

**In the High Court of New Zealand  
Auckland Registry**

**I Te Kōti Matua O Aotearoa  
Tāmaki Makaurau Rohe**

CIV-2018-

**Under** Parts 1 and 5 of the Fair Trading Act 1986.

**Between** **Commerce Commission** a body corporate established under section 8 of the Commerce Act 1986 having its offices at level 6, 44-52 The Terrace, Wellington.

**Plaintiff**

**And** **viagogo AG** a body corporate incorporated in Switzerland having its registered office at Rue du Commerce 4, c/o Geneva Rhone 8 Sàrl, 1204, Geneva, Switzerland.

**Defendant**

---

## **Statement of claim**

**30 November 2018**

---

**MEREDITH  
CONNELL**

**Solicitors:**

N Flanagan | A Luck  
PO Box 90750, Victoria Street West, Auckland 1142  
T: +64 9 336 7500  
nick.flanagan@mc.co.nz |  
andy.luck@mc.co.nz

# Statement of claim

The Plaintiff by its solicitor says:

## The parties

- 1 The plaintiff, the Commerce Commission, is a body corporate established under s 8 of the Commerce Act 1986 (the **Commission**). Its functions include the administration and enforcement of the Fair Trading Act 1986 (**FTA**).
- 2 The defendant, viagogo AG (**Viagogo**) is a company incorporated in Switzerland, having its registered office at Rue du Commerce 4, c/o Geneva Rhone 8 Sàrl, 1204, Geneva, Switzerland.
- 3 Since 18 July 2016, the Commission has received over 560 complaints or enquiries regarding representations made by Viagogo.

## Viagogo's business

- 4 Viagogo is a ticket reselling company. It operates a website at <http://www.viagogo.com/nz> (the **Website**) that offers for sale tickets to sporting, music and entertainment events in New Zealand (**Tickets**) to consumers located in New Zealand (**Consumers**).
- 5 Viagogo also:
  - (a) operates a New Zealand-registered domain, [www.viagogo.co.nz](http://www.viagogo.co.nz), which redirects to the Website; and
  - (b) is listed by the Domain Name Commission as the registrant for the New Zealand-registered domain, [www.viagogo.nz](http://www.viagogo.nz).
- 6 Tickets are listed for sale on the Website by sellers (**Sellers**) who either:
  - (a) have acquired a Ticket which they seek to resell through the Website; or
  - (b) have not yet acquired a Ticket, but who contemplate doing so upon making a sale through the Website.
- 7 The Website does not inform Consumers whether a Seller has already acquired a Ticket (s)he has listed, or not.
- 8 At no stage during the Ticket listing process does Viagogo require the Seller to demonstrate that they hold a valid Ticket that has been issued for an event.

## Viagogo's revenue model

- 9 Viagogo is not an official ticketing agent in New Zealand, meaning it is not authorised by event promoters or venues to sell Tickets to events in New Zealand.

- 10 Viagogo derives revenue through:
- (a) fees charged to Consumers who purchase Tickets through the Website; and
  - (b) fees charged to Sellers for Tickets sold through the Website.
- 11 The prices paid for Tickets purchased by Consumers via the Website are comprised of:
- (a) an amount set by the Seller (the **Initial Price**); and
  - (b) a number of unavoidable fees (collectively, the **Viagogo Fees**), which include:
    - (i) a percentage-based fee variously described as the “GST and Booking Fee” or “Booking Fee” (each referred to in this statement of claim as the **GST and Booking Fee**); and
    - (ii) a fixed fee described as the “**Handling Fee**” and occasionally as a “Secure Ticket Delivery Fee” or a “Delivery Fee” (each referred to in this statement of claim as the **Handling Fee**).
- 12 At all relevant times:
- (a) the amount of the Initial Price was set by the Seller; and
  - (b) the amounts of the Viagogo Fees were set by Viagogo.

#### **Particulars**

Except to the extent the GST and Booking Fee included an amount required to be paid as goods and services tax, the amount of that fee was set by Viagogo.

#### **Delivering Tickets**

- 13 Viagogo also arranges for Tickets to be delivered to Consumers, either:
- (a) where the Seller uploads the Tickets to the Website, by sending a link to the email address nominated by the Consumer (including email addresses in New Zealand) allowing the Consumer to download the Tickets in an electronic format; or
  - (b) in other cases, by arranging for Sellers to deliver physical Tickets to an address designated by the Consumer (including physical addresses in New Zealand).
- 14 For some events, electronic delivery is the only delivery method available.

#### **Marketing to New Zealand Consumers**

- 15 Viagogo makes representations on the Website which are intended for Consumers in New Zealand, in that:
- (a) the Website lists Tickets for events held in New Zealand;

- (b) the Website is directed to New Zealand Consumers by virtue of its domain names (www.Viagogo.com/nz and www.Viagogo.co.nz);
- (c) the Website lists Tickets for “Top Events in New Zealand”;
- (d) the Website lists “Upcoming Events” based on the Consumer’s location; and
- (e) the prices for Tickets are often advertised in New Zealand Dollars.

16 Viagogo also markets to New Zealand Consumers by:

- (a) purchasing advertisements displayed on search results viewed by New Zealand Consumers via the Google search engine (**Google Advertisements**); and
- (b) arranging for affiliate marketers to disseminate links to the Website to New Zealand Consumers.

17 Viagogo also sends marketing emails to email addresses with New Zealand domains.

#### **Other conduct in New Zealand**

18 In some instances Viagogo obtains payment (through its payment agent, Adyen N.V., **Adyen**) from Consumers for Tickets in New Zealand dollars, and when it does so it obtains such funds in New Zealand.

#### **Particulars**

Where the Seller is based in New Zealand, Adyen processes payments for Tickets in New Zealand Dollars.

19 Viagogo obtains from Consumers their New Zealand telephone number, and on occasion calls them on that number in New Zealand in the course of its business.

#### **Particulars**

For example, on 28 February 2017 Viagogo called a Consumer on her cellphone after the Consumer and her child had been denied entry to a Bruno Mars concert at Spark Arena in Auckland. The Consumer had been denied entry as her Tickets (which had been purchased from Viagogo) had already been scanned for entry by another concert-goer.

#### **The Ticket purchasing process**

20 The Website contains a number of webpages which a Consumer is required to progress through in order to purchase Tickets. Those webpages include:

- (a) The **Homepage**, which advertises Tickets available for particular events, and which allows the Consumer to search for particular events.
- (b) The **Event Page**, which appears after a Consumer selects an advertised event. The Event Page displays the dates, times and venues for events for which Tickets are available via the Website. The Event Page also includes a link for the Consumer to “View Tickets” to a particular event.

- (c) The **Loading Screen**, which appears after a Consumer selects the “View Tickets” link for a particular event. The Loading Screen contains representations as to how many other persons are currently “viewing this event”, and as to the number of “tickets left” for that event.
- (d) The **Ticket Selection Pages**, which appear after the Loading Screen. The Ticket Selection Pages allow the Consumer to select the number of Tickets they wish to purchase and the location within the venue where they wish to be seated, and displays prices for Tickets on offer. This information appears either on a single page, or as two separate pages (the first requiring the Consumer to select a number of Tickets, the second containing the remaining information). The Ticket Selection Pages also contain representations as to the number of Tickets available for an event, and includes links for the Consumer to purchase particular Tickets.
- (e) The **Pre-Purchase Page**, which appears after a Consumer has selected a link to purchase Tickets. This page states that the Consumer has “entered the waiting room for these tickets” or is in the “waiting area”.
- (f) The **Checkout Stage**, which represents that the Consumer has a specified time (typically ten minutes or less) to “secure these tickets”. The Checkout Stage includes a timer counting down from the specified time, with a representation that the Tickets “will no longer be reserved” once that time has run out. The Checkout Stage consists of a number of webpages, in the order set out below, requiring the Consumer to:
  - (i) confirm the number of Tickets they wish to purchase (the **Confirmation Page**);
  - (ii) provide personal information, including their name, email address and phone number (the **Personal Details Page**);
  - (iii) confirm the method of delivering the Tickets to the Consumer (the **Delivery Method Page**);
  - (iv) select a payment method (the **Payment Method Page**);
  - (v) enter their payment information (the **Payment Details Page**);
  - (vi) provide a billing address (the **Billing Address Page**);
  - (vii) confirm that the details provided at the Checkout Stage are correct (the **Details Check Page**); and
  - (viii) if the Consumer accesses the Website from a mobile device, a page containing information regarding how the Consumer will receive their Tickets (the **Information Page**).
- (g) The **Order Confirmation Page**, which contains a link for the Consumer to confirm their purchase.

## Representations as to the quantity of Tickets available for an event

- 21 From at least 18 July 2016, Viagogo made representations on the Website that Tickets for the particular event selected by a Consumer were scarce (the **Scarcity Representations**). The Scarcity Representations included:
- (a) As to the number of Tickets available, that:
    - (i) there were only a specified number of Tickets left “for this event”;
    - (ii) there were less than a specified percentage of Tickets left for the event;
    - (iii) there were “only a few tickets left”;
    - (iv) particular tickets were the “last tickets in this section” of the venue;
    - (v) a specified number of sections within the venue had “already sold out”; and
    - (vi) it was the Consumer’s “LAST CHANCE!” to purchase Tickets for the event.
  - (b) As to demand for the Tickets:
    - (i) that Tickets were:
      - (A) “selling fast”;
      - (B) “likely to sell out soon”;
      - (C) “about to sell out”;
      - (D) “almost gone”; and
    - (ii) that a specified number of other persons:
      - (A) were viewing Tickets for the particular event; and
      - (B) were viewing the particular Ticket selected by the Consumer.
- 22 The Scarcity Representations created the impression that:
- (a) few and rapidly decreasing quantities of Tickets were available for a particular event, from any source;
  - (b) Tickets to a particular event were unlikely to be available in the near future, from any source; and
  - (c) the Consumer should act quickly to secure Tickets for the particular event, or would risk missing out.

## Particulars

For example:

- (d) Viagogo represented that only 97 Tickets were left for a Michael Bolton concert, being only 5% of Tickets left for the venue, and that Tickets were about to sell out. In fact, at the time those representations were made, there were at least 507 Tickets available to that concert from an authorised ticketing agent, representing over 25% of the venue's capacity.
  - (e) Viagogo represented that only 120 Tickets were left to a performance of the Russian Ballet in November 2018, that Tickets were in high demand, that Tickets were likely to sell out soon, and that Tickets were almost gone. In fact, at the time those representations were made, there were at least 656 Tickets available to that performance, representing approximately 60% of the venue's capacity.
  - (f) Viagogo represented that there was only "Only 1 Ticket left" to a performance of *Peter Pan Goes Wrong* in November 2018, and that Tickets were "likely to sell out soon". In fact, at the time those representations were made, there were at least 473 Tickets available to that performance.
  - (g) On 26 October 2018 Viagogo represented that there were "Only 16 tickets left" for a performance of *The Nutcracker* in December 2018, being "Less than 2% of tickets left for this event". In fact, at the time those representations were made, there were at least 382 Tickets available for that performance, representing nearly 40% of the venue's capacity.
- 23 As a Ticket reselling company, Viagogo does not have access to current information about the number of Tickets available for particular events, except to the extent that this information has entered the public domain.
- 24 At all relevant times, Viagogo did not disclose, or did not adequately disclose, that:
- (a) the references to the availability of Tickets for events were made by reference to the number or percentage of Tickets available through the Website only, and not by reference to the total number or percentage of Tickets available to the event, including those available from other sources of Tickets; and
  - (b) the references to the demand for Tickets were made by reference to the supposed demand for Tickets available through the Website only.

## Particulars

In some instances, the Scarcity Representations were accompanied by an image of a small circle with the letter 'i' inside it. If a Consumer interacted with that image (either by moving their cursor over the circle, or by tapping the image using a touch screen), the Website would display a disclaimer to the effect that the representations as to the availability of Tickets referred to Tickets available

from Viagogo. This disclaimer did not adequately disclose the true position, since:

- (a) a Consumer was not required to view the disclaimer in order to continue with a purchase;
- (b) the disclaimer would only be viewed if the Consumer interacted with the image in the manner described above;
- (c) the disclaimer was not sufficiently prominent to counteract the overall impression created by the Scarcity Representation accompanying it; and
- (d) given the effect of the Scarcity Representations, and other features of the Website (such as the countdown timer at the Checkout Stage), Viagogo led Consumers to believe they had a limited time to complete their purchases, making those Consumers less likely to view the disclaimers.

25 The Scarcity Representations were likely to mislead Consumers as to the availability of Tickets.

26 Viagogo habitually makes Scarcity Representations for events listed on the Website, whether or not Tickets to that event are in short supply.

27 Viagogo continues to make the Scarcity Representations as at the date of this statement of claim.

### **Representations as to the price of Tickets**

28 From at least 18 July 2016, Viagogo made representations via the Website which created the overall impression that Tickets sold through the Website were available to be purchased at the Initial Price (the **Price Representations**), as follows:

- (a) On the Ticket Selection Page, Viagogo represented that Tickets were available at the Initial Price, and only disclosed the existence of the Viagogo Fees at the bottom of the page, in a section headed "General Notes".
- (b) At the Checkout Stage:
  - (i) On the Confirmation and Personal Details Pages, Viagogo:
    - (A) represented that the Initial Price was the "Ticket Price"; and
    - (B) stated "Not included: Handling Fee, GST and Booking Fee", but did not disclose the amount of those fees.
  - (ii) On the Delivery Method and Payment Method Pages, Viagogo:
    - (A) disclosed the Initial Price and the amount of the Handling Fee; and

- (B) stated “Not included: GST and Booking Fee”, but did not disclose the amount of that fee.
- (iii) Viagogo disclosed the Initial Price and the full amount of the Viagogo Fees:
  - (A) in some instances, on the Payment Details, Billing Address and Details Check Pages; and
  - (B) in all other cases, on the Details Check Page only (and in those cases, disclosed only the Initial Price and the amount of the Handling Fee on the Payment Details and Billing Address Pages).

**Particulars**

When the Website was accessed via a desktop or a laptop until in or about November 2017, Viagogo disclosed the full amount of the Viagogo Fees on the Details Check Page only. Consumers accessing the Website via a mobile device have only ever had the full amount of the Viagogo Fees disclosed to them on the Details Check Page.

- 29 Tickets sold through the Website were not available to be purchased at the Initial Price.
- 30 The Viagogo Fees materially increased the overall price payable by Consumers to purchase Tickets via the Website.

**Particulars**

For example:

- (a) For a Ticket to a Bruno Mars concert offered at the Initial Price of \$211.61, the defendant charged Viagogo Fees totalling \$61.25 (bringing the total price of the Ticket to \$272.86, a 29% increase from the Initial Price).
- (b) For a Ticket to a Lorde concert offered at the Initial Price of \$177.26, the defendant charged Viagogo Fees totalling \$51.72 (bringing the total price of the Ticket to \$228.98, a 29% increase from the Initial Price).
- (c) For a Ticket to an All Blacks match offered at the Initial Price of \$342.63, the defendant charged Viagogo Fees totalling \$102.28 (bringing the total price of the Ticket to \$444.91, a 30% increase from the Initial Price).
- (d) For a Ticket to a performance of West Side Story offered at the Initial Price of \$128.14, the defendant charged Viagogo Fees totalling \$40.12 (bringing the total price of the Ticket to \$168.26, a 31% increase from the Initial Price).
- (e) For a Ticket to an Ed Sheeran concert offered at the Initial Price of \$129.97, the defendant charged Viagogo Fees totalling \$40.48 (bringing the total price of the Ticket to \$170.45, a 31% increase from the Initial Price).

- (f) For a Ticket to a Celine Dion concert offered at the Initial Price of \$177AUD, the defendant charged Viagogo Fees totalling \$59AUD (bringing the total price of the Ticket to \$236AUD, a 33% increase from the Initial Price).
  - (g) For a Ticket to a match in the 2017 British & Irish Lions Tour offered at the Initial Price of \$233.48, the defendant charged Viagogo Fees totalling \$95.67 (bringing the total price of the Ticket to \$329.15, a 41% increase from the Initial Price).
  - (h) For a Ticket to a Calum Scott concert offered at the Initial Price of \$72, the defendant charged Viagogo Fees totalling \$30 (bringing the total price of the Ticket to \$102, a 42% increase from the Initial Price).
- 31 Viagogo had determined the method by which it calculated the Viagogo Fees before the Consumer commenced the purchasing process.
- 32 Viagogo failed to disclose the amount of the Viagogo Fees, or the method by which it calculated them, at the earliest opportunity in the purchasing process, in that:
- (a) The earliest opportunity to disclose the amounts of the Viagogo Fees arose when Viagogo knew either the exact amount of those fees, or the price range that the Viagogo Fees would fall within.
  - (b) The earliest opportunity to disclose the amount of the Handling Fee arose:
    - (i) where only an electronic delivery option was available, before the Consumer commenced the purchasing process; and
    - (ii) in cases where other delivery options were available, Viagogo:
      - (A) was able to disclose the manner in which it calculated those fees at the point the Consumer commenced the purchasing process; and
      - (B) was able to disclose the precise amount of the Handling Fee once the Consumer had made a selection at the Delivery Method Page.
  - (c) The earliest opportunity to disclose the amount of the GST and Booking Fee arose once the Consumer had selected a quantity of Tickets on the Ticket Selection Page.
- 33 Viagogo continues to make the Price Representations as at the date of this statement of claim.

### **Representations that Consumers were guaranteed to receive valid Tickets**

- 34 From at least 18 July 2016, Viagogo represented on the Event Page and at the Checkout Stage that:
- (a) "All tickets are fully protected by our guarantee";

- (b) “All Tickets Are 100% Guaranteed”; and
  - (c) “We guarantee that you’ll get valid tickets in time for the event”.
- (the **Guaranteed Tickets Representations**).

#### **Particulars**

Viagogo:

- (a) represented on the Event Page, that “All tickets are fully protected by our guarantee”;
- (b) made each of the Guaranteed Tickets Representations on the Confirmation, Personal Details, Delivery Method, Payment Method, Payment Details and Billing Address Pages; and
- (c) represented on the Order Confirmation Page that “All Tickets Are Fully Protected By Our Guarantee” and that Viagogo “guarantee that you’ll get valid tickets in time for the event”.

35 At all relevant times, clause 1.3 of Viagogo’s Terms and Conditions (the **Viagogo Terms and Conditions**) provided that in instances where a problem had arisen with the Tickets purchased by a Consumer, Viagogo could, in its “sole and absolute discretion” provide the Consumer with either:

- (a) “comparably priced” replacement Tickets; or
- (b) a refund instead of replacement Tickets.

36 Because Tickets offered for sale by Viagogo on the Website are resold, and it is not an official seller of Tickets, Viagogo cannot guarantee that:

- (a) the Tickets purchased by a Consumer will be valid for that event; and
- (b) it could provide valid replacement Tickets to the Consumer in time for the event, if the Tickets purchased by that Consumer were subsequently found to be invalid, because:
  - (i) Particular venues, ticketing agents and promoters have terms and conditions which allow them not to honour Tickets which have been purchased through resellers; and
  - (ii) Viagogo cannot otherwise guarantee that it will be able to obtain replacement Tickets from official ticketing sources, as it has no way to ensure that Tickets will still be available from those sources at the point when a Consumer seeks to rely on the guarantee.

37 Viagogo has not provided valid replacement Tickets to Consumers who have contacted it after purchasing invalid Tickets from the Website.

#### **Particulars**

The Commission has received 79 complaints from Consumers who have received invalid Tickets, and to whom Viagogo did not provide valid replacement Tickets

in time for the Consumer to attend the relevant event. Those Consumers include:

- (a) A Consumer who purchased a Ticket to the Electric Avenue Music Festival in Christchurch, and who contacted the official ticketing agent prior to the event to ascertain whether the Ticket she had purchased was valid. When the agent confirmed that the Ticket was invalid, the Consumer contacted Viagogo to make a claim under the guarantee. Viagogo refused to provide the Consumer with a replacement Ticket, and maintained that the guarantee did not apply where the Consumer had checked the Ticket validity with the venue before the day of the event. Viagogo then invited the Consumer to re-list the (invalid) Ticket on the Website.
- (b) The Consumer referred to in the particulars for paragraph 19 above, who was denied entry to a Bruno Mars concert after staff at the venue determined that the Tickets for her and her young child had already been used for entry by another concert-goer. When the Consumer made a claim under the guarantee, Viagogo only offered the Consumer an inferior standing-room only Ticket, which would have left her child unable to see the stage.

38 Viagogo continues to make the Guaranteed Tickets Representations as at the date of this statement of claim.

### **Representations that Viagogo was an “official” Ticket seller**

39 From at least 18 July 2016 to on or about 23 November 2017, Viagogo made representations in Google Advertisements that it was an official Ticket seller for particular events (the **Official Seller Representations**).

#### **Particulars**

The representations featured the name of the event, followed by the words “Buy Now, viagogo Official site”.

40 The overall impression created by the Official Seller Representations was that Viagogo was:

- (a) the official ticketing agent for the particular event specified;
- (b) affiliated with, or had approval from, the relevant team, musician, entertainer, event promoter, organiser or venue (as applicable, the **Host**), to act as the Host’s official ticketing agent for the particular event; and
- (c) that Tickets supplied by Viagogo were not resold Tickets.

41 At all relevant times, Viagogo was not, in respect of any events in New Zealand:

- (a) an official Ticket seller; or
- (b) a ticketing agent authorised as such by the Host of any such events.

- 42 At all relevant times, all Tickets offered for sale to Consumers by Viagogo on the Website were resold Tickets.
- 43 On or about 23 November 2017 Google imposed restrictions on Ticket resellers, preventing them from using the word “official” in Google Advertisements.

## **The unfair contract term**

### **The terms and conditions**

- 44 From at least 18 July 2016 to the present, Viagogo deemed Consumers accessing the Website to have agreed to the Viagogo Terms and Conditions.
- 45 In some instances Viagogo has also required Consumers to click a checkbox confirming that they have agreed to the Viagogo Terms and Conditions (the **Checkbox**).

### **Particulars**

Consumers are required to click the Checkbox in a number of instances, including when the Consumer accesses the Website using particular browsers (such as Internet Explorer or Safari) or when using a particular operating system (such as iOS).

- 46 In circumstances where the Checkbox did not appear on the Website, the Order Confirmation Page provides that, by choosing to proceed with a purchase, the Consumer is deemed to have acknowledged and accepted the Viagogo Terms and Conditions.

### **The impugned term**

- 47 The Viagogo Terms and Conditions include a term (the **Governing Law Term**) which provides as follows:

**Governing Law.** This Agreement shall be governed by and interpreted in accordance with Swiss laws, with the exclusion of its conflict of laws rules and provisions of the United Nations Convention on Contracts for the International Sale of Goods (CISG). All disputes arising out of or in connection with this Agreement, including disputes on conclusion, binding effect, amendment and termination, shall be resolved exclusively by the competent Courts of Geneva, Switzerland. We also have the option of taking legal action against You at Your domicile.

### **Particulars**

Clause 7.4 of the Viagogo Terms and Conditions.

## **First cause of action: the Scarcity Representations**

The plaintiff repeats paragraphs 1 to 27 and 34 to 43 above.

- 48 Viagogo:
- (a) is in trade in New Zealand; and further, or alternatively

- (b) made the Scarcity Representations in trade and to New Zealand Consumers.
- 49 The Scarcity Representations were made in connection with the supply of services to Consumers in New Zealand.
- 50 By making the Scarcity Representations, Viagogo habitually represented that Tickets to events were in short supply, when that was not necessarily the case.
- 51 By making the Scarcity Representations, Viagogo:
- (a) engaged in conduct that was misleading or deceptive, or was likely to mislead or deceive, in breach of s 9 of the FTA;
  - (b) engaged in conduct that was liable to mislead the public as to the quantity of Tickets available for particular events, in breach of s 11 of the FTA; and
  - (c) made a false or misleading representation as to the quantity of Tickets available for particular events, in breach of s 13(b) of the FTA.
- 52 Viagogo also misled Consumers, in breach of any or all of ss 9, 11, 13(e) and 13(i) of the FTA, by creating the impression that it was an official source of valid Tickets. That impression arose from:
- (a) the Scarcity Representations; and further, or alternatively
  - (b) when the Scarcity Representations were viewed in combination with the Guaranteed Tickets and/or Official Seller Representations.

**Accordingly, the Plaintiff seeks:**

- A. a declaration that, by making the Scarcity Representations, Viagogo breached any or all of ss 9, 11 and 13(b) of the FTA;
- B. an order under s 41(1)(a) of the FTA restraining Viagogo from continuing to make the Scarcity Representations;
- C. an order under s 42(1)(b) of the FTA requiring Viagogo to publish corrective statements; and
- D. costs.

**Second cause of action: the Price Representations**

The plaintiff repeats paragraphs 1 to 20 and 28 to 33 above.

- 53 Viagogo:
- (a) is in trade in New Zealand; and further, or alternatively
  - (b) made the Price Representations in trade and to New Zealand Consumers.
- 54 The Price Representations were made in connection with the supply of services to Consumers in New Zealand.

- 55 By making the Price Representations, Viagogo created the overall impression that Tickets were available for purchase at the Initial Price, when they were not because a Consumer purchasing Tickets through the Website would also be required to pay the Viagogo Fees for those Tickets.
- 56 The existence of, and the amount of, the Viagogo Fees was not disclosed at a sufficiently early stage in the Ticket purchasing process to correct the overall impression created by the Price Representations.
- 57 By making the Price Representations, Viagogo:
- (a) engaged in conduct that was misleading or deceptive, or was likely to mislead or deceive, in breach of s 9 of the FTA;
  - (b) engaged in conduct that was liable to mislead the public as to a characteristic of Tickets sold through the Website, in breach of s 11 of the FTA; and
  - (c) made a false or misleading representation with respect to the price of services, in breach of s 13(g) of the FTA.

**Accordingly, the Plaintiff seeks:**

- A. a declaration that, by making the Price Representations, Viagogo breached any or all of ss 9, 11 and 13(g) of the FTA;
- B. an order under s 41(1)(a) of the FTA restraining Viagogo from continuing to make the Price Representations;
- C. an order under s 42(1)(b) of the FTA requiring Viagogo to publish corrective statements; and
- D. costs.

**Third cause of action: the Guaranteed Tickets Representations**

The plaintiff repeats paragraphs 1 to 27 and 34 to 43 above.

- 58 Viagogo:
- (a) is in trade in New Zealand; and further, or alternatively
  - (b) made the Guaranteed Tickets Representations in trade and to New Zealand Consumers.
- 59 The Guaranteed Tickets Representations were made in connection with the supply of services to Consumers in New Zealand.
- 60 By making the Guaranteed Tickets Representations, Viagogo represented that Consumers would receive valid Tickets to particular events, when in fact:
- (a) the Viagogo Terms and Conditions also allowed Viagogo to discharge its obligations to those Consumers by providing them with a refund, instead of Tickets; and

- (b) Viagogo could not guarantee that it could provide Consumers with valid Tickets before the event, as it was not an official Ticket seller.

61 By making the Guaranteed Tickets Representations, Viagogo:

- (a) engaged in conduct that was misleading or deceptive, or likely to mislead or deceive, in breach of s 9 of the FTA;
- (b) engaged in conduct that was liable to mislead the public as to the characteristics and suitability for purpose of Tickets supplied through the Website, in breach of s 11 of the FTA;
- (c) made a false or misleading representation that Tickets had particular benefits, namely that Consumers were guaranteed entry to an event because invalid Tickets could be substituted for valid Tickets in time for the event, in breach of s 13(e) of the FTA; and
- (d) made a false or misleading representation regarding the existence and effect of the rights available to Viagogo and the Consumer under the Viagogo Terms and Conditions, in breach of s 13(i) of the FTA.

62 Viagogo also misled Consumers, in breach of any or all of ss 9, 11, 13(e) and 13(i) of the FTA, by creating the impression that it was an official source of valid Tickets. That impression arose from:

- (a) the Guaranteed Tickets Representations; and further, or alternatively
- (b) when the Guaranteed Tickets Representations were viewed in combination with the Scarcity and/or Official Seller Representations.

**Accordingly, the Plaintiff seeks:**

- A. a declaration that, by making the Guaranteed Tickets Representations, Viagogo breached any or all of ss 9, 11, 13(e) and 13(i) of the FTA;
- B. an order under s 41(1)(a) of the FTA restraining Viagogo from continuing to make the Guaranteed Tickets Representations;
- C. an order under s 42(1)(b) of the FTA requiring Viagogo to publish corrective statements; and
- D. costs.

**Fourth cause of action: the Official Seller Representations**

The plaintiff repeats paragraphs 1 to 27 and 34 to 43 above.

63 Viagogo:

- (a) is in trade in New Zealand; and further, or alternatively
- (b) made the Official Seller Representations in trade and to New Zealand Consumers.

64 The Official Seller Representations were made in connection with the supply of services to Consumers in New Zealand.

- 65 By making the Official Seller Representations, Viagogo represented that it was an official seller of Tickets, when it was not.
- 66 By making the Official Seller Representations, Viagogo:
- (a) engaged in conduct that was misleading or deceptive, or was likely to mislead or deceive, in breach of s 9 of the FTA;
  - (b) engaged in conduct that was liable to mislead the public as to the nature of the Tickets supplied through the Website and of its ticketing services, in breach of s 11 of the FTA; and
  - (c) made a false or misleading representation that Viagogo had the approval or endorsement from the Host for the particular event, in breach of s 13(e) of the FTA.
- 67 Viagogo also misled Consumers, in breach of any or all of ss 9, 11, 13(e) and 13(i) of the FTA, by creating the impression that it was an official source of valid Tickets. That impression arose from:
- (a) the Official Seller Representations; and further, or alternatively
  - (b) when the Official Seller Representations were viewed in combination with the Scarcity and/or Guaranteed Tickets Representations.

**Accordingly, the Plaintiff seeks:**

- A. a declaration that, by making the Official Seller Representations, Viagogo breached any or all of ss 9, 11 and 13(e) of the FTA;
- B. an order under s 42(1)(b) of the FTA requiring Viagogo to publish corrective statements; and
- C. costs.

**Fifth cause of action: the Governing Law Term**

The plaintiff repeats paragraphs 1 to 20 and 44 to 47 above.

- 68 From at least 18 July 2016 to the present, Viagogo has provided for the Governing Law Term in the Viagogo Terms and Conditions.
- 69 Consumers purchasing Tickets on the Website are required to accept the Viagogo Terms and Conditions (including the Governing Law Clause).
- 70 The Viagogo Terms and Conditions are a consumer contract.
- 71 The Viagogo Terms and Conditions are a standard form contract.

**Particulars**

- The Commission relies on the presumption at s 46J(3) of the FTA.
- 72 The Governing Law Term causes a significant imbalance in the parties' rights and obligations arising under the Viagogo Terms and Conditions.

### **Particulars**

- (a) As a choice of forum clause, the Governing Law Term:
  - (i) gives Viagogo the right to bring proceedings against New Zealand Consumers in either Switzerland or New Zealand, at Viagogo's discretion; but
  - (ii) provides that New Zealand Consumers may only bring proceedings against Viagogo in the competent Courts of Geneva, Switzerland;
- (b) As a choice of law clause, the Governing Law Term requires disputes to be heard in accordance with Swiss law, which:
  - (i) would require New Zealand Consumers to incur additional costs of consulting and instructing counsel with knowledge of Swiss law; and
  - (ii) if Viagogo elects to have the dispute heard in New Zealand, Consumers would be required to incur additional costs of obtaining affidavit evidence on the effect of Swiss law; and
- (c) The Governing Law Term is a term of a kind referred to in s 46M(k) of the FTA, in that the term has the effect of limiting a New Zealand Consumer's right to sue Viagogo.

- 73 The Governing Law Term is not reasonably necessary in order to protect the legitimate interests of Viagogo, being the party who would be advantaged by the term if it were applied, enforced or relied on.

### **Particulars**

The Commission relies on the presumption at s 46L(3) of the FTA.

- 74 The Governing Law Term would cause detriment to Consumers if it were to be applied, enforced or relied on by Viagogo.

### **Particulars**

The Governing Law Term would cause detriment to New Zealand Consumers in that:

- (a) the term has the effect of making proceedings by New Zealand Consumers against Viagogo prohibitively expensive; and
- (b) by making proceedings prohibitively expensive, the term effectively precludes Consumers from bringing proceedings against Viagogo to enforce Viagogo's obligations under the Viagogo Terms and Conditions.

- 75 By virtue of the matters pleaded at paragraphs 68 to 74 above, the Governing Law Term is an unfair contract term within the meaning of s 46L of the FTA.

**Accordingly, the plaintiff seeks:**

- A. a declaration pursuant to s 46I(1) of the FTA that the Governing Law Term is an unfair contract term; and
- B. costs.

This document is filed by **Nicholas Fraser Flanagan**, solicitor for the plaintiff, of the firm Meredith Connell. The address for service of the plaintiff is Level 5, 4 Graham Street, Auckland Central, Auckland 1010.

Documents for service on the Commerce Commission may be:

- (a) emailed to [nick.flanagan@mc.co.nz](mailto:nick.flanagan@mc.co.nz) and [andy.luck@mc.co.nz](mailto:andy.luck@mc.co.nz); or
- (b) if email is not practical:
  - (i) posted to Meredith Connell (attn. Nick Flanagan/Andy Luck) at PO Box 90750, Victoria Street West, Auckland 1142; or
  - (ii) left at the solicitor's address as noted above (attn. Nick Flanagan/Andy Luck).