list for sheet and coil products for July 2014. The price notification letter and the Distribution Market price list for sheet and coil products were largely in the same format as the versions since March 2014, including particularly the references to “recommended resale price” in both the price notification letter and the price list.
- (n) On 2 June 2014, Mr Kelso sent an email to (amongst others) Messrs Bolzan and Lewin of OneSteel Metalcentre attaching a price notification letter and CIPA’s Distribution Market price lists for a number of steel plate products for August 2014. Again, the covering email listed standard plate products with “recommended resale prices”.

1523 I find that the conduct of Messrs Ellis, Hennessy, Kelso and Cooper was engaged in on behalf of BlueScope and was within the scope of their actual or apparent authority. Their conduct is therefore to be attributed to BlueScope. I also find that the conduct of Messrs Hennessy, Gent and Cooper was engaged in at the direction of Mr Ellis.

1524 There is no evidence that BlueScope or Mr Ellis offered OneSteel inducements in the nature of promised commercial advantages (such as CIPA reducing its tactical pricing or even that BlueScope Distribution would increase its prices in accordance with CIPA’s price lists). Nevertheless, an inducement may comprise other persuasive conduct that is intended to induce a consensus. In the case of OneSteel, the evidence shows that what was communicated to, and understood by, OneSteel, was that the benchmarking strategy was being promoted to other distributors in the market. In Mr Ellis’s words, there was an “opportunity” for distributors to set their prices by reference to CIPA’s recommended resale prices. The opportunity was created

by BlueScope and Mr Ellis seeking to persuade a significant number of distributors to set their prices by reference to CIPA's price lists. I find that that "opportunity" was communicated to OneSteel, and that the communication of the "opportunity" was an inducement to reach a price fixing understanding within the meaning of the Act. I find that the conduct of BlueScope and Mr Ellis was sufficient to constitute an attempt to induce an understanding containing the cartel provision referred to above. The critical fact is that BlueScope's proposals to OneSteel were capable of assent.

1525 I also find that BlueScope and Mr Ellis had knowledge of the essential facts that would have rendered the contemplated understanding unlawful. I have earlier found that BlueScope and Mr Ellis knew that OneSteel and BlueScope Distribution were in competition with each other in relation to the supply of flat steel products at the distribution level of the market. It follows from my findings with respect to intention that BlueScope and Mr Ellis knew that the understanding sought to be induced with OneSteel contained a provision that had the purpose and effect of controlling or maintaining the price at which flat steel products would be sold by OneSteel in competition with BlueScope Distribution.

1526 For those reasons, I find that the respondents attempted to induce OneSteel to contravene s 44ZZRJ by arriving at an understanding with BlueScope that contained a cartel provision, being a provision to the effect that OneSteel would use the list prices in CIPA's Distribution Market price lists as a base or floor price when selling flat steel products to steel users in Australia, within the meaning of s 76(1)(d) of the Act.

Alleged attempt to induce Wright Steel understanding

1527 The ACCC alleged that BlueScope and Mr Ellis attempted to induce Wright Steel and/or Citic to arrive at an understanding with BlueScope which included one or more of the following provisions:

- (a) that Wright Steel and/or Citic (either in their own right or acting jointly through the Wright Steel-Citic JV) would sell flat steel products to distributors in Australia at increased prices by reference to CIPA's price lists;
- (b) that Wright Steel would take steps to cause other import traders to sell flat steel products to distributors in Australia at increased prices by reference to CIPA's price lists; and/or
- (c) that BlueScope and NZSA would sell flat steel products to distributors in Australia at increased prices by reference to CIPA's price lists.

1528 The provisions alleged in paras (a) and (c) were capable of constituting cartel provisions within s 44ZZRD(1). In relation to the competition condition, those provisions concerned the price of supply of flat steel products at the manufacture/import level of the market. One or both of Wright Steel and Citic competed at that functional level of the market with BlueScope CIPA in relation to the supply of flat steel products. In relation to the purpose/effect condition, the provisions had the purpose and effect of controlling or maintaining the price of flat steel products supplied by one or both of Wright Steel and Citic, BlueScope and NZSA. A provision that requires prices to be increased above their current levels is a provision that controls prices in the sense of exercising restraint over prices, and is also a provision that maintains prices in the sense of keeping prices from declining. The purpose/effect condition does not require that the provision stipulates an agreed price with precision. It only requires that the provision controls or maintains a price for goods or services supplied by all or any of the parties in competition with each other. A provision that exercises restraint over pricing freedom, including particularly a provision that requires an increase in price over current levels, is within the statutory definition. It is harmful to competition and the welfare of Australians.

1529 The provision alleged in para (b) was not capable of constituting a cartel provision within s 44ZZRD(1). The provision concerned the price of supply of flat steel products by other import traders. It was not alleged that the respondents attempted to induce price fixing understandings with those other import traders. In those circumstances, the provision could not satisfy the purpose/effect condition because the provision would not have related to the price of products supplied by a proposed party to the understanding.

1530 I find that the conduct of BlueScope and Mr Ellis with respect to Wright Steel relied upon by the ACCC constituted steps towards the inducement of an understanding being reached between BlueScope and Wright Steel containing cartel provisions, which steps were more than merely preparatory of the inducement and which were immediately and not merely remotely connected with the inducement. The cartel provisions were that:

- (a) Wright Steel and/or Citic would sell flat steel products to distributors in Australia at increased prices by reference to CIPA's Distribution Market price lists; and
- (b) BlueScope CIPA and NZSA would sell flat steel products to distributors in Australia at increased prices by reference to CIPA's Distribution Market price lists.

1531 The conduct of BlueScope and Mr Ellis that constituted the attempt comprised statements made by Mr Ellis at a dinner with Mr Wright on 12 September 2013. I have found that, at that dinner,

Mr Ellis made statements to the effect that: Mr Ellis had been successful in BlueScope's Thailand business and had returned to Australia intending to implement similar strategies; Mr Ellis considered that the prices of flat steel products were undervalued in Australia and he wanted to restore value (in other words, increase prices); Mr Ellis considered that imports were driving prices down and BlueScope intended to use anti-dumping complaints to diminish the effect of imports; and part of Mr Ellis's strategy to raise prices was to publish a recommended resale price list for distributors to adopt, but that he needed importers to support the price increase. Mr Ellis proposed that Wright Steel could encourage its distribution customers to use CIPA's price lists as a benchmark for their prices; and in that way market prices could be increased without loss of market shares. Having regard to the whole of the evidence given by Mr Wright, I find that Mr Ellis communicated a proposal to Mr Wright which included the elements that:

- (a) Mr Ellis's objective was to bring about an increase in prices at the manufacture/import level of the market for flat steel products;
- (b) one element of the strategy was the benchmarking strategy by which CIPA would publish recommended resale prices for distributors to adopt;
- (c) both BlueScope CIPA and NZSA would increase their prices by reference to CIPA's recommended resale prices for distributors;
- (d) BlueScope wanted the support of Wright Steel/Citic and other import traders for the price increases; and
- (e) BlueScope intended to use anti-dumping actions against imports of flat steel products that remained at low price levels.

1532 I find that the conduct of Mr Ellis was engaged in on behalf of BlueScope and was within the scope of his actual or apparent authority. His conduct is therefore to be attributed to BlueScope.

1533 I find that the conduct of BlueScope and Mr Ellis was sufficient to constitute an attempt to induce an understanding containing the cartel provisions referred to above. The critical fact is that BlueScope's proposal to Wright Steel/Citic, that Wright Steel/Citic increase its prices for flat steel products, was capable of assent. The inducement offered by BlueScope and Mr Ellis was the promise that CIPA and NZSA would be increasing their prices and the threat that, if import traders did not increase prices, BlueScope would initiate anti-dumping complaints against the imported products.

1534 I also find that BlueScope and Mr Ellis had knowledge of the essential facts that would have rendered the contemplated understanding unlawful. I have earlier found that BlueScope and Mr Ellis knew that Mr Wright was a representative of a competitor to BlueScope and NZSA in respect of the manufacture/import level of the market for the supply of flat steel products in Australia, whether that competitor was Wright Steel, or Citic, or both entities as joint venturers. It follows from my findings with respect to intention that BlueScope and Mr Ellis knew that the understanding sought to be induced with Wright Steel/Citic contained provisions that had the purpose and effect of controlling or maintaining the price at which flat steel products would be sold by Wright Steel/Citic, BlueScope and NZSA in competition with each other.

1535 For those reasons, I find that the respondents attempted to induce one or both of Wright Steel and Citic to contravene s 44ZZRJ by arriving at an understanding with BlueScope that contained cartel provisions, being provisions to the effect that:

- (a) one or both of Wright Steel and Citic would sell flat steel products to distributors in Australia at increased prices by reference to CIPA's Distribution Market price lists; and
- (b) BlueScope CIPA and NZSA would sell flat steel products to distributors in Australia at increased prices by reference to CIPA's Distribution Market price lists,

within the meaning of s 76(1)(d) of the Act.

Alleged attempt to induce Yieh Phui understanding

1536 The ACCC alleged that BlueScope and Mr Ellis attempted to induce Yieh Phui to arrive at an understanding with BlueScope which included one or more of the following provisions:

- (a) that Yieh Phui would sell flat steel products to import traders at a higher price than it was doing at the time of the Yieh Phui meeting;
- (b) that Yieh Phui would raise the price at which it sold flat steel products to import traders by reference to BlueScope's price list in order to increase the profitability of both Yieh Phui and BlueScope;
- (c) that BlueScope would be taking anti-dumping measures against any overseas steel manufacturer that it considered was selling flat steel products into Australia at a price that was too low; and/or
- (d) that BlueScope Distribution would sell flat steel products to steel users in Australia in accordance with BlueScope's price list.

1537 The substantive effect of the provisions alleged in paras (a) and (b) is largely the same: that Yieh Phui would increase the price for flat steel products supplied into Australia. The provisions were capable of constituting cartel provisions within s 44ZZRD(1). In relation to the competition condition, those provisions concerned the price of supply of flat steel products at the manufacture/import level of the market. I have found that Yieh Phui competed at that functional level of the market with BlueScope CIPA. In relation to the purpose/effect condition, the provisions had the purpose and effect of controlling or maintaining the price of flat steel products supplied by Yieh Phui. A provision that requires prices to be increased above their current levels is a provision that controls prices in the sense of exercising restraint over prices, and is also a provision that maintains prices in the sense of keeping prices from declining. As observed in connection with the Wright Steel understanding, the purpose/effect condition does not require that the provision stipulates an agreed price with precision; it only requires that the provision controls or maintains a price for goods or services supplied by all or any of the parties in competition with each other.

1538 The provision alleged in para (c) was not capable of constituting a cartel provision within s 44ZZRD(1) because the purpose/effect condition could not be satisfied. However, to the extent that representations to that effect were made by BlueScope to Yieh Phui, the representations were capable of constituting relevant inducements in the form of a threat.

1539 The provision alleged in para (d) was also not capable of constituting a cartel provision within s 44ZZRD(1) because the competition condition could not be satisfied for that provision. The provision concerned the price of supply of flat steel products at the distribution level of the market by BlueScope Distribution. Yieh Phui did not compete at that functional level of the market. However, to the extent that representations to that effect were made by BlueScope to Yieh Phui, the representations were capable of constituting relevant inducements. By causing BlueScope Distribution to increase the price at which it sold flat steel products, BlueScope would promote the conditions under which prices could be successfully increased at the manufacture/import level of the market. That would confer a commercial benefit or advantage on overseas steel mills wishing to import flat steel products into Australia.

1540 I find that the conduct of BlueScope and Mr Ellis with respect to Yieh Phui relied upon by the ACCC constituted steps towards the inducement of an understanding being reached between BlueScope and Yieh Phui containing a cartel provision, which steps were more than merely preparatory of the inducement and which were immediately and not merely remotely connected

with the inducement. The cartel provision was that Yieh Phui would sell flat steel products to import traders at a higher price than it was doing at the time of the Yieh Phui meeting by reference to CIPA's Distribution Market price lists.

1541 The conduct of BlueScope and Mr Ellis that constituted the attempt comprised statements made by Mr Ellis at a meeting with representatives of Yieh Phui on 26 February 2014. By way of summary, I have found that the following occurred during the meeting:

- (a) Mr Ellis said that there was an opportunity for Yieh Phui to sell steel at "better prices" than they were currently achieving and BlueScope believed that the prices at which Yieh Phui's steel was sold into Australia were lower than the market and that Yieh Phui was "leaving some profitability behind".
- (b) While Mr Ellis stated on a number of occasions that BlueScope was not attempting to influence, instruct or direct Yieh Phui as to its pricing, Mr Ellis: pressed the discussion; insisted that the conversation was lawful under Australian law; stated that BlueScope published a recommended retail price in Australia; suggested that Yieh Phui get access to that document; and suggested that Yieh Phui use the document as a reference point for its business (implicitly, in respect of Australian imports).
- (c) Mr Ellis said that there was opportunity for Yieh Phui to extract more value from the Australian market (that is, increase prices). Mr Ellis explained the "opportunity" as arising from the fact that a number of mills and a number of countries had been restricted from supply to Australia (implicitly, by anti-dumping action) and that transportation distance rendered supply to Australia from Europe or the Americas uncompetitive.
- (d) Mr Ellis stated that India and Vietnam would be facing anti-dumping action from BlueScope within the next three months.
- (e) Mr Ellis sought to make clear that he was suggesting that Yieh Phui base its prices on BlueScope's recommended resale prices, recognising that those prices were the prices at the distribution level of the market.
- (f) Mr Ellis stated that BlueScope had a market share in Australia of about 85% and that, as a result, when BlueScope set the recommended resale price, it established a market norm.

1542 In the meeting, Yieh Phui raised repeated objections to the subject matter of its prices being discussed at all. I find that Yieh Phui understood that Mr Ellis was seeking to persuade Yieh Phui to increase its prices into the Australian market. I also find that that was Mr Ellis’s intention. That finding is reinforced by the following further matters (the subject of earlier findings):

- (a) First, on a number of occasions, Mr Ellis stated that what he was suggesting to Yieh Phui was lawful in Australia because BlueScope’s recommended resale price list was “public information” and not “private information”. The statement was at best a half-truth and that was known to Mr Ellis at the time of the meeting. BlueScope’s recommended resale price list was not published on its website and not publically available. It was only provided to BlueScope’s distributor customers and Yieh Phui would need to obtain a copy from such distributors. Mr Ellis stated in the meeting that he was not sure if BlueScope was allowed to give the document to Yieh Phui and he was not sure how he could give the document to Yieh Phui. Towards the end of the meeting, Ms Wang suggested to Mr Ellis that she might be provided with the recommended resale price list and would personally deliver it to Yieh Phui in Taiwan.
- (b) Second, Mr Ellis stated during the course of the discussion that he had received legal advice about the subject of the discussion, that his lawyer had given him “very strict instructions”, that he was being very careful with his words, and that everything he said had been practised maybe 20 times before. Those statements were generally followed by laughter in the room. It is apparent that those statements were understood by those present as indicating that, under legal advice, Mr Ellis was using careful language in what he was seeking to convey.
- (c) Third, Mr Ellis’s written report on the Yieh Phui meeting to Mr Vassella did not include any reference to the discussions with Yieh Phui in relation to prices. Mr Ellis gave evidence that he did not include that in his report because he “did not want a summary written report to be forwarded about that matter because it could be misconstrued without the full context”, and because he “regarded it as a sensitive matter”.

1543 I find that the conduct of Mr Ellis was engaged in on behalf of BlueScope and was within the scope of his actual or apparent authority. His conduct is therefore to be attributed to BlueScope.

1544 I find that the conduct of BlueScope and Mr Ellis was sufficient to constitute an attempt to induce an understanding containing the cartel provisions referred to above. The critical fact is that BlueScope's proposal to Yieh Phui, that Yieh Phui increase its prices for flat steel products, was capable of assent. The inducement offered by BlueScope and Mr Ellis was twofold. First, Mr Ellis stated that when BlueScope set the recommended resale price, it established a market norm. The statement was an implicit promise that BlueScope would support the price increases reflected in its price lists. Second, Mr Ellis referred to the likelihood of anti-dumping action against low priced imports from Vietnam and India, which constituted a threat of such action against any imports at low prices. I also consider that the totality of Mr Ellis's statements to Yieh Phui were in the nature of persuasive arguments for Yieh Phui to increase its prices, which is sufficient to constitute an attempt to induce an understanding.

1545 I also find that BlueScope and Mr Ellis had knowledge of the essential facts that would have rendered the contemplated understanding unlawful. I have earlier found that BlueScope and Mr Ellis knew that Yieh Phui was a competitor to BlueScope in respect of the manufacture/import level of the market for the supply of flat steel products in Australia. It follows from my findings with respect to intention that BlueScope and Mr Ellis knew that the understanding sought to be induced with Yieh Phui contained a provision that had the purpose and effect of controlling or maintaining the price at which flat steel products would be sold by Yieh Phui in competition with BlueScope.

1546 For those reasons, I find that the respondents attempted to induce Yieh Phui to contravene s 44ZZRJ by arriving at an understanding with BlueScope that contained a cartel provision, being a provision to the effect that Yieh Phui would sell flat steel products to import traders at a higher price than it was doing at the time of the Yieh Phui meeting by reference to CIPA's Distribution Market price lists, within the meaning of s 76(1)(d) of the Act.

Knowledge of Mr Vassella

1547 The ACCC alleged that, at all material times from at least 11 October 2013, Mr Vassella was aware of certain aspects of the conduct constituting the alleged attempts to induce the unlawful understandings.

1548 The evidence concerning Mr Vassella's knowledge was sparse. It establishes that aspects of the benchmarking strategy were discussed with Mr Vassella. By way of summary of my earlier findings:

- (a) In an email sent by Mr Ellis to Mr Vassella on 11 September 2013, in advance of their breakfast meeting the following morning, Mr Ellis raised the topic of “benchmark pricing” with Mr Vassella. The email referred to the need to get back to benchmark pricing as a response to BlueScope prices being too cheap.
- (b) In October 2013, Mr Ellis pressed Mr Vassella to allow CIPA to exercise control over NZSA’s pricing in Australia.
- (c) The “CEO Market Report” for October 2013 which was provided to (amongst others) Mr Vassella, referred to a different strategy being adopted by the Distribution Markets team in respect of the CIPA price lists for December 2013 delivery including (i) earlier announcement of prices “to deliver a price leadership outcome”; and (ii) increased list prices through a changed tactical support mechanism as a means to support channel partners to increase prices in the market and improve overall profitability.
- (d) On 24 October 2013, Mr Ellis sent an email to Mr Vassella’s executive assistant, copied to Mr Vassella, attaching a presentation titled “CIPA Sales and Marketing – CIPA Business Review”. On a slide of the presentation titled “Market Intelligence”, under the heading “Key Customer Issues”, the first bullet point stated “Benchmarking concept is gaining some traction”.
- (e) On 14 November 2013, Mr Vassella attended a meeting with Messrs Stedman and Simpkin of CMC Steel, together with Mr Ellis, at which the benchmarking strategy was discussed.
- (f) On 16 December 2013, Mr Ellis sent an email to Mr Vassella with a list of topics for discussion the next day. One of the topics was “Distribution Channel Strategy (+ simplification of price list + recommended retail pricing)” in respect of which Mr Ellis commented “working well thus far”.
- (g) On 17 December 2013, Messrs Vassella, Ellis and Hennessy had a conversation in which Mr Ellis said that CIPA would be simplifying its price list and was planning to release the price list as a recommended resale price for distributors to consider when setting their prices. Mr Vassella responded by saying that he would like further detail.
- (h) On 14 February 2014, at a business review of the BlueScope Sales & Marketing division, Messrs Vassella, Ellis and Hennessy had a discussion about Mr Ellis’s forthcoming trip to visit Asian steel mills and sought Mr Vassella’s approval to discuss Mr Ellis’s overseas mill strategy. Mr Vassella told Mr Ellis that Mr Vassella wanted to

see a full proposal before Mr Ellis made any commitments. Mr Ellis also sought Mr Vassella's approval to discuss anti-dumping and Mr Vassella gave his approval.

- (i) On 17 April 2014, Mr Ellis gave a presentation to Mr Vassella. The presentation was titled "CIPA Sales and Marketing FY15 Pricing & Volume Review". Toward the end of the document was a slide titled "Other Pricing Initiative" and subtitled "Recommended Resale Price Project – Distribution ... Building market coming". The first bullet point stated as follows:

A project was undertaken to incorporate the concept of a "Recommended Resale Price (RRP)" into the Distribution Sector.

- Aim was to improve the profitability of our Distribution channel customers by attempting to set a price floor for each major product category within the sector.
- We have not yet measured success but anecdotal feedback has suggested that our Distributors have had some wins.
- The concept is attempting to be expanded into Sheet & Coil Processing, as well as the Building Market rollformers.

1549 Mr Ellis gave evidence in relation to the presentation on 14 April 2014, which I accept, that Mr Vassella was aware of the benchmarking strategy and that Mr Ellis had explained to Mr Vassella what the benchmarking strategy was. However, Mr Ellis did not elaborate on what he told Mr Vassella about the benchmarking strategy. Mr Ellis also gave evidence that, following the meeting with Yieh Phui, Mr Ellis would have had a discussion with Mr Vassella about the discussion concerning Yieh Phui prices. Again, though, Mr Ellis did not elaborate on what he told Mr Vassella on that subject.

1550 I find that Mr Vassella was aware of the following elements of the benchmarking strategy: that CIPA was promoting its Distribution Market price lists as recommended resale prices; that CIPA's aim in doing so was to bring about an increase in prices at the distribution level of the market, which would assist CIPA in both increasing its own prices and increasing sales volume to distributors; that CIPA was supporting the strategy by reducing tactical pricing support; that CIPA also wished to support the strategy by aligning NZSA's prices in the market with CIPA's prices; that the strategy was having some success in the market; and that CIPA proposed to raise the threat of anti-dumping actions with overseas steel mills.

1551 However, the evidence does not support the further finding that Mr Vassella was aware that, as part of the benchmarking strategy, BlueScope was attempting to induce distributors, or Wright Steel, to reach a price fixing understanding with BlueScope in relation to their prices.

Nor does the evidence support a finding that Mr Vassella was aware that, as part of the overseas mill strategy, BlueScope was attempting to induce Yieh Phui to reach a price fixing understanding in relation to its prices.

Q. CONCLUSION

1552 In conclusion, I find that the ACCC's allegations are established to the following extent. Each of BlueScope and Mr Ellis attempted to induce:

- (a) Selection Steel to contravene s 44ZZRJ by arriving at an understanding with BlueScope that contained cartel provisions, being provisions to the effect that:
 - (i) Selection Steel would use the list prices in CIPA's Distribution Market price lists as a base or floor price when selling flat steel products to steel users in Australia; and
 - (ii) BlueScope Distribution would sell flat steel products to steel users in Australia in accordance with CIPA's Distribution Market price lists,within the meaning of s 76(1)(d) of the Act;
- (b) Apex Steel to contravene s 44ZZRJ by arriving at an understanding with BlueScope that contained cartel provisions, being provisions to the effect that:
 - (i) Apex Steel would use the list prices in CIPA's Distribution Market price lists as a base or floor price when selling flat steel products to steel users in Australia; and
 - (ii) BlueScope Distribution would sell flat steel products to steel users in Australia in accordance with CIPA's Distribution Market price lists,within the meaning of s 76(1)(d) of the Act;
- (c) Southern Steel to contravene s 44ZZRJ by arriving at an understanding with BlueScope that contained cartel provisions, being provisions to the effect that:
 - (i) Southern Steel would use the list prices in CIPA's Distribution Market price lists as a base or floor price when selling flat steel products to steel users in Australia; and
 - (ii) BlueScope Distribution would sell flat steel products to steel users in Australia in accordance with CIPA's Distribution Market price lists,within the meaning of s 76(1)(d) of the Act;

- (d) Vulcan Steel to contravene s 44ZZRJ by arriving at an understanding with BlueScope that contained cartel provisions, being provisions to the effect that:
- (i) Vulcan Steel would use the list prices in CIPA's Distribution Market price lists as a base or floor price when selling flat steel products to steel users in Australia; and
 - (ii) BlueScope Distribution would sell flat steel products to steel users in Australia in accordance with CIPA's Distribution Market price lists,
- within the meaning of s 76(1)(d) of the Act;
- (e) Selwood Steel to contravene s 44ZZRJ by arriving at an understanding with BlueScope that contained a cartel provision, being a provision to the effect that Selwood Steel would use the list prices in CIPA's Distribution Market price lists as a base or floor price when selling flat steel products to steel users in Australia, within the meaning of s 76(1)(d) of the Act;
- (f) CMC Steel to contravene s 44ZZRJ by arriving at an understanding with BlueScope that contained cartel provisions, being provisions to the effect that:
- (i) CMC Steel would use the list prices in CIPA's Distribution Market price lists as a base or floor price when selling flat steel products to steel users in Australia; and
 - (ii) BlueScope Distribution would sell flat steel products to steel users in Australia in accordance with CIPA's Distribution Market price lists,
- within the meaning of s 76(1)(d) of the Act;
- (g) OneSteel to contravene s 44ZZRJ by arriving at an understanding with BlueScope that contained a cartel provision, being a provision to the effect that OneSteel would use the list prices in CIPA's Distribution Market price lists as a base or floor price when selling flat steel products to steel users in Australia, within the meaning of s 76(1)(d) of the Act;
- (h) one or both of Wright Steel and Citic to contravene s 44ZZRJ by arriving at an understanding with BlueScope that contained cartel provisions, being provisions to the effect that:
- (i) one or both of Wright Steel and Citic would sell flat steel products to distributors in Australia at increased prices by reference to CIPA's Distribution Market price lists; and

(ii) BlueScope and NZSA would sell flat steel products to distributors in Australia at increased prices by reference to CIPA's Distribution Market price lists, within the meaning of s 76(1)(d) of the Act; and

(i) Yieh Phui to contravene s 44ZZRJ by arriving at an understanding with BlueScope that contained a cartel provision, being a provision to the effect that Yieh Phui would sell flat steel products to import traders at a higher price than it was doing at the time of the Yieh Phui meeting by reference to CIPA's Distribution Market price lists, within the meaning of s 76(1)(d) of the Act.

1553 In its amended originating application, the ACCC seeks by way of relief declaratory orders, the imposition of pecuniary penalties and a disqualification order against Mr Ellis. I will make orders timetabling a hearing on the question of relief.

I certify that the preceding one thousand five hundred and fifty-three (1553) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justice O'Bryan.

Associate:

Dated: 9 December 2022