IN THE COURT OF APPEAL OF NEW ZEALAND

CA312/2011
[2012] NZCA 383

BETWEEN	COMMERCE COMMISSION Appellant
AND	VISY BOARD PTY LIMITED Respondent

CA351/2011

AND BETWEEN	JOHN RODERICK STEPHEN CARROLL Appellant
AND	COMMERCE COMMISSION Respondent

Hearing:	18-19 June 2012
Court:	Arnold, Stevens and Wild JJ
Counsel:	F M R Cooke QC, B Hamlin and R J Hart for Appellant in CA312/2011 and Respondent in CA351/2011 A R Galbraith QC, S C Keene and S A Cunliffe for Respondent and Cross Appellant in CA312/2011 S J Mills QC and W K Blennerhassett for Appellant in CA351/2011
Judgment:	31 August 2012 at 3.00 pm

JUDGMENT OF THE COURT

A The appeal in CA312/2011 is allowed.

B The cross appeal by the respondent in CA312/2011 is dismissed.

C The respondent in CA312/2011 must pay the appellant costs for a complex appeal on a band A basis and usual disbursements.

D The appeal by the appellant in CA351/2011 is dismissed.

E **The appellant in CA351/2011 must pay the respondent costs for a standard appeal on a band A basis and usual disbursements.**

F **The following orders are consequential upon the outcome of the appeals:**

(a) **If the Commission files and serves a third amended statement of claim, restricted to pleading those causes of action against Visy Board that we have determined can proceed, and to those causes of action against Mr Carroll that Heath J determined can proceed, then the Commission's applications to set aside the protests to jurisdiction shall be granted. The third amended statement of claim shall be filed and served on or before 28 September 2012.**

(b) **If a third amended statement of claim complying with order (a) is not filed and served on or before 28 September 2012, the Commission's applications to set aside the protests to jurisdiction will be dismissed.**

(c) **The case is remitted to the High Court for further case management.**

G **By consent the confidentiality orders made by Heath J in the High Court are to continue provided however that such orders are varied by order of this Court to the extent only that the reasons set out in this judgment may be published in the news media. Any application to vary or set aside such orders is to be made to the High Court.**

REASONS OF THE COURT

(Given by Stevens J)

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A cartel extending to New Zealand?

[1] The respondent, Visy Board Pty Ltd (Visy Board), and Amcor Ltd (Amcor Australia) are the major suppliers of corrugated fibreboard packaging (CFP) in the Australian market. In November 2007 Visy Board and three of its senior executives (including the appellant, Mr Carroll) admitted in proceedings brought in the Federal Court of Australia by the Australian Competition and Consumer Commission (ACCC) participation in cartel conduct between Visy Board and Amcor Australia extending for almost five years.[1] As a result Heerey J granted declarations and

[1] *Australian Competition and Consumer Commission v Visy Industries Holdings Pty Ltd (No 3)* [2007] FCA 1617, (2007) 244 ALR 673 [Federal Court judgment].

imposed pecuniary penalties of $36 million on Visy Board and $500,000 on Mr Carroll. The Judge found that the cartel conduct involved was "inherently likely to cause loss".[2] He said that this was conduct:[3]

> … run from the highest level in Visy, a very substantial company. It was carefully and deliberately concealed. It was operated by men who were fully aware of its seriously unlawful nature.

[2] These findings were based on an agreed statement of facts (ASOF) detailing the nature of the CFP market in Australia, the nature and scope of an overarching understanding between the two competitors and the conduct giving rise to the 69 contraventions of the Trade Practices Act 1974 (Cth) by Visy Board and 49 contraventions by Mr Carroll.[4] The significance of these contraventions is illustrated both by the size of the pecuniary penalties imposed and the importance of the CFP market in general. Heerey J observed:[5]

> Every day every man, woman and child in Australia would use or consume something that at some stage has been transported in a cardboard box. The cartel in this case therefore had the potential for the widest possible effect.

[3] A critical question arising in this appeal is whether such cartel conduct was extended by the parties to a market in New Zealand. A proceeding has been brought by the Commerce Commission alleging that Visy Board and Mr Carroll, among others, contravened provisions of the Commerce Act 1986 (the Act). As both of these parties are based in Australia, the Commission was required to serve the proceedings (first launched in November 2007) in Australia. Protests to the jurisdiction of the New Zealand High Court followed. At issue therefore is whether the Court has jurisdiction to hear and determine the alleged contraventions of the Act.

[4] The protests to jurisdiction were heard by Heath J, who dismissed significant parts of the Commission's application to set aside such protests by Visy Board and

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2 At [314].

3 At [315].

4 Other senior executives were also the subject of pecuniary penalty orders. Neither Amcor Australia nor any of its executives were the subject of the proceedings, as they had reported the contraventions to the Australian Competition and Consumer Commission [ACCC] and received the benefit of the ACCC leniency programme. Amcor Australia made a request for leniency in New Zealand which was granted by the Commerce Commission in December 2004.

5 At [312].

Mr Carroll.[6] Only two central allegations made by the Commission were allowed to continue. Otherwise the protests to jurisdiction were upheld. The Commission has appealed against the upholding of the protests by Visy Board. There is a cross-appeal by Visy Board against the ruling that the two central allegations were allowed to continue.[7] Mr Carroll has appealed against the decision not to uphold the protest by him in respect of the central allegations. There is no appeal by the Commission against the upholding of the protest on the other causes of action against Mr Carroll.

[5] We begin by detailing the broad background facts. We then expand upon the possible avenues by which the Commerce Commission may establish jurisdiction. Those are r 6.27(2) of the High Court Rules (HCR), and ss 90 and 4 of the Act. We then consider the facts relating to the CFP markets in New Zealand, as ascertained from the ASOF filed in the Federal Court proceeding, the second amended statement of claim filed in the New Zealand proceeding,[8] the affidavits filed by the Commission and the annexed exhibits. Finally, we consider which, if any, of the jurisdictional avenues apply in relation to each cause of action. The issues before us turn largely on our assessment of the evidence said to support the Commission's claims.

Some more background

[6] The customers of both Visy Board and Amcor Australia include a number of major customers who themselves transact business on both sides of the Tasman. They include well known companies like Lion Nathan Ltd, Goodman Fielder Ltd and Coca-Cola Amatil Ltd, conveniently referred to as trans-Tasman purchasers of CFP. Both Visy Board and Amcor Australia have New Zealand subsidiaries, Visy Board (NZ) Ltd (Visy Board NZ) and Amcor Packaging New Zealand Ltd (Amcor NZ) respectively. There are three major suppliers of CFP in New Zealand, the Visy Board interests, the Amcor interests and Carter Holt Harvey Ltd (CHH).

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6 *Commerce Commission v Visy Board (New Zealand) Ltd (No 2)* (2011) 13 TCLR 166 (HC) [High Court judgment].

7 Visy Board also seeks to uphold the decision of Heath J on the protests upheld on grounds other than those relied upon in the judgment.

8 Filed on 8 October 2010 on the eve of the protest to jurisdiction hearing.

Mr Carroll was the general manager of Visy Board from early 2000 until December 2004; previously he had been the general manager of Visy Board NZ.

[7] In the late 1990s there had been a price war in Australia for the supply of CFP products. Competition between Visy Board and Amcor Australia was intense resulting in depressed prices and low margins for both suppliers. As a result of a series of private meetings in Melbourne between January and April 2000 involving Mr Debney, the chief executive of Visy Board, and Mr Brown, the managing director of Amcor Australia, a market sharing and price fixing agreement was entered into. In the Federal Court judgment this agreement is referred to as the overarching understanding. It applied, according to the ASOF, to the Australian CFP market. It contained the following provisions:

(a) Visy Board and Amcor Australia would permit each other to maintain approximately their then current share of the CFP market;

(b) Visy Board and Amcor Australia would not seek to enter into contracts for the supply of CFP with each other's principal CFP customers;

(c) if, for one reason or another, Visy Board did enter into a contract for the supply of CFP with a principal CFP customer of Amcor Australia, then Visy Board would not prevent or seek to prevent Amcor Australia from entering into a supply contract with a customer or customers of Visy Board in order to replace the share of the CFP market that it had lost as a result of losing the supply contract to Visy;

(d) the converse would apply when Amcor Australia entered into a contract with a principal CFP customer of Visy Board;

(e) Visy Board and Amcor Australia would, in future, collaborate with each other in order to increase the prices at which they supplied CFP;

(f) Visy Board would appoint Mr Carroll as its nominated contact person with Amcor Australia to effect the implementation of the overarching understanding; and

(g) Amcor Australia would appoint Mr Laidlaw as its nominated contact person with Visy Board.[9]

[8] The overarching understanding therefore manifested cartel conduct of various types including market allocation, price fixing/controlling, tender-rigging and measures to ensure compliance. The commercial purpose behind this collusive conduct was to ensure that Visy Board and Amcor Australia would continue to enjoy the same market share held by each in early 2000. The agreement was that neither would poach the other's customers and prices for CFP would be gradually increased from their then current unsustainable levels.

[9] From mid 2000 Visy Board and Amcor Australia gave effect to the overarching understanding. Mr Carroll met with Messrs Laidlaw and Hodgson of Amcor Australia to discuss how the understanding would be implemented. The flavour of how the cartel operated is demonstrated by the following findings of Heerey J:

> [51] Between July 2000 and November 2004 Mr Carroll and Mr Laidlaw met some 30–40 times to discuss issues or matters arising from the over-arching understanding. These meetings were held at Rockman's Regency Hotel in Melbourne, the Tudor Motel in Box Hill, the Elizabethan Lodge in Blackburn North, Westerfolds Park on Fitzsimons Lane, Templestowe, the Templestowe Park on Porter St, Templestowe, the Cherry Hill Tavern in East Doncaster and Myrtle Park on Severn St, North Balwyn. Mr Carroll and Mr Laidlaw also discussed matters arising from the over-arching understanding by telephone on numerous occasions. The telephone discussions were generally initiated from public telephones and received on Mr Carroll's or Mr Laidlaw's mobile telephones. …
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> [52] In late 2000 Mr Carroll provided Mr Laidlaw with an Optus pre-paid mobile telephone and the telephone number for it and a new mobile number on which Mr Laidlaw was to contact him. Mr Carroll told Mr Laidlaw he should use the Optus mobile for the purpose of contacting him in relation to the over-arching understanding.

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9 The terms are taken from the Federal Court judgment at [41].

[10] In Australia the overarching understanding was given effect to in a number of ways. Between 2000 and 2003 Visy Board and Amcor Australia arrived at annual price increase understandings whereby regular price increases were implemented.[10] In addition customer price understandings were arrived at and given effect to. Examples involving major customers included Goodman Fielder and Nestlé in 2001–2002[11] and Fosters and Coca-Cola in 2001.[12] The provision concerning maintaining of market share resulted in several "compensation understandings" between the two competitors. An example of this type of contravention arose following the loss by Visy Board of its major customer Lion Nathan to Amcor Australia in early 2001. It gave rise to a compensation understanding entered into and given effect to with Inghams Enterprises Pty Ltd.[13]

[11] There is a market for CFP in New Zealand. CFP is used as a primary packing medium for the bulk supply of products like fresh meat, fruit and vegetables. It is also a secondary packaging medium for the supply of products like beverages, processed foods, consumer goods and manufactured products. At the relevant time the New Zealand participants on the manufacturing and supply side were Visy Board NZ, Amcor NZ and CHH. We are not concerned with any question of market definition, save to observe that the pleaded markets are alternatively the North Island CFP market, the South Island CFP market, the market in New Zealand for the manufacture and supply of CFP to national multi site customers and the New Zealand trans-Tasman customer market.[14]

[12] As we will later describe, the CFP market in New Zealand was, like Australia, unprofitable in 1999–2000. It was in the interests of the major suppliers to take steps to address that problem. In that context the Commission has alleged that Visy Board and Amcor Australia entered into an overarching understanding in relation to trans-Tasman customers operating in any one or more of the New Zealand

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10 Federal Court judgment at [61]–[92].
11 At [93]–[108].
12 At [109]–[122].
13 At [194]–[207].
14 We note that there is in the second amended statement of claim no pleading of a "New Zealand trans-Tasman market". It is not therefore necessary for us to consider the legal question addressed by Heath J whether s 27(1) of the Commerce Act 1986 [the Act] extends to a trans-Tasman market: High Court judgment at [40]–[48]. None of the parties before us sought to support the Judge's analysis on this issue.

CFP markets. Such understanding is said to be in terms broadly similar to those described at [7] above, except that it related to markets and customers in New Zealand. It is said to give rise to various contraventions of the Act, including breaches of s 27(1) and (2) of the Act though conduct entering into and giving effect to such overarching understanding. The Commission also alleges Visy Board and Amcor Australia entered into and/or gave effect to eight further price fixing understandings in respect of major customers in the New Zealand market including Coca-Cola, Goodman Fielder, Inghams, Mainland and Fonterra.[15]

Jurisdiction – applicable principles

Generally

[13] As a company, Visy Board must act through human actors comprising its directors or officers, and servants or agents of the body corporate. In each case the company will be responsible for such conduct where the representative is acting within the scope of his or her actual or apparent authority.[16] Establishing jurisdiction for alleged contraventions of the Act depends, as we will explain, upon the existence of acts or omissions related to conduct in New Zealand. Where the liability of a body corporate is in issue, it will be necessary for the Commission to show that persons for whose conduct the company is responsible acted or engaged in conduct in one of three distinct ways.

[14] The first involves an act or omission that was done or occurred in New Zealand. This may found jurisdiction under the provisions of r 6.27 of the HCR. But because such conduct will have been carried out by directors, employees or agents, this will also engage the provisions of s 90(2)(a) of the Act.[17] The second basis of jurisdiction could be through the application of s 90(2)(b) where a body

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15 A more detailed review of the pleadings will be necessary when we assess the evidence against the Commission's allegations to determine questions of jurisdiction.

16 This concept of corporate responsibility through human actors is recognised in the provisions of the Act. For example, s 90(1) relates to proof of the state of mind of a body corporate and s 90(2)(a) deals with vicarious liability of the body corporate for the conduct of its directors, employees and others.

17 Section 90(2)(a) provides that any conduct engaged in on behalf of a body corporate by a director, servant or agent of the body corporate acting within the scope of actual or apparent authority shall be deemed to have been engaged in also by the body corporate.

corporate may be liable for conduct engaged in on its behalf by another person or legal entity at the direction or with the consent or agreement of the body corporate.[18] The third possibility involves the application of s 4(1) of the Act to conduct that occurred outside New Zealand. We will now elaborate on each of these possible bases for founding jurisdiction.

High Court Rules

[15] Where proceedings are served out of New Zealand without leave and the parties protest the Court's jurisdiction under r 5.49 of the HCR, r 6.29(1) applies. The Court must dismiss the proceeding unless the party serving the proceedings, here the Commission, establishes first that there is a good arguable case that the claim falls wholly within one or more of the paragraphs of r 6.27 of the HCR and second that the Court should assume jurisdiction by reason of the matters set out in r 6.28(5)(b) to (d). These include whether there is a serious issue to be tried on the merits.[19] Counsel for both Visy Board and Mr Carroll realistically accepted that, if the Court found that any of the claims fell wholly within one or more of the types of claim in r 6.27, then the further test of whether there was a serious question to be tried on the merits of such claims would also be satisfied.

[16] The Commission relies first on r 6.27(2)(j)(i). This rule provides for service outside the jurisdiction where a claim arises under an enactment and the act or omission to which the claim relates was done or occurred in New Zealand. In determining whether there is a "good arguable case" that the claim falls within one of the paragraphs of r 6.27, the test described by this Court in *Wing Hung Printing Co Ltd v Saito Offshore Pty Ltd* applies:[20]

> It is clear … that the good arguable case test does not require the plaintiff to establish a prima facie case. This recognises that disputed questions of fact cannot be readily resolved on affidavit evidence. On the other hand, there must be a sufficiently plausible foundation established that the claim falls

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[18] An example of jurisdiction arising on this basis is seen in the decision of this Court in *Kuehne + Nagel International AG v Commerce Commission* [2012] NZCA 221.

[19] This is the two-stage inquiry described in *Kuehne + Nagel International AG v Commerce Commission* at [11]–[16].

[20] *Wing Hung Printing Co Ltd v Saito Offshore Pty Ltd* [2010] NZCA 502, [2011] 1 NZLR 754 at [41] (footnotes omitted).

> within one or more of the headings in r 6.27(2). The Court should not engage in speculation.

[17] This Court also stated in *Stone v Newman*:[21]

> What is a good arguable case is a straightforward test which comes down to a matter of judgment, in all the circumstances, having regard to the principle of restraint concerning a foreign citizen resident overseas.

[18] Applying the two-stage inquiry in this case requires us to determine whether there is a good arguable case that the overarching understanding (admitted in the Federal Court proceedings) extended to New Zealand markets and trans-Tasman customers operating in those markets. If the answer is yes, the next step is to determine whether there is a good arguable case in relation to allegations that Visy Board acted directly in New Zealand in the sense that an act or omission to which the claim relates was done or occurred in New Zealand.[22] Where it is alleged that Visy Board gave effect to the overarching understanding in New Zealand, this may or may not occur through qualifying conduct by Visy Board or its servants in New Zealand (relying on s 90(2)(a)). Where there is evidence to show a good arguable case of direct action in New Zealand by Visy Board, the Commission does not need to rely on conduct by attribution under s 90(2)(b) of the Act or s 4 dealing with the application of the Act to conduct outside New Zealand.

Section 90(2)(b) of the Act

[19] The second method of establishing jurisdiction is by demonstrating that there is a good arguable case that Visy Board acted in a manner through Visy Board NZ to attract liability under s 90(2)(b) of the Act. This subsection provides:

> **90 Conduct by servants or agents**
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> …
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> (2) Any conduct engaged in on behalf of a body corporate—
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> …
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> (b) by any other person at the direction or with the consent or agreement (whether express or implied) of a director,

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21 *Stone v Newman* (2002) 16 PRNZ 77 (CA) at [26].

22 Rule 6.27(2)(j)(i) of the High Court Rules [HCR].

> servant, or agent of the body corporate, given within the scope of the actual or apparent authority of the director, servant or agent—
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> shall be deemed, for the purposes of this Act, to have been engaged in also by the body corporate.

[20] The views of this Court on s 90(2)(b) were discussed in *Kuehne + Nagel International AG*.[23]

[21] The principles enunciated there were not debated before us. Rather the focus was on factual issues and whether the Commission could show a good arguable case on the evidence presently before the Court that Visy Board NZ was acting on behalf of Visy Board. We accept the principle that a subsidiary, such as Visy Board NZ, does not carry on business as an agent for its parent merely as a result of the legal and commercial capacity of a parent to control the subsidiary and the fact that the parent is involved in a cartel arrangement.[24] But this does not detract from the purpose of s 90(2)(b) as a statutory provision aimed at facilitating the proof of the responsibility of a company for the acts of others acting at the direction or with the consent or agreement of the company. Put another way, the issue is whether there is a good arguable case of conduct being engaged in in New Zealand on behalf of the company sought to be made liable.[25] Thus liability under the Act may be attributed

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23 *Kuehne + Nagel International AG v Commerce Commission* at [37]–[40].

24 As discussed by Harrison J in *Bomac Laboratories Ltd v F Hoffman-La Roche Ltd* (2002) 7 NZBLC 103,627 (HC) at [67]–[70].

25 See *Walplan Pty Ltd v Wallace* (1985) 8 FCR 27 at 37: "The phrase "on behalf of" is not one with a strict legal meaning and it is used in a wide range of relationships. The words are not used in any definitive sense capable of general application to all circumstances which may arise and to which the subsection has application. This must depend upon the circumstances of the particular case ... In the context of s 84(2) [of the Trade Practices Act 1974 (Cth)] the phrase suggests some involvement by the person concerned with the activities of the company. The words convey a meaning similar to the phrase "in the course of the body corporate's affairs or activities". The words "on behalf of" also encompass acts done by a corporation's servants in the course of their employment, but those words are not confined to the notion of the master/servant relationship. Section 84(2) refers to conduct by directors and agents of a body corporate as well as its servants. Also, the second limb of the subsection extends the corporation's responsibility to the conduct of other persons who act at the behest of a director, agent or servant of the corporation. Hence the phrase "on behalf of" casts a much wider net than conduct by servants in the course of their employment, although it includes it."
The above passage was cited with approval by Lindgren J in *NMFM Property Pty Ltd v Citibank Ltd* [2000] FCA 1558, (2000) 107 FCR 270 at [1242]. The Judge in that case held: "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."

to a company such as Visy Board where conduct in New Zealand on its behalf is engaged in by an agent such as Visy Board NZ.

Section 4 of the Act

[22] The third method of establishing jurisdiction is under s 4 of the Act whereby the provisions of the Act extend to conduct outside New Zealand if certain statutory requirements are met. It is s 4 that demarcates the extraterritorial reach of the Act. As Tipping J said in *Poynter v Commerce Commission*:[26]

> It is important to recognise that the Act is a code and, for extraterritoriality purposes, the court should confine itself to the express terms of the Act and any additional extraterritorial effect which flows as a matter of inevitable logic from those express terms read contextually in the light of the purposes of the Act.

[23] Section 4(1) of the act provides:

> **4 Application of Act to conduct outside New Zealand**
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> (1) This Act extends to the engaging in conduct outside New Zealand by any person resident or carrying on business in New Zealand to the extent that such conduct affects a market in New Zealand.

[24] The interpretation of s 4 was the subject of comprehensive submissions from counsel for the Commission and Visy Board. We set out our views below. We approach the task of analysing the interpretation and scope of s 4 in the light of the "key principle" identified by the Supreme Court in *Poynter v Commerce Commission* that:[27]

> … the courts should not treat legislation as having extraterritorial effect unless and then only to the extent Parliament has made that clear by means of express words or necessary implication.

[25] That said, the Supreme Court was not required to address the meaning of s 4(1) of the Act because the Commission did not rely on that section as a basis for

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[26] *Poynter v Commerce Commission* [2010] NZSC 38, [2010] 3 NZLR 300 at [46]. Tipping J was speaking on behalf of a plurality of four Judges.

[27] At [38].

jurisdiction of the New Zealand courts over Mr Poynter's conduct.[28] The scope of s 4 turns on the words used read contextually in the light of the purposes of the Act. This requires analysis in the present case of the words "carrying on business in New Zealand" and the phrase "to the extent that such conduct affects a market in New Zealand". On each of these two points, there is limited authority addressing the use of such language in the Commerce Act context.

[26] Section 4(1) extends the jurisdiction of the Act only to persons who are resident in New Zealand or are "carrying on business" there. Counsel for the Commission submitted that whether a company is "carrying on business" in New Zealand is a question of fact involving a wide variety of factors, not one of which is essential for making a positive finding.[29] Such factors would include conducting business in New Zealand, dealing directly with customers here, regular visits by staff and communicating directly with customers and the local division. Counsel for Visy Board, however, submitted that a continuous and systematic physical presence in New Zealand is needed before a company is found to be "carrying on business" here.

[27] Section 4 distinguishes "residence" from "carrying on business" in New Zealand. Jurisdiction can be founded on one or the other. One relevant factor is that the word "business" is given a broad definition in s 2(1) of the Act. It means any undertaking that is carried on for gain or reward, or any undertaking in the course of which goods or services are acquired or supplied, or any interest in land is acquired or disposed of, otherwise than free of charge. A further factor is that the second requirement of s 4(1) – that the conduct must affect a market in New Zealand – limits the extra-territorial reach of the Act, meaning that there is less need to interpret "carrying on business" narrowly. Case law from Australia supports the proposition that whether or not a company is "carrying on business in New Zealand" requires a contextual analysis. In *Bray v F Hoffman-La Roche Ltd*[30] Merkel J in the Federal

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[28] As confirmed by Elias CJ at [4]. We respectfully disagree with the suggestion of Heath J (High Court judgment at [10]) that the Supreme Court in *Poynter v Commerce Commission* authoritatively determined the scope of s 4.

[29] Citing Matt Sumpter with Ben Hamlin and James Mellsop *New Zealand Competition Law and Policy* (CCH, Auckland, 2010) at 432 as an authority.

[30] *Bray v F Hoffman-La Roche Ltd* [2002] FCA 243, (2002) 118 FCR 1. As noted in *Poynter v Commerce Comission*, the decision of Merkel J in *Bray* was appealed, but the decision of the

Court of Australia commented on the interpretation of s 5(1) of the Trade Practices Act, which extended the application of parts of the Trade Practices Act to conduct outside Australia by bodies "carrying on business in Australia". Merkel J reasoned that the phrase should be given "its ordinary or usual meaning"[31] and that whether a corporation is carrying on business within Australia is "very much a question of fact".[32] He found that it did not require a foreign company to have a place of business in the jurisdiction.[33] The Judge signalled, however, that the test was not open-ended, in that "carrying on business" will usually involve a series or repetition of acts.[34]

[28] Observations of Croft J in *Sunland Waterfront (BVI) Ltd v Prudentia Investments Ltd (No 2)* support this proposition.[35] The ordinary and natural meaning of "carrying on" also suggests that the conduct in question must have some degree of continuity or repetition. We agree that such a limit on the phrase is necessary as it would run counter to the policy of the Act if jurisdiction extended to those who had only a transitory or tangential connection with New Zealand.

[29] In summary, we consider that whether or not a person is "carrying on business in New Zealand" is a question of fact where a number of factors are relevant. But the analysis is not confined to whether or not the company maintained a systematic and continuous physical presence in New Zealand; that states the test too highly and does not serve the purpose of the Act. We add that the approach to be taken requires recognition of the practical modes of transacting business. The reality of modern day commerce necessitates dealing with consumers through a variety of methods of communication including the internet. Inevitable developments in

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Full Court of the Federal Court did not affect the relevant aspects of Merkel J's reasoning regarding the carrying on business point (see *Bray v F Hoffman-La Roche Ltd* [2003] FCAFC 153, (2003) 130 FCR 317).

31 At [60].

32 At [62].

33 At [63].

34 At [62], citing *Thiel v Commissioner of Taxation of the Commonwealth of Australia* (1990) 171 CLR 338 at 350.

35 *Sunland Waterfront (BVI) Ltd v Prudentia Investments Pty Ltd (No 2)* [2012] VSC 239 at [380]. The Judge cited *R T & Y E Falls Investments Pty Ltd v New South Wales* [2001] NSWSC 1027 at [78]. *Sunland* involved consideration of legislation concerning fair trading practices that also extended jurisdiction to those "carrying on business". There is also an extraterritoriality provision in the New Zealand Fair Trading Act 1986 that extends jurisdiction to those carrying on business in New Zealand: s 3.

globalisation of commerce are also relevant. The definition of market in s 3(1A) underscores these factors.

[30] The interpretation outlined also accords with the purpose of the Act. This is "to promote competition in markets for the long-term benefit of consumers within New Zealand".[36] The promotion of competition is, as this Court has previously said,[37] based on the premise that society's resources are best allocated in a competitive market where rivalry between firms ensures maximum efficiency in the use of resources. This purpose of the Act is arguably not well served by Visy Board's interpretation of "carrying on business", which would significantly narrow the reach of the Act by insisting on continuous and systematic physical presence.

[31] The second limb of the test under s 4(1) provides that the Act only extends to conduct outside New Zealand to the extent that such conduct "affects a market in New Zealand".[38] Counsel for the Commission argued that "affects" in s 4(1) requires the conduct in question to "relate to" a market in New Zealand. This would ensure that the Act does not apply to issues that only concern a foreign market. Counsel for Visy Board, however, submitted that conduct "affects" a market in New Zealand only if a demonstrable effect on that market can be shown.

[32] One consequence of Visy Board's interpretation is that it only allows s 4(1) to be used in conjunction with provisions of the Act that require an actual effect to be produced. It would not cover conduct that is purposive only, such as simply entering into an anti-competitive agreement that is directed at New Zealand markets (under s 27(1)) but without any actual immediate effect on a New Zealand market. Such an interpretation would in our view introduce an unwarranted restriction on the scope of this method of establishing jurisdiction.[39] Cartel conduct has a damaging impact

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36 Section 1A of the Act.

37 *Tru Tone Ltd v Festival Records Retail Marketing Ltd* [1988] 2 NZLR 352 (CA) at 358, cited in *Giltrap City Ltd v Commerce Commission* [2004] 1 NZLR 608 (CA) at [76] per McGrath J.

38 An equivalent provision does not appear in s 5(1) of the Competition and Consumer Act 2010 (Cth), formerly the Trade Practices Act 1974.

39 We acknowledge that there might arguably be good reason for Parliament to have limited the extended jurisdiction to conduct which actually affects a market in New Zealand rather than including conduct which has that purpose but has no effect. The argument would be that if jurisdiction is to be extended there must be proper justification for doing so, and the fact that the conduct has an actual effect on a market in New Zealand is a good reason. The same imperative does not apply where there is purpose but no direct effect. But we are not persuaded that a

upon society: it results in high prices, misallocation of resources, and corrodes the incentive for firms to innovate.[40] As Heerey J observed about the conduct in this case:[41]

> Cartel behaviour of the kind with which this case is concerned is extremely destructive of the competition on which the prosperity of a free market economy depends. Often the profits can be immense, and the risk of detection slight. Of its nature, cartel behaviour is likely to occur in secret and between parties who seek mutual benefit.

[33] Visy Board submitted that its interpretation of "affects" accords with the dictionary meaning of the word. In the Oxford English Dictionary the word "affect" means "to have an effect on, either materially or otherwise" or "to have a material effect on; to make a material impression on; to influence, move, touch". But "affects" is not a legal term of art and in our view may also bear the meaning "relates to". Visy Board's interpretation essentially seeks to read words into s 4(1) that are not there: an effect does not need to be "demonstrable" in order for it to have affected an object, namely, a market in New Zealand. If non-authorised anti-competitive behaviour is to be properly enforced in New Zealand for the benefit of consumers, then an interpretation of "affects", which attaches to conduct that is both effects-based and purposive, is warranted. This is consistent with the fact that the Act is a code.[42]

[34] A requirement that the conduct should relate to a market permits s 4(1) to be used in conjunction with all substantive provisions of the Act, even if the conduct in question is only directed at a market in New Zealand.[43] That accords with the

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contextual interpretation supports this approach.

40 *New Zealand Competition Law and Policy* at 127. See also Alix Boberg "Fixing the Price at Liberty: The Case for Imprisoning Price-Fixers in New Zealand" (2010) 16 Auckland U L Rev 81 at 81–82: "The modern international consensus is that hard-core cartels are severely detrimental to economic welfare; labelled the most 'egregious violations of competition law' by the Organisation for Economic Co-operation and Development (OECD), as the 'supreme evil of antitrust' by the United States Supreme Court, and as a 'major and largely invisible drain on the world's economy' by the United Kingdom Department of Trade and Industry in its 2001 White Paper. By inflating prices, cartels deceitfully transfer wealth from consumers to the producer, to the detriment of the consumer surplus and allocative efficiency". (Footnotes omitted.)

41 Federal Court judgment, above n 1, at [306].

42 *Poynter v Commerce Commission* at [46].

43 See Legislation Advisory Committee *Legislation Advisory Committee Guidelines: Guidelines on Process and Content of Legislation – 2001 edition and amendments* (May 2011) at 344–345, which states that while considerable care must be taken in applying legislative provisions that extend jurisdiction to overseas conduct on the basis of effects produced in New Zealand, it is generally preferable to limit the application of such laws of this kind to "cases involving an

purpose of the Act.[44] However, we accept that overseas conduct would only "relate to" a market in New Zealand to the extent that it impacts or will likely impact upon competition in the market in New Zealand in which a contravention of the Act is alleged to have occurred.[45] In other words, prohibited conduct overseas would not be amenable to jurisdiction if it only had a derivative or "ripple down" effect on a different market in New Zealand.[46]

The High Court judgment

[35] The result of the judgment was that the protests to jurisdiction by Visy Board and Mr Carroll were upheld on all of the causes of action brought against them, except for nine – six against Visy Board and three against Mr Carroll.[47] The Judge suggested that some of these causes of action might need repleading and his orders allowed for that.[48] These causes of action related only to the overarching understanding in relation to New Zealand markets and allegations resulting from dealings with the Fonterra group of companies in early 2004 (the Fonterra understanding). The allegations in relation to seven other transactions concerning Coca-Cola, Goodman Fielder, Inghams, Mainland, apple boxes, PPCS/Richmond and Huhtamaki could not proceed.

[36] The basis upon which the protests were upheld in relation to the Coca-Cola, Goodman Fielder, Inghams and Huhtamaki transactions was that the claims in each case concerned a "New Zealand trans-Tasman market" and "there [was] no arguable

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element of conduct directed at New Zealand, or at the least to conduct where it is foreseeable that effects will result in New Zealand".

44 A similarly broad view was taken by Williams J in the context of the application of s 4 to the business acquisition provisions in ss 47 and 48 of the Act: see *Commerce Commission v British American Tobacco Holdings (New Zealand) Ltd* (2001) 10 TCLR 320 (HC) at [73]. The Judge held that "any affecting suffices".

45 See *Commerce Commission v Air New Zealand Ltd* (2011) 9 NZBLC 103,318 (HC) at [260]–[261], which is on appeal to this Court.

46 We also note that there are proposed amendments to the jurisdictional reach of the Act in a current government bill, the Commerce (Cartels and Other Matters) Amendment Bill, introduced on 13 October 2011. The proposed amendment to s 4 – a new subsection saying that a breach of the Act is deemed to occur in New Zealand if either an act or omission, or event necessary for the completion, that forms part of the breach occurs in New Zealand – would greatly expand the Act's jurisdiction.

47 These comprise the first, second, third, thirty-first, thirty-third and thirty-sixth causes of action against Visy Board and the fourth, thirty-second and thirty-fourth causes of action against Mr Carroll.

48 At [85].

case for a s 27 infringement in respect of the alleged trans-Tasman markets".[49] The Judge appears to have overlooked the fact that alternative markets were pleaded in each case relating to the North Island, South Island and New Zealand CFP markets. Counsel for all parties accepted that we would need to approach our analysis on the basis of all the pleaded New Zealand markets.

[37] In respect of the Mainland, apple boxes and PPCS/Richmond transactions, the Judge concluded:[50]

> I am not satisfied there is any plausible foundation for the proposition that Visy New Zealand acted as Visy Australia's agent in respect of all of the transactions into which it entered in New Zealand that are alleged to be caught under s 27. No safe inference to that effect could be drawn, even if all pleaded facts were true.

The Judge also added that he was not satisfied that there is a good arguable case that the claim falls within r 6.27(2)(j) or any of the other paragraphs in r 6.27.[51]

[38] The Judge does not seem to have assessed the conduct of Visy Board against the specific requirements of s 4(1) of the Act. That provision was mentioned by the Judge in his analysis of the conduct of Mr Carroll as follows:[52]

> Save for his involvement in the Fonterra transaction, Mr Carroll was not resident in New Zealand at any time when acts were undertaken by him in Australia that might otherwise be regarded as giving effect to the "overarching understanding" reached in Australia. Based on the terms of s 4(1) of the Act, as interpreted in *Poynter*, no additional claim may be brought against him.

[39] For the reasons appearing in the previous section we propose to analyse the Commission's allegations against Visy Board and Mr Carroll in a manner somewhat different from the methodology used by Heath J.

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49 At [48].
50 At [82(b)].
51 At [83].
52 At [82(a)] (footnotes omitted).

Overarching understanding – application to New Zealand

[40] The first and second causes of action[53] allege that Visy Board and Amcor Australia entered into an overarching understanding between January 2000 and April 2001 in relation to trans-Tasman customers. In summary it is alleged that the terms included an agreement not to compete for each other's customers, to compensate one another if they did secure the other's customers, and to price offers accordingly. The third cause of action alleges that Visy Board and Amcor Australia gave effect to the overarching understanding in New Zealand from mid-2000.

[41] In the High Court Heath J approached his analysis of the overarching understanding by referring first to the allegations regarding the Fonterra understanding that developed out of, and comprised one part of, the overarching understanding. The Judge found that there was a good arguable case that deliberate engagement in a preparatory meeting for the tenders for the supply of CFP to six members of the Fonterra Group occurred in breach of s 27 of the Act, bringing the claim within r 6.27(2)(j) of the HCR. He also found that there was a serious question to be tried on the merits.[54]

[42] The Judge then referred to the overarching understanding, noting an apparent paucity of evidence of activities undertaken in New Zealand by representatives of Visy Board or Visy Board NZ that could be seen as entry into or the giving effect in New Zealand of an overarching agreement of the type agreed in Australia.[55] The Judge concluded:

> [78] The existence, however, of a tenable cause of action based on the Fonterra transaction means that an allegation can legitimately be made that the overarching understanding reached in Australia was given effect in New Zealand by Mr Carroll, acting on behalf of both Visy Australia and Visy New Zealand in January 2004 while preparing for the Fonterra tender. The pleading and evidence against Mr Carroll on that issue has already been the subject of analysis. Visy Australia can be placed in the mix as a potential tenderer in respect of that particular transaction, though not as an active participant in the tender process itself.

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53 All references to the pleading are to the second amended statement of claim filed by the Commission on 8 October 2010, unless otherwise specified.

54 High Court judgment, above n 6. at [74].

55 At [77].

> [79] Based on what occurred in the course of that transaction, I am satisfied there is a good arguable case that Visy Australia entered into, and either attempted to give effect or did give effect to the overarching understanding reached in Australia through its participation in the meeting attended by Mr Carroll in January 2004. Likewise, there is a good arguable case that Mr Carroll aided and abetted that conduct. I also consider there is a serious issue to be tried on the merits, in respect of those claims. Those conclusions mean that the first, second, third and fourth causes of action can proceed.
>
> (Footnotes omitted.)

[43] Our analysis first considers whether there is evidence to show a good arguable case that the overarching understanding extended to New Zealand. We have no doubt that there is. Despite statements by a number of witnesses that as far as they were concerned the overarching understanding applied only to Australia, there is ample evidence that the executives of both Visy Board and Amcor Australia applied it to major customers who required CFP for their operations in New Zealand. It was implemented in relation to trans-Tasman customers such as Fonterra, Goodman Fielder and Coca-Cola. There is also evidence that, when the arrangements under the overarching understanding were being implemented, in relation to compensation when one of the competitors secured a customer from the other (as occurred for example in the case of Lion Nathan in 2001), New Zealand customers were treated as part of the compensation package. Mr Laidlaw of Amcor Australia prepared handwritten notes setting out his analysis of various Amcor accounts that he thought could be offered to Visy Board to make up for the loss of the Lion Nathan account. This document refers to at least three trans-Tasman customers, Nestlé, Inghams and Goodman Fielder, in respect of which the New Zealand business of each was to be included as compensation pursuant to the overarching understanding. Further customers, including Sanitarium New Zealand and Hansells New Zealand, were also proposed as part of the compensation package.

[44] There is other evidence of collusive dealings between Visy Board and Amcor Australia executives in relation to the trans-Tasman customer Goodman Fielder. The two competitors knew that in early 2001 Goodman Fielder would be issuing a request for a proposal (RFP) seeking tenders for CFP products. In or about February 2001 senior executives of Visy Board and Amcor Australia held discussions confirming that Amcor Australia should retain the Goodman Fielder account, as well

as the Smiths and Nestlé accounts. The position was that Visy Board would "cover" Amcor Australia for these customers. In other words, Visy Board would allow Amcor Australia to secure the tender thereby protecting its existing business. In the case of Goodman Fielder a significant part of the Goodman Fielder business was in New Zealand.

[45] Further evidence of implementation of the overarching understanding in New Zealand occurred in 2003 when Amcor Australia learned that it was being undercut by Visy Board in apple box pricing in this country. Discussions between Mr Laidlaw of Amcor Australia and Mr Carroll of Visy Board followed. Mr Carroll was told that feedback from New Zealand suggested there was undercutting going on in the apple sector. Mr Laidlaw explained that this was his "understanding of the list price, and your guys are quoting below that level". Mr Carroll indicated that he was not aware of any problems but would investigate. Having made inquiries Mr Carroll subsequently contacted Mr Laidlaw advising that Visy Board NZ had sold below list price to some of its own major customers but that it was not trying to poach Amcor's customers. This evidence strongly suggests that the New Zealand market was being treated as part of the overarching understanding. There is no other basis upon which to explain what was occurring between senior executives of the two competitors in the exchange just described.

[46] The evidence of Mr Brown, managing director of Amcor Australia, records that the business of Amcor NZ in the period 1999 to 2003 was unprofitable. Given this commercial reality for suppliers it is inherently likely that the overarching understanding (which was directed to ceasing intense competition and increasing CFP prices to more realistic levels) would also extend to the New Zealand market. There is further evidence of collusive behaviour from conversations recorded by Mr Hodgson, group general manager of Amcor Australia, with Visy Board executives (including Mr Debney) and Amcor executives discussing competition in the New Zealand market. These references include statements that "we fixed New Zealand" and the market being "all under control".

[47] This evidence is sufficient for us to conclude that the Commission has a good arguable case that the overarching understanding applied to a CFP market in New

Zealand. We will refer below to further evidence supporting the existence of a good arguable case (as well as a serious issue to be tried on the merits on this issue) when considering the various pleaded transactions said to have arisen under the umbrella of the overarching understanding. We accept the submission of counsel for Visy Board that such an understanding probably did not underpin the whole of the New Zealand CFP market. But we do not consider that it needs to go that far. It is sufficient that trans-Tasman customers and major customers of CFP products acquiring product for the New Zealand market were plainly affected by the terms of the overarching understanding applicable to the New Zealand market.

Acts done or occurring in New Zealand

[48] In this section we examine the pleadings and the evidence to determine whether the Commission has a good arguable case that an act or omission by Visy Board to which the claims concerning the overarching understanding (and associated transactions) relate was done or occurred in New Zealand.[56] In this context, the observations of this Court in *Kuehne + Nagel International AG* are apposite:

> [67] It is also important to note that at the preliminary stage of protest to jurisdiction the Court is not engaged in a mini trial. That is not the purpose of this procedural step. First, as was said by this Court in *Harris v Commerce Commission*, how much material is required to persuade the Court will depend in part upon the stage the case has reached. Second, the relevant tests are to be measured against the need for a plausible and not speculative case. Hence the Court will not normally determine credibility issues, even where there is a contest on affidavits.
>
> (Footnotes omitted.)

[49] There are four transactions namely, Goodman Fielder, Mainland, apple boxes and Fonterra, in respect of which there is evidence of conduct occurring in New Zealand by executives of Visy Board. If such conduct occurred in the context of the overarching understanding it would also support jurisdiction in relation to those causes of action against Visy Board.[57]

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[56] As required by r 6.27(2)(j).

[57] The first, second and third causes of action.

The Goodman Fielder understanding

[50] Three causes of action are pleaded[58] against Visy Board in respect of Goodman Fielder alleging conduct occurring between early 2001 and April 2001 that breached s 27(1) and (2) of the Act (including via s 30) (the GFL understanding). The contraventions involve the entering into and giving effect to the GFL understanding whereby Visy Board and Amcor Australia agreed that Visy Board would not seek to enter into contracts for the supply of CFP to Goodman Fielder, a trans-Tasman customer of Amcor Australia. Further, if Goodman Fielder requested Visy Board to provide a quote for supply of CFP, Visy Board would quote prices higher than the prices Amcor Australia quoted to Goodman Fielder. This is one of the transactions which involved contraventions of the Australian Trade Practices Act of arriving at, and giving effect to, customer price understanding in the Australian CFP market.[59]

[51] The Goodman Fielder contract, which related in part to Bluebird Foods in New Zealand, was due to expire on 30 June 2001. Goodman Fielder issued a RFP in March 2001 for submission by late April 2001. The affidavit evidence of Mr Laidlaw, general manager, sales and marketing for Amcor Australia (and the counterpart to Mr Carroll for implementation of the overarching understanding in Australia) describes what then took place:

> 58. In or about late January or early February 2001, Mr Hodgson had a discussion with me in relation to upcoming major accounts, in which, to the best of my recollection, he said to me words to the following effect:
>
> > Brown has spoken with Debney about AFPA retaining Goodman Fielder, Smith's and Nestle accounts and the need for Visy to cover us. In turn, we will need to cover Visy on Coca-Cola and Foster's.
>
> 59. Shortly after my discussion with Mr Hodgson, Mr Carroll confirmed to me that he had been told that Amcor and Visy would be providing coverage for each other in upcoming negotiations and tenders for the major accounts referred to in paragraph 58 above.
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> 60. In or about March or April 2001, I spoke to Mr Carroll again, and said words to the effect that I wanted his assurance that Visy was not doing

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58 The eleventh, thirteenth and sixteenth causes of action.

59 Federal Court judgment, above n 1, at [93]–[108].

> anything to encourage GFL to change suppliers from Amcor to Visy. Given that GFL was one of Amcor's biggest accounts, I was concerned that Visy did not submit prices to GFL that were lower than the prices that Amcor submitted. While I cannot recall his exact response, I recall that Mr Carroll said that Visy was proceeding on the basis that he expected that the account would remain with Amcor (or words to that effect).

[52] In late April 2001 Amcor Australia submitted its tender for supply of CFP in Australia and New Zealand. In early June 2001 Amcor Australia and Goodman Fielder informally agreed on the supply of CFP products in Australia and New Zealand. In December 2001 a formal supply agreement for a term of five years was agreed upon.

[53] Critical to the jurisdiction question is what occurred involving Visy Board executives in New Zealand. Mr Peter Lloyd was the national sales and marketing manager for Australia and New Zealand based in Victoria. He, together with Mr Carroll, was responsible for setting the pricing of products for tenders for large accounts and determining prices payable by major customers.[60] As part of Visy Board's preparation for the tender, Visy Board executives were to visit Goodman Fielder factories to form a view of the business being tendered for. Visits to New Zealand (to the Bluebird Foods and Meadow Lea businesses) were scheduled for 18 April or earlier. Mr Lloyd sent an email to Mr Gleason, general manager of Visy Board NZ, saying "I will come over for reasons we discussed". A further email confirmed that the visitors to the New Zealand business would include Mr Lloyd and other Visy Board representatives plus a "state representative" meaning an executive from the New Zealand operation. Mr Carroll was copied into the email and the entire file was to go to him in preparation for the Visy Board tender submission.

[54] Visy Board subsequently provided a tender to Goodman Fielder dealing in part with the supply of CFP into the New Zealand market.[61] As noted the Visy Board tender was unsuccessful. But we are satisfied that the steps taken by Mr Lloyd and others from Visy Board, as part of their preparation for compiling and submitting the tender to Goodman Fielder, comprised acts done or occurring in New Zealand to

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60 Agreed statement of facts at paragraphs 66 and 69.

61 The tender document demonstrates Visy Board's willingness to, and capacity for, carrying on business in New Zealand. A point to which we return later.

which the contravention claims relate sufficient to ground jurisdiction under r 6.27(2)(j) for these three causes of action. Such acts included the emails referred to, both sent to New Zealand together with (we infer) associated telephone contact with Visy Board NZ personnel and no doubt Goodman Fielder representatives in New Zealand. As well there was the visit of Mr Lloyd and others to the Goodman Fielder New Zealand business units. Information gleaned from such visits in New Zealand would have been an important step in deliberations between Mr Lloyd and Mr Carroll as to where pricing in the tender proposal would be pitched in the light of the acknowledged overarching understanding and its (admitted) application to the Goodman Fielder transaction.

[55] The existence of communications between Mr Carroll and Mr Lloyd and the general manager of Visy Board NZ, Mr Gleason, is confirmed in Mr Gleason's affidavit. He deposed that when Australian and New Zealand business was included in an RFP Visy Board took on the responsibility for tendering for both countries. But this occurred in consultation with Mr Gleason himself for the New Zealand element of the work. Communication between Mr Carroll in head office in Australia and Mr Gleason in Auckland was usually by telephone, both as required for any particular transaction and through regular Friday management teleconference meetings led by Mr Carroll.

[56] We agree with counsel for Mr Carroll, Mr Mills QC, who accepted that email or telephonic communications (even where they were initiated outside New Zealand) to Visy Board NZ representatives in New Zealand were properly to be regarded as acts taking place in New Zealand. Communications initiated by Mr Lloyd or Mr Carroll in Australia but directed to Visy Board NZ executives (or customers) in New Zealand are received in this country. They are thus characterised as acts done or conduct occurring in New Zealand for jurisdictional purposes.[62]

[57] For the above reasons we are satisfied that jurisdiction exists in respect of the three causes of action relating to the Goodman Fielder transaction. There is a good arguable case that the claims fall within r 6.27(2)(j) and a serious issue to be tried on the merits. We have not overlooked the submission by Mr Galbraith QC for Visy

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[62] See Merkel J's decision in *Bray v F Hoffman-La Roche Ltd*, above n 30, at [147].

Board that Mr Laidlaw considered that Visy Board was proceeding on the basis that the Goodman Fielder account would remain with Amcor Australia. He also submitted there was evidence that the Goodman Fielder tender was run entirely in Australia. But the evidence needs to be assessed against the background of the admitted overarching understanding and other relevant facts. Hence they are properly matters for trial.

[58] For completeness we add that, if we are wrong in our view that there is jurisdiction under r 6.27(2)(j), we are nevertheless satisfied that there is a good arguable case that jurisdiction in respect of these three causes of action arises under s 4 of the Act in relation to the Goodman Fielder transaction. For reasons we will develop below, we consider Visy Board was at the relevant time carrying on business in New Zealand in the sense required under s 4(1). Visy Board's conduct in Australia in entering into and giving effect to the Goodman Fielder price understanding also affected the CFP market in New Zealand.

The Mainland understanding

[59] Three causes of action are pleaded[63] against Visy Board in respect of the Mainland understanding alleging contraventions of s 27(1) and (2) of the Act (including via s 30). The entering into of the understanding is said to have occurred in early to mid 2002 whereby Amcor Australia would not seek to enter into a contract for the supply of CFP to Tip Top Ice Cream Ltd (Tip Top) and Peters & Browne Ltd, an Australian company, in an upcoming tender, and Visy Board would not seek to enter into a contract for the supply of CFP to Mainland. Amcor Australia would price its offer to Tip Top at a level that would enable Visy Board to retain the Tip Top business and Visy Board would price its offer to Mainland at a level that would enable Amcor Australia to retain the Mainland business. The giving effect allegations relate to events surrounding the submission of a proposal to Mainland, Tip Top and Peters & Browne by both Visy Board and Amcor Australia in or about April 2002.

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63 The twenty-first, twenty-third and twenty-fifth causes of action.

[60] The background leading up to the Mainland tender is important. In September 2001 the Dairy Industry Restructuring Act 2001, creating Fonterra, was enacted. In October 2001 Visy Board NZ executives wrote to Visy Board executives (Mr Carroll being copied) seeking to have an employee working on dairy industry supply issues in New Zealand be jointly funded by Australia and New Zealand. In early December 2001 senior executives and staff of Visy Board attended a dairy industry conference in Auckland organised by Visy Board NZ executives. In early 2002 Peters & Browne was being supplied by Visy Board, Tip Top by Visy Board NZ and Mainland by Amcor NZ. Each of the (by now) Fonterra owned companies was concerned about ongoing drastic price increases for CFP products in recent times. All three Fonterra companies decided to work together to ascertain whether one of either Visy Board or Amcor Australia could offer a better supply arrangement for all three customers. Tenders were invited from the two competitors, CHH not being asked to participate. The final contextual factor is that in early 2002 Visy Board and Amcor Australia entered into the National Foods Ltd price understanding, as well as the Parmalat Australia Ltd (Parmalat) price understanding in early 2003, as part of giving effect to the overarching understanding in Australia.

[61] In the case of the Visy Board tender the Fonterra request was made to Visy Board in part because of the involvement of the West Australian (Fonterra) business of Peters & Browne. But executives of Visy Board NZ were permitted to carry out an audit (for evaluation purposes) of at least the Tip Top business. Importantly for jurisdictional purposes Visy Board and Visy Board NZ representatives made a presentation to Fonterra (Tip Top) executives in New Zealand in April 2002. As stated in its introduction, the presentation itself was prepared by executives of Visy Board. Although the particular Visy Board executives involved are not identified in the evidence, Mr Gleason's evidence supports an inference that senior Visy Board executives would have participated because Australian and New Zealand businesses were seeking tenders. The presentation stated that:

> We at Visy believe that these products and services play a vital role in an ongoing supply alliance to produce benefits over the term of an agreement.
>
> Visy can provide dedicated resources to identify and implement these benefits, giving MAINLAND PRODUCTS, PETERS & BROWNES GROUP & TIP TOP ICE CREAM a continued focus on process and cost reduction.

[62] The actual proposal by Visy Board dated April 2002 would have been received and assessed by Fonterra executives, at least as to the Tip Top business in New Zealand. The involvement of Visy Board is also supported by later discussions between Mr Debney and Mr Hodgson in October 2002 that the Mainland account (part of the tender) had been "lined up".

[63] A second factor relevant to acts occurring in New Zealand concerns a request by Visy Board NZ executives for advice and input about the tender. In April 2002 Mr Lloyd was asked by Mr Gleason for assistance with pricing concerning the Mainland portion of the business. Mr Lloyd replied, with a copy to Mr Carroll, that he would ring Mr Gleason to discuss. Similarly in early May 2002 Mr Savery of Visy Board NZ sought a decision from Mr Lloyd as to whether it was "worth doing the pricing at Mainland Meats". We are satisfied that the replies to both inquiries were received in New Zealand, thereby providing further evidence of conduct occurring in New Zealand relevant to these claims.

[64] The aftermath following the submission of the tenders from both Visy Board[64] and Amcor Australia is instructive. The Amcor Australia prices were significantly lower for Mainland, while the Visy Board prices were significantly lower for Tip Top and Peters & Browne, in each case by around 13–15 per cent. In the post submission phase, the Fonterra companies sought to negotiate with the two suppliers. But neither was prepared to move its prices for the part of the business for which its prices were high. No material change resulted from the negotiations even though Fonterra executives found the results surprising and sought explanations for the approaches taken by Visy Board and Amcor Australia.

[65] In May 2002, Mainland notified Visy Board that the Mainland account would remain with Amcor Australia. Visy Board continued to supply Peters & Browne, as did Visy Board NZ to Tip Top. Fonterra was concerned enough about the outcome to write in August 2002 to Mr Carroll (as well as to Amcor Australia) expressing

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[64] We accept that there is some evidence that the tender was submitted by Visy Board NZ. But as Mr Gleason deposed, where business from Australia and New Zealand was involved Visy Board typically took responsibility for tendering for both companies. The submission of the tender by Visy Board NZ was as representatives of Visy Board.

disappointment with the "apparent significant lack of competitiveness". The letter explained that the process had "not yielded any commercial value for [Fonterra]".

[66] We are satisfied that a court in New Zealand has jurisdiction in respect of the three causes of action concerning the Mainland understanding. There is a good arguable case that the claim falls within r 6.27(2)(j) and a serious question to be tried on the merits. We have taken into account the submissions for Visy Board which centred around a contention that the presentation in Christchurch was a "marketing presentation and not a tender" and the suggestion that the proposal submitted comprised a form of "benchmarking" only. We consider that these matters properly fall to be considered at trial, given that there is presently evidence from Fonterra executives involved that what occurred was more correctly seen as a formal tender process.

[67] As with the Goodman Fielder understanding, if we are wrong in the above conclusions, we are satisfied that there is a good arguable case for jurisdiction arising under s 4 of the Act.

The apple box price understanding

[68] There are three causes of action pleaded[65] against Visy Board alleging conduct occurring in mid to late 2003 in breach of s 27(1) and (2) of the Act (including via s 30). The contraventions involve the entering into and giving effect to an apple box price understanding whereby Visy Board and Amcor Australia agreed that both would price apple boxes at levels contained in apple box price lists that were known to each party. Further, that neither would poach each other's major apple box customers in any CFP market in New Zealand.

[69] We have already discussed this alleged understanding at [45] above in the context of the application of the overarching understanding to New Zealand. Some more detail of the allegations is needed on the jurisdiction point. In mid to late 2003 Mr Hodgson, general manager, Amcor Corrugating Australia (a role incorporating the whole of Australia and New Zealand), learned that Visy Board NZ was

[65] The twenty-sixth, twenty-seventh and twenty-eighth causes of action.

undercutting Amcor NZ's apple box pricing contrary to an agreement that was in place between the two companies.[66] Mr Hodgson then provided Mr Laidlaw with information about Amcor NZ's apple box pricing and instructed him to speak with Mr Carroll about the matter. Mr Laidlaw then had a conversation with Mr Carroll suggesting that Visy Board NZ was undercutting Amcor NZ's apple box pricing and Amcor expected Visy Board NZ to sell at list price. Evidence from Mr Laidlaw provides a foundation for the allegations about the nature of understanding from Amcor's perspective. But critical to the current issue are the actions of Mr Carroll. He claimed not to be aware of such pricing in New Zealand but said he would investigate. Mr Laidlaw deposes to a subsequent conversation with Mr Carroll explaining that Visy Board NZ had in fact sold apple boxes below list price to some of its own major customers, but was not trying to poach Amcor NZ's customers.

[70] We infer that the only way in which Mr Carroll would investigate the Amcor claims was by inquiries made of Visy Board NZ executives with sufficient knowledge of the detail to be able to respond adequately. An alternative way would have been by contacting the New Zealand customers direct. Either way such communication would have been either by email or, more likely, telephone to New Zealand. Such actions would amount to conduct occurring in New Zealand. We take into account the evidence that most communications between senior executives in Australia and New Zealand was via mobile telephone. There was also the available channel of regular weekly teleconferencing. The executive of Visy Board NZ with the responsibility for pricing decisions was Mr Gleason. Under the Visy Board executive structure he reported directly to Mr Carroll. We infer that he, or a senior executive under him in Visy Board NZ, would have been the likely source of Mr Carroll's information on what was happening with apple box pricing on the ground in the New Zealand market.

[71] These events regarding apple box pricing in New Zealand must also be seen in context. Visy Board's participation in supplying apple boxes in New Zealand had attracted the involvement of the chief executive, Mr Debney. He had visited New Zealand for discussions with ENZA. To the extent that major customers were

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[66] Mr Hodgson is the sixth defendant in the New Zealand proceedings, although his position is not relevant to the issues under appeal.

involved, pricing matters would have been the responsibility of Mr Lloyd and Mr Carroll. These executives, along with Mr Debney, were regular participants in the telephone conferences with the New Zealand executives – the likely occasions for pricing discussions, given Mr Gleason's evidence that where tenders were involved he was consulted by Visy Board executives on the New Zealand part of the work.

[72] We consider that there is a good arguable case that the apple box price understanding claims fall within r 6.27(2)(j) and there is a serious issue to be tried on the merits. In reaching these views we have taken into account the submissions for Visy Board that the pleaded particulars overstate the deposed conversations of Mr Laidlaw. We disagree. Visy Board also argued that in the supply of apple boxes there was strong competition from CHH. Hence any understanding as alleged was likely to be commercially ineffective and thus implausible. But as with the issues of credibility and reliability of Mr Laidlaw's evidence, these are matters for trial and not for resolution on a jurisdictional challenge.

[73] If we should be wrong in the above conclusions, we are also satisfied that a New Zealand court would have jurisdiction over these claims under s 4 of the Act.

The Fonterra understanding

[74] Three causes of action are pleaded against Visy Board concerning Fonterra[67] alleging that conduct occurred in early 2004 that breached s 27(1) and (2) of the Act (including via s 30). The contraventions involve the entering into and giving effect to the Fonterra understanding whereby Amcor Australia would not seek in an upcoming tender by the Fonterra group of companies to enter into a contract for the supply of CFP to Tip Top and Visy Board would not seek to enter into a contract for the supply of CFP to Mainland Products Ltd and several other Fonterra companies. Further, Visy Board and Amcor Australia would price their tenders at such a level that would enable Visy Board to secure the Tip Top business and Amcor Australia to secure the business for the remainder of the Fonterra companies.

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[67] The thirty-first, thirty-third and thirty-sixth causes of action.

[75] Particulars given for the Fonterra understanding include:

(a) the attendance by Mr Carroll in early 2004 at a meeting with Fonterra representatives in Auckland;

(b) the giving of instructions by Mr Hodgson to Mr Laidlaw in about April 2004 to speak to Mr Carroll to ascertain Visy Board's plans; and

(c) meetings in Balwyn, Victoria, between April and June 2004 between Mr Laidlaw and Mr Carroll about inter alia the upcoming Fonterra tender.

The contravention involving giving effect to the Fonterra understanding is said to relate to conduct between early 2004 and July 2004 when Visy Board and Amcor Australia were respectively awarded supply contracts consistent with the Fonterra understanding. Mr Carroll is alleged to have played an integral role in these contraventions. We will deal separately with the allegations against him.

[76] We begin our analysis of the facts by referring to the background by late 2003. By then the overarching understanding had been in effect for over three and a half years. It had resulted in Visy Board and Amcor Australia securing effective price increases on four separate occasions from early 2000 to January 2003. In April to June 2002 the two competitors entered into and gave effect to a price understanding involving the supply of CFP to National Foods Ltd, a major player in the Australian dairy industry. Another such player is Parmalat. Between April and August 2003, Visy Board and Amcor Australia entered into and gave effect to the Parmalat price understanding. Both this and the National Foods price understanding involved contraventions of the Trade Practices Act.[68] In April 2003 there was a major presentation to Tip Top in Christchurch. The inference from Mr Gleason's evidence is that Visy Board and Visy Board NZ executives would have been present because trans-Tasman businesses were involved. In June 2003 Visy Board hosted a meeting with the New Zealand Milk Association in Australia. Visy Board's interest

[68] Federal Court judgment, above n 1, at [139]–[148] (National Foods) and [149]–[164] (Parmalat).

in, and participation as a supplier of the New Zealand dairy industry (through Tip Top), was well established. We infer that it was vital that Visy Board retain this business, given the level of competition in the New Zealand CFP market. For example in 2002–2003 Visy Board NZ had proposed, and later decided not to implement, a five per cent price increase for supply of CFP products to Tip Top.

[77] Finally in September 2003 Mr Debney of Visy Board and Messrs Brown and Sutton of Amcor Australia held a meeting at the Crown Crystal Club in Australia. Mr Sutton was due to take over Mr Brown's position and the latter confirmed his confidence in him and his ability to work together to continue implementing the overarching understanding.

[78] Prior to 2004 each Fonterra company was responsible for its own procurement of its CFP requirements. But it was decided that one tender process for all companies be held so that Fonterra group companies could obtain the best possible price and supply conditions. Because the business of Bonlac (a Fonterra company) was based in Australia it was a trans-Tasman tender. Visy Board therefore had responsibility for tendering. The upcoming tender would have been well known to both Visy Board and Amcor Australia. In January 2004 Mr Carroll came to New Zealand. One of the purposes of his trip was a "routine" visit to Visy Board NZ's premises. But he also met with Fonterra executives in Auckland to discuss participation in the tender. Mr Archer of Fonterra described the meeting and its aftermath as follows:

> 17. Prior to the RFP being issued, I had met with Rod Carroll (the fifth defendant in this proceeding) and Andrew Gleason to discuss Visy's participation in the RFP process. Mr Carroll was General Manager of Visy Board Pty Limited (the second defendant in this proceeding), and Mr Gleason was General Manager of Visy NZ. This meeting took place between myself and my colleague, Kieran Chapman, and was held at Visy's Wiri Plant in Auckland. Mr Carroll and Mr Gleason assured us that Visy were keen to participate. John Savery of Visy led the presentation part of Visy's bid, and was our key contact for the RFP.
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> 18. After receiving Visy's response to the RFP, I spoke with John Savery by telephone to see if Visy would resubmit a proposal for the non-Tip Top business, as the submitted proposal was incomplete and uncompetitive. My understanding from Mr McVitty's analysis was that Visy had only provided pricing for a small parcel of the

> business, which made it difficult to gauge exactly how competitive or uncompetitive they were.
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> 19. Mr Savery did not seem to understand the Fonterra Ingredients part of the business very well. From those discussions, I got the impression that Visy was only interested in the Tip Top business and was not willing to submit a competitive proposal for the remainder of the Fonterra business.
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> 20. As a result of Visy maintaining its uncompetitive position, there was not a great deal of post-submission negotiation.

[79] Although the tender was submitted through Visy Board NZ, we are satisfied that the evidence is sufficient to demonstrate the involvement of Mr Carroll and other senior Visy Board executives in the content of the tender. The fact that it was a trans-Tasman tender required such involvement. Its purpose was the maintenance of the Tip Top business, while the balance of the pricing was found upon subsequent analysis to be uncompetitive.

[80] Amcor's position was the reverse. Its pricing for all of its existing business with Fonterra companies was highly competitive and included a $6 million one-off payment. The proposal stated that: "Full and exclusive supply of corrugated packaging to Tip Top Ice Cream Company is <u>not</u> a condition of this supply proposal." This meant the sign-on fee proposal was commercially odd, given that such a fee was usually offered in respect of the whole business. A request by Tip Top for a package covering all business was met by Amcor Australia with submission for the Tip Top business with prices 20.8 per cent higher than those submitted by Visy Board NZ. The Tip Top reaction to the tender is summarised by Mr Archer as follows:

> When we were going through our tender process, we found that the pricing that was eventuating was suspicious. Visy were very competitive on sites and items that they currently supplied, but were non-competitive on sites and items that they did not. Amcor were the same. I do not recall exactly what I heard or from whom, but there were rumours in the market that filtered through from our sites of an anti-competitive arrangement between [Amcor] and Visy. Internally, we were starting to get concerned about the possibility of being exposed to what was allegedly occurring.

[81] In relation to the post-tender negotiation phase between April and July 2004, there is further evidence of collusive contacts between Mr Laidlaw and Mr Carroll in Australia. Their discussions related directly to how each competitor intended to

respond to Fonterra. This provides further evidence supporting the entry into and giving effect to the terms of the Fonterra understanding pleaded by the Commission. Features of these post-tender discussions are the subject of pleaded particulars. We have considered not only the pleadings but also the whole of the available evidence. The results of the tender proposals submitted by the two competitors suggest that the Fonterra understanding is likely to have been entered into prior to 31 March 2004 when Visy Board NZ submitted its tender. This is apparent from the nature of the tenders submitted and the refusal of both Visy Board NZ and Amcor Australia materially to alter the structure of their tenders in the post-tender negotiations.[69]

[82] In early July 2004 Visy Board NZ and Tip Top entered into a contract for the supply of CFP. Fonterra and Amcor Australia also signed a contract for the supply to all of the Fonterra companies, with the exception of Tip Top.

[83] The critical point in this analysis is whether in relation to the three claims arising from the alleged Fonterra understanding there was any act or omission that was done or occurred in New Zealand. We are satisfied that there is a good arguable case that there was, as well as a serious issue on the merits. A meeting with the party requesting the proposals (Fonterra), particularly when close to the date of the submission of any tender, is an important step for both parties. The meeting in Auckland in late January 2004 was such an event, particularly when its purpose was, as Mr Archer says, to discuss Visy's participation in the RFP process. It also involved a presentation by Visy Board executives as part of the process. Mr Carroll was present at that meeting also attended by Mr Gleason and Mr Savery from Visy Board NZ. Quite apart from being part of the preparatory steps in the tender process, there is evidence that Mr Carroll jointly with Mr Gleason offered an assurance to Fonterra of a keenness to participate. This would have been important to Fonterra given the purpose of the tender discussed at [78] above.

[84] It is true that the tender itself was submitted by Mr Savery to Fonterra in Hamilton and the correspondence is on Visy Board NZ letterhead. But the content of the proposal is replete with references to Visy Board suggesting that Visy Board

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[69] Amcor Australia agreed in this phase to a three and a half per cent reduction of prices, but this made no commercial difference to the Tip Top component, given where the original tender was pitched.

executives must have had significant input into its preparation. We infer that any instructions to Visy Board NZ executives as to the content of, and pricing elements for, the proposal would have been communicated to New Zealand by Mr Carroll or Mr Lloyd (or both). Such communications, whether by email, telephone or howsoever, inferentially occurred in New Zealand. The proposal document could not have been prepared without such input, given Visy Board NZ did not proceed in transactions involving major customers and a trans-Tasman tender without specific authority from Visy Board to do so.[70]

[85] In case our views on jurisdiction over the Fonterra understanding claims are wrong, we nevertheless conclude that a New Zealand court would have jurisdiction over these claims under either s 90(2) or s 4 of the Act. Our views on the applicability of s 4 are set out below. With respect to s 90(2), there is ample evidence to support the proposition that the conduct of Mr Gleason and Mr Savery in New Zealand was within the scope of their actual or apparent authority from Visy Board. Moreover, such conduct in finalising and submitting the tender to Fonterra in New Zealand was arguably conduct engaged in on behalf of, or as a representative of, Visy Board.

Overarching understanding

[86] Having found that jurisdiction arises in respect of the claims relating to the GFL understanding, the Mainland understanding, the apple box price understanding and the Fonterra understanding, it follows that jurisdiction also arises in respect of the entering into and giving effect to the overarching understanding. The various acts or omissions that were done or occurred in New Zealand in relation to these consequential understandings (as described above) are sufficient to allow us to conclude that there is a good arguable case that the overarching understanding reached in Australia was extended to New Zealand commerce and Visy Board entered into, or attempted to give effect (or gave effect) to, that overarching understanding here. For completeness, we emphasise that evidence of the giving effect to, or implementation of, the four separate understandings also arguably

[70] Mr Gleason's evidence supports this view of how trans-Tasman tenders were dealt with.

comprises relevant evidence of the entry into, and scope of, both the sub and overarching understandings.[71] As with the four sub-understandings, we are satisfied that jurisdiction also arises in respect of the overarching understanding under s 4 of the Act.

Jurisdiction concerning the further understandings

[87] It is under s 4 of the Act that the four remaining understandings must be considered. That is because in each case we are satisfied, and the Commission accepts, that there was no act or omission to which the claim relates done or occurring in New Zealand so as to ground jurisdiction under r 6.27(2)(j). But in each case there is evidence that Visy Board engaged in collusive conduct outside New Zealand, namely, the overarching understanding and consequential understandings comprising conduct that (arguably) related to the New Zealand CFP market. There are two issues for decision: was Visy Board at the material time carrying on business in New Zealand? And did such conduct affect a market in New Zealand? We begin by describing the four understandings and the pleadings relating to each.

Coca-Cola understanding

[88] Three causes of action are pleaded[72] against Visy Board in respect of the Coca-Cola understanding alleging conduct occurring in early 2001 that breached s 27(1) and (2) of the Act (including via s 30). The contraventions involve entering into an understanding whereby Visy Board and Amcor Australia agreed that Amcor Australia would not seek to enter into a contract for the supply of CFP to Coca-Cola, a major trans-Tasman customer of Visy Board. Further, Amcor Australia would quote prices to Coca-Cola above the prices Visy Board quoted to Coca-Cola in order to allow Visy Board to retain the account. The supply of CFP to Coca-Cola included supply to the New Zealand operations of Coca-Cola.

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71 Heath J made a similar finding in respect of the Fonterra understanding: High Court judgment at [78]–[79].

72 The sixth, seventh and eighth causes of action.

[89] In terms of giving effect to the Coca-Cola understanding, collusive discussions between senior executives of Visy Board and Amcor Australia occurred between February and March 2001 in the lead up to the two competitors presenting proposals to Coca-Cola in July and August 2001. It is alleged that Amcor Australia submitted a proposal to Coca-Cola for the supply of CFP to Coca-Cola in Australia and New Zealand, the proposal containing prices that Amcor Australia believed to be substantially higher than the prices Visy Board would submit in its proposal to Coca-Cola. The Coca-Cola understanding is another of the transactions that was the subject of contravention in the ACCC proceedings.[73]

[90] The ASOF makes it clear that the Coca-Cola understanding was arrived at between January and March 2001 in a series of meetings in Australia between Mr Debney and Mr Brown. Mr Debney suggested that Amcor Australia should not cause trouble for Visy Board in the upcoming tender for the Coca-Cola account. Mr Brown responded that Amcor Australia would not compete with Visy Board for the Coca-Cola account.

[91] There is no dispute that the Coca-Cola understanding was entered into in Australia. Neither is it disputed that Visy Board and Amcor are in competition in Australia. It is also the case that the ASOF states that the Coca-Cola understanding was not put into effect in Australia.[74] Part of the existing supply arrangement related to CFP products supplied into the New Zealand market. When it came time to consider continuation of supply arrangements, all of Coca-Cola Amatil (NZ) Ltd's CFP supply was in play.

[92] As the time for submission of tenders approached Mr Laidlaw was instructed to talk to Mr Carroll, which he did. There is evidence from Mr Laidlaw and from Mr Brown from which it may be inferred that steps were taken to implement the Coca-Cola understanding. Given that Coca-Cola was a major trans-Tasman customer Mr Gleason's evidence suggests that Visy Board had overall responsibility for tendering in both Australia and New Zealand. But the New Zealand element of the pricing would have been determined in consultation with Visy Board NZ.

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73 Federal Court judgment, above n 1, at [109]–[122].

74 Federal Court judgment at [122].

[93] As a result of the tender, Visy Board was successful. On 26 September 2001 a supply agreement for three and a half years was entered into. It included all of the supply of Coca-Cola Amatil (NZ) Ltd's CFP products in New Zealand. In terms of delivery, the supply of product was to be delivered and separately invoiced by Visy Board NZ pursuant to the agreement. The evidence is that this part of the arrangement was customer driven.

The Inghams understanding

[94] There are two causes of action pleaded against Visy Board in respect of the Inghams understanding.[75] Only contraventions involving conduct entering into this arrangement in breach of s 27(1) of the Act are alleged. They concerned an agreement in early 2001 between the two competitors in Australia whereby Amcor Australia would compensate Visy Board for the loss of the Lion Nathan account (a major trans-Tasman account) by allowing Visy Board to secure, among other things, the Inghams accounts in Australia and New Zealand. Further, if Inghams requested Amcor Australia to provide a quote for the supply of CFP, Amcor Australia would quote prices higher than the prices Amcor quoted to Inghams. The entry into, as well as giving effect to, the Inghams understanding was also the subject of contraventions in the ACCC proceedings.[76]

[95] There is no dispute that the Inghams understanding was arrived at as a result of discussions at a Melbourne hotel in early 2001 between Mr Debney and Mr Brown. Given that the two had agreed as part of the overarching understanding that there would be no poaching of major customers, Visy Board was upset that Amcor Australia had secured the Lion Nathan account. Hence the compensation agreement (admitted in the ACCC proceedings) was entered into. As a result of reaching the compensation agreement, Mr Hodgson requested Mr Laidlaw to analyse Amcor Australia accounts that could be offered to Visy Board to make up for the loss of the Lion Nathan account. Mr Laidlaw's notes of a meeting held to identify such customers include a reference to supply to Inghams in both Australia and New Zealand.

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[75] The eighteenth and nineteenth causes of action.

[76] Federal Court judgment at [194]–[207].

[96] The ASOF refers to a subsequent discussion between Mr Debney and Mr Brown in which the latter said that Amcor Australia would allow Visy Board to take the Inghams account as compensation for losing Lion Nathan. The Inghams compensation understanding was therefore given effect to in Australia. It was not given effect to in New Zealand because Amcor NZ, contrary to Mr Laidlaw's expectation, retained the Inghams account in New Zealand. As noted, there is no allegation in the New Zealand proceedings of breach of s 27(2). This is because Amcor NZ actively sought to retain the business when the RFP from Inghams NZ was made in July 2001. We note that counsel for Visy Board contended that this fact supported the view that no such understanding referable to the New Zealand market was entered into. Subject to jurisdiction being found, this will be an issue for trial. Whether jurisdiction extends in relation to the Inghams compensation understanding turns on whether jurisdiction extends to that understanding under s 4 of the Act.

The PPCS/Richmond compensation understanding

[97] There are three causes of action pleaded[77] against Visy Board in respect of this understanding. They comprise conduct in July or August 2004 said to breach s 27(1) by entering into the PPCS/Richmond compensation understanding (including via s 30) and a breach of s 27(2) alleging an attempt to give effect to such understanding. The understanding was to the effect that Amcor Australia would compensate Visy Board for the loss of its share of the Richmond Meats account. Further Amcor Australia would provide Visy Board with a list of accounts that it would be prepared to allow Visy Board to secure as compensation for Visy Board losing the Richmond Meats account.

[98] In May 2004 PPCS Ltd and Richmond Meats Ltd jointly issued an expression of interest for the supply of CFP to the soon to be merged PPCS/Richmond group. As events transpired Visy Board NZ, who had hitherto supplied Richmond Meats, lost that business to Amcor NZ. Subsequently in about July 2004 Mr Carroll is alleged to have said to Mr Laidlaw that Amcor NZ was undercutting Visy Board NZ's prices to PPCS/Richmond. Mr Laidlaw said that he would discuss these

[77] The thirty-seventh, thirty-ninth and forty-second causes of action.

concerns and get back to Mr Carroll. Further conversations ensued and at a meeting in or about August 2004 Mr Carroll said that Visy Board expected to be compensated for the loss of the PPCS/Richmond account. Mr Laidlaw's response was that he would discuss Mr Carroll's concerns and get back to Mr Carroll with proposed accounts that could be used as compensation.

[99] We consider that the available evidence supports the compensation understanding as pleaded. The same is the case in respect of the allegations of breach of s 27(2) that Visy Board attempted to give effect to the PPCS/Richmond compensation understanding. The existence of jurisdiction turns on the applicability of s 4 of the Act.

The Huhtamaki understanding

[100] There are two alleged contraventions concerning this understanding, both involving s 27(1) of the Act (including via s 30).[78] The conduct concerned an agreement between March and June 2003 that Visy Board would allow Amcor Australia to retain the business of Huhtamaki, a trans-Tasman account. Further it is said Visy Board would price its proposal to Huhtamaki at a level that would allow Amcor Australia to retain the account. No cause of action in respect of giving effect to the Huhtamaki understanding is pleaded. Moreover, the Huhtamaki understanding was not the subject of the ACCC proceedings.

[101] The Amcor Australia supply agreement with Huhtamaki was due to expire in July 2003. In about March 2003 Mr Laidlaw spoke with Mr Carroll to inform him that the contract was about to expire and that Amcor was keen to retain the account. There is evidence from Mr Laidlaw that Mr Carroll responded that he understood that Huhtamaki was to remain with Amcor.

[102] Amcor Australia submitted a proposal to Huhtamaki setting out its proposed pricing for the Huhtamaki business sites in Australia and New Zealand for a three year period. The proposal involved an immediate price increase of five per cent with a further five and a half per cent increase the following year followed by annual

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78 The forty-fifth and forty-seventh causes of action.

reviews for the remainder of the agreement. Shortly thereafter Mr Laidlaw was contacted by a representative of Huhtamaki to say that Amcor Australia's pricing was not competitive. Mr Laidlaw then contacted Mr Carroll to tell him of the feedback that had been received. Mr Carroll then indicated that Visy Board had made a "mistake" with its pricing and had submitted a price lower than that intended. Mr Laidlaw requested Mr Carroll to rectify the mistake in pricing so that Amcor could retain the Huhtamaki account. Mr Carroll indicated that it would be difficult but that he would look into the matter. Subsequently it transpired that Amcor lost the Huhtamaki account. Mr Laidlaw took this to mean that Visy Board had been unsuccessful, or had no intention of withdrawing its "mistaken" pricing.

[103] We are satisfied that there is sufficient evidence at this stage to support the Huhtamaki understanding. Whether a New Zealand court has jurisdiction then turns on whether jurisdiction arises under s 4 of the Act.

Jurisdiction under s 4

Carrying on business in New Zealand

[104] We mention at the outset that we have already identified that s 4 of the Act is a "back up" basis for jurisdiction in respect of the Goodman Fielder, Mainland, apple box pricing, Fonterra and overarching understandings.[79] But jurisdiction under s 4 of the Act is crucial to, and the only basis relied upon, for jurisdiction in respect of the Coca-Cola, Inghams, Richmond and Huhtamaki understandings.[80] Our evaluation on the question of whether Visy Board was carrying on business in New Zealand involves an intensely factual consideration. The same applies to whether there is conduct affecting a market in New Zealand. We are satisfied from our review of the evidence that Visy Board was carrying on business in New Zealand. As is clear from the legal analysis at [26]–[34] above, there are a number of ways to assess whether a company is carrying on business in the sense required by s 4. We

[79] See [58], [67], [73], [85] and [86] above.
[80] As noted at [87], [96], [99] and [103] above.

have considered some eight factors[81] relating to the test described and the results of which persuade us that there is a good arguable case this question must be answered in the affirmative.

[105] These eight factors are as follows:

(a) Visy Board operated Visy Board NZ as an integrated division of Visy Board and presented itself to trans-Tasman customers as one business including the New Zealand division;

(b) Visy Board was directly involved in Visy Board NZ's New Zealand operations;

(c) Visy Board on various occasions dealt directly with New Zealand customers, particularly with major customers;

(d) customers considered Visy Board to be carrying on business in New Zealand;

(e) Visy Board staff regularly came to New Zealand, including to meet with customers;

(f) Visy Board communicated directly into New Zealand both to executives of Visy Board NZ and with customers;

(g) Visy Board acted from time to time on behalf of Visy Board NZ; and

(h) industry practice saw Australian firms carrying on business here in respect of trans-Tasman customers.

We will discuss each factor briefly providing examples of the evidence supporting our overall conclusion. Some of the evidence relevant to this issue has been touched on indirectly when considering whether acts or conduct occurred in New Zealand.

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[81] Drawing on the wide range of factors identified in Sumpter with Hamlin and Mellsop, above n 29, at 432.

Visy Board NZ a division of Visy Board

[106] Visy Board structured its business into seven regions including each of the Australian states. Visy Board NZ was, according to Mr Debney, treated (and structured) the same way, albeit that it was incorporated in New Zealand as a separate company. Mr Gleason has confirmed that at an operational level the New Zealand business operates as one of the "States".[82] In terms of responsibilities within Visy Board, the Visy Board National Sales Manager, Mr Lloyd, covered Australia and New Zealand. All of the State general managers (as well as Mr Lloyd) reported directly to Mr Carroll, who was described as General Manager Visy Board Australasia. According to the Visy Board organisation chart for Australia and New Zealand, operationally and structurally Mr Gleason reported directly to Mr Carroll.

[107] Visy Board began supplying CFP in New Zealand in 1992 but withdrew some months later. It re-entered the market in 1997 after building a large new CFP converting plant in Auckland to service certain large trans-Tasman contracts. Correspondence from Visy Board in October/November 2000 described the Wiri plant as the "Wiri Division". Moreover, in terms of reporting on financial matters Visy Board NZ is included in Visy Board financial requirements that budgets be prepared and distributed in respect of "each State".

[108] Given these structural and operational features it is not surprising that the evidence shows that Visy Board presented itself to trans-Tasman customers as one business. Examples include the presentation and tender submission to Goodman Fielder in April 2001, the Visy Board presentation to Mainland Products, Peters & Brownes Group and Tip Top Ice Cream Company in April 2002 and the presentation by Visy Board representatives to Fonterra during tender negotiations of its organisational structure showing Visy Board NZ integrated into Visy Board.

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[82] This is consistent with the Visy Board website at visy.com.au and the fact that Visy Board NZ executives attended Visy Board "State Managers" meetings in Australia.

Visy Board involvement in operations in New Zealand

[109] The ASOF states that prices charged to major customers of Visy Board were determined through discussions between Mr Carroll, the relevant State manager and Mr Lloyd. Mr Debney confirmed that Visy Board executives made decisions about large trans-Tasman tenders. We have already referred to the weekly reporting by Visy Board NZ executives to Mr Debney and Mr Carroll.[83] It is apparent that there "weren't too many things they didn't know" about the operation of Visy Board NZ. An example of the operational control exerted by Visy Board executives was that New Zealand executives sought advice or approval from Visy Board on whether to submit a tender for Mainland Meats.

[110] Other examples of Visy Board involvement include the fact that, in relation to a Fonterra tender for bulk bins in March 2003, executives in New Zealand copied Mr Carroll who then sought an update on progress and asked whether help was required. In relation to the Huhtamaki transaction Visy Board set the initial prices for the tender and then checked the position with Visy Board NZ executives. We have already referred to the Visy Board interest in the New Zealand milk industry. In October 2001 Mr Gleason wrote to Mr Carroll seeking to have an employee working on dairy industry matters jointly funded by Visy Board and Visy Board NZ. A further example relates to Mr Carroll being sent memoranda in relation to the forthcoming contract renewal with PPCS/Richmond seeking his approval for the tender proposal, despite the fact that it related wholly to the New Zealand CFP market. Moreover, Mr Gleason was required to obtain approval for even modest capital expenditure and was required to seek approval from Mr Carroll for a purchase transaction involving expenditure of $3 million.

Visy Board dealing direct with New Zealand customers

[111] The evidence produced demonstrates that on a number of occasions Visy Board dealt directly with New Zealand customers, particularly major trans-Tasman customers. An example is in June 1999 when Visy Board signed the Coca-Cola

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[83] See [55] above.

extension. Similarly in September 2001 Visy Board signed the letter of agreement with Coca-Cola including supply of CFP into the New Zealand market. The contract specifically lists Coca-Cola Amatil (NZ) Ltd as one of the customers. Again in July 2002 Visy Board signed the extension to the subsequent Coca-Cola contract also involving Coca-Cola Amatil (NZ) Ltd.

Customers' perspective

[112] Mr Gleason's evidence establishes that customers with operations in both Australia and New Zealand typically dealt with a single negotiating agent within Visy Board and Visy Board NZ so that the customer only needed to deal with one person when negotiating supply across operations in Australia and New Zealand. Such a requirement was entirely customer driven. In respect of tenders the approach was also customer driven and focussed. As illustrated by the Fonterra and Goodman Fielder tenders the customers sought to have all of their business across Australia and New Zealand with a single supplier. Once tenders were complete the customer would decide whether it wanted a single set of terms covering both countries, or whether it wanted Visy Board NZ to enter into separate contractual arrangements with its New Zealand operating company. Moreover, when Australia and New Zealand business was included in an RFP, Visy Board would take responsibility for tendering in both countries, in consultation with Mr Gleason in respect of the New Zealand element of the work.

[113] Visy Board acknowledged, again through Mr Gleason, that in the relevant period there were various customers who had requested proposals on a trans-Tasman basis. These included Fisher and Paykel, Coca-Cola, Unilever, Goodman Fielder, Masterfoods, Nestlé, Heinz Watties, Kraft Foods, Pizza Haven/Dominos, Canterbury Leather, Huhtamaki and Constellation. Eight of these customers made RFPs in the period to December 2004.

[114] With respect to the Mainland tender, proposals and other communications were sent directly by the customer to Visy Board. There was also evidence that when Fonterra was conducting its analysis of the CFP market and supply from Visy interests, it referred to Visy Board as one group.

Visy Board staff visit New Zealand

[115] There are numerous examples of Visy Board staff coming to New Zealand, including to meet directly with customers. One such situation occurred in November 2001 when staff of the Queensland State division of Visy Board came to visit three Tegel sites at Henderson, New Plymouth and Christchurch to discuss issues of carton accumulation. The chief executive, Mr Debney, came to New Zealand in relation to meetings concerning the apple industry, Masterfoods and Unilever. Visy Board staff came to New Zealand for the Goodman Fielder tender.

[116] With respect to the dairy industry, various staff from Visy Board, including senior executives, attended meetings in New Zealand regarding the dairy industry, particularly after rationalisation resulted in the creation of Fonterra after late 2001. As we have seen, Mr Carroll attended Visy Board NZ's premises for a "routine visit" in January 2004. At the same time Mr Carroll met with Fonterra executives relating to Visy Board's participation in the RFP issued in respect of the Fonterra understanding. Finally, there is evidence of a number of Visy Board staff, including managers, coming to New Zealand to assist with productivity issues at the Wiri plant in Auckland.

Visy Board communicating in New Zealand

[117] A range of examples have already been discussed in this judgment. The evidence supports the fact that Visy Board executives made regular telephone calls to New Zealand, given that the culture of internal communication between executives on both sides of the Tasman was telephone rather than letter, email or memoranda. There is evidence that Visy Board dealt directly with the trans-Tasman customer Fisher and Paykel, as well as other examples that do not need repeating.

Visy Board acting on behalf of Visy Board NZ

[118] There is evidence of this type of conduct occurring in relation to the Coca-Cola contract and the Huhtamaki contract for New Zealand and Australia. Moreover, Visy Board from time to time sought to negotiate the purchase of

materials for operations in New Zealand and Australia. With respect to the role of Mr Carroll, he sought and passed on information regarding the market for apple boxes in New Zealand. He also raised with Amcor Australia the fact that the PPCS/Richmond business was available to trade.

Industry practice

[119] In many cases Amcor Australia's trans-Tasman customers had agreements between Amcor in Australia and Amcor NZ. An example is Lion Nathan. There is evidence that Amcor executives prepared for Visy Board executives material regarding the businesses that might be traded as part of a specific understanding for loss of the Lion Nathan business. This included trans-Tasman and New Zealand businesses as described in relation to the Inghams understanding.

[120] In the light of all of the above, we consider that there is ample evidence to support a good arguable case that Visy Board was carrying on business in the sense that we have discussed at [26] to [29] above. In reaching this conclusion we have considered a number of factors none of which alone necessarily is determinative. But together they present a persuasive picture. The examples given demonstrate that Visy Board maintained direct customer contacts and regularly transacted commerce in New Zealand. It did so on a continuous basis, both for itself and through its Visy Board NZ division (once it re-entered New Zealand at the time the Wiri factory was constructed). Accordingly, the first limb of the test in s 4(1) of the Act is satisfied.

Affects a market in New Zealand

[121] We are satisfied that this aspect of s 4(1) of the Act is also met on the facts. We have already referred to the market effects that flow from cartel conduct both as a matter of commercial principle[84] and in this case in respect of the impact on competition in Australia.[85] We consider that the application of the overarching understanding to New Zealand and its implementation in respect of the eight

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84 At [32] above.

85 At [2] and [32] above, citing the findings of Heerey J in the Federal Court judgment.

transactions pleaded plainly related to, was concerned with, and was directed towards, a CFP market in New Zealand.

[122] In particular the entry into the overarching understanding and each of the eight consequential understandings was arguably intended by Visy Board and Amcor Australia to fix, control or maintain or provide for the fixing, controlling or maintaining of the price for goods (CFP products) in New Zealand. Proof of price fixing of the type defined in s 30 of the Act, which we find is arguable on the facts, could lead to the application of the deeming provisions of that section.[86] The conduct of Visy Board also arguably related to, was concerned with, and was directed to market allocation, tender rigging and compliance measures affecting the CFP market(s) in New Zealand. By virtue of such conduct the competition process was damaged and the interests of New Zealand consumers were arguably prejudiced in significant ways.

[123] Furthermore the contravention provision in s 27 of the Act prohibits a person from entering into inter alia an understanding that "has the purpose, or has or is likely to have the effect, of substantially lessening competition in a market". The pleaded conduct in relation to the overarching understanding and each of the eight consequential understandings arguably on the facts available at this stage affects a CFP market in New Zealand, either as a purpose of the conduct or as an effect arising from such conduct. So far as the purpose of the understandings is concerned, the overarching understanding and the eight consequential understandings were arguably entered into by Visy Board and Amcor Australia in order to bring to an end the competition that existed in the New Zealand CFP markets up to around the year 2000. The two competitors thereby sought to shore up their existing market shares and protect their relationships with major customers, including trans-Tasman customers. Once that had been achieved, the next step was to raise prices in the New Zealand market. Precisely the same thing happened in Australia as a result of the application of the overarching understanding there. Regular price increases were imposed on CFP customers annually from 2000 to 2003. The same effect was no doubt intended from the application of the overarching agreement in New Zealand. From Amcor Australia's perspective it was hoped that it would return Amcor NZ to

[86] Nine of the pleaded causes of action against Visy Board rely on the application of s 30.

profitability. We infer that Visy Board also expected it to improve its commercial position at the expense of its customers and consumers in New Zealand generally.

[124] So far as the effects of such conduct are concerned, we are satisfied that the effects of such cartel conduct, if proved in New Zealand in relation to the particular transactions pleaded, arguably had the effect of substantially lessening competition in the CFP market in New Zealand. Lessening of competition includes references to the hindering or preventing of competition. The understandings arguably had that effect at the very least.

[125] The effect on the New Zealand market at the time of the Mainland tender process in 2002 is eloquently described from a consumer perspective in the letter from Australasian Food Holding (Australia) Pty Ltd (Fonterra) to Mr Carroll dated 29 August 2002 as follows:

> Our Procurement Management Team … has subsequently advised me that they have been very disappointed in the process as a whole. With a combined spend on corrugated board in excess of NZ$12 million and growing, along with the substantial relationship that is already in place between our businesses through Peters and Brownes and Tip Top, we thought that Visy Board would progress the review enthusiastically. To the contrary, we had to coerce Visy Board to become involved in evaluating and submitting proposals for the business that is currently being enjoyed by your competitors. Subsequently, upon receipt of proposals the Procurement Team was further disappointed with the apparent significant lack of competitiveness.
>
> I therefore understand that since the review process has not yielded any commercial value for [Fonterra] the Procurement Management Team has reluctantly decided not to further progress discussions at this stage, as originally planned.

[126] We do not propose to go through each of the eight transactions referring to the particular purpose or effects of the understandings that arguably apply to the markets supplied. The above general conclusions are sufficient to enable us to conclude that in relation to the overarching understanding and the eight consequential understandings the requirement of "affects a market in New Zealand" is satisfied. It follows that we consider that a New Zealand court has jurisdiction in respect of all of the causes of action pleaded by virtue of s 4(1) of the Act.

Appeal by Mr Carroll

[127] The second amended statement of claim pleaded thirteen causes of action against Mr Carroll.[87] In the High Court the protests to the jurisdiction in all bar three of these causes of action were upheld in respect of the contraventions alleged against Mr Carroll. The three causes of action that Heath J permitted to proceed[88] were the subject of an appeal by Mr Carroll to this Court. The Commission did not appeal against the orders in respect of the ten causes of action that could not proceed.

The pleadings against Mr Carroll

[128] As it was not necessary to describe the specific conduct alleged against Mr Carroll when dealing with the overarching understanding, we briefly refer to the key allegations against him to place the causes of action in context. It is said that in July 2000 Mr Carroll met with Mr Laidlaw and Mr Hodgson in Melbourne and Mr Carroll or Mr Hodgson said words to the effect that Visy Board and Amcor Australia had agreed that they would not poach each other's Australian and trans-Tasman customers and were agreed that Visy Board and Amcor Australia would price offers to Australian and trans-Tasman customers at a level that would enable the other (as agreed) to secure the business. Further, each would focus on increasing its prices for CFP products. In terms of implementation Mr Carroll is said to have told Mr Hodgson and Mr Laidlaw that he had been appointed as the contact person at Visy Board with whom Amcor Australia representatives should discuss issues and matters arising from the overarching understanding and that Mr Laidlaw should deal with him to discuss such matters. Insofar as each of the above pleaded matters related to the Australian market, there were admissions to each pleading in the ASOF. Only the specific application of the overarching understanding to trans-Tasman customers and markets of New Zealand was not admitted in the ASOF.

[129] It is alleged that during the period from approximately July 2000 to November 2004 Mr Carroll and Mr Laidlaw discussed issues and matters from, inter

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87 The fourth, ninth, twelfth, fourteenth, seventeenth, twenty-ninth, thirty-second, thirty-fourth, thirty-eighth, fortieth, forty-third, forty-sixth and forty-eighth causes of action.

88 The fourth, thirty-second and thirty-fourth causes of action: High Court judgment, above n 6, at [84].

alia, the overarching understanding. In so far as this pleading related to the Australian market, the ASOF acknowledges the holding of approximately 30 to 40 meetings at private meeting venues in Victoria, Australia in the period concerned. In addition there is an admission of telephone discussions relating to the overarching agreement, Mr Carroll having purchased for Mr Laidlaw a pre-paid mobile telephone to facilitate contact between the two.

[130] The fourth cause of action pleads that by engaging in the above summarised conduct and by conduct referred to in the causes of action pleaded later (including many of the consequential understandings) Mr Carroll contravened s 27(2) of the Act or attempted to contravene s 27(2) for the purposes of s 80(1)(b). The latter sub-paragraph relates to an attempt to contravene a provision of the Act. Section 80(1) also includes (in paras (c) to (f)), as a basis for imposing a pecuniary penalty, conduct where a person has aided, abetted, counselled, or procured any other person to contravene a provision of the Act; or has induced, or attempted to induce, any other person to contravene a provision of the Act; or has been in any way, directly or indirectly, knowingly concerned in, or party to, the contravention by any other person of such a provision; or has conspired with any other person to contravene a provision of the Act. The pleading against Mr Carroll includes particulars in the alternative alleging conduct against paras (c) to (f) of s 80(1) of the Act. Various forms of relief are sought by the Commission in respect of such conduct for contravention of s 27 and s 80 of the Act including pecuniary penalties.

[131] Allegations against Mr Carroll in respect of one of the consequential understandings were permitted to proceed by Heath J. This was the Fonterra understanding. The particulars stipulated include the attendance by Mr Carroll on behalf of Visy Board at a meeting with Fonterra representatives in Auckland in early 2004, as well as his attendance later at various other meetings in Australia about the forthcoming Fonterra tender. Such pleadings are said to amount to Mr Carroll engaging in conduct that he has contravened s 27(1) of the Act or attempted to contravene s 27(1) or in the alternative has acted in one of the ways referred to in s 80(1)(c) to (f) inclusive.

High Court judgment

[132] With respect to these pleadings Heath J concluded:

> [74] While it is true that the meeting in Auckland preceded the date on which tenders were issued, there is a plausible narrative, from which appropriate inferences could be drawn, to suggest that Mr Carroll's attendance was for the purpose of understanding the nature of the tender process, so that he could return to Australia and discuss, with the nominated Amcor representative, the possibility of implementing the overarching understanding to this particular process. There is a good arguable case that deliberate engagement in a preparatory meeting of that type occurred in breach of s 27, bringing the claim with r 6.27(2)(j) of the High Court Rules. There is also a serious issue to be tried, on the merits.
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> [75] Save for one entity (Bonlac Foods Ltd, based in Tasmania), the tenders invited for the Fonterra businesses all related to the New Zealand market. I consider that there is a good arguable case that tenders which relate almost exclusively to a New Zealand market are actionable under the Act, notwithstanding that one component is directed to a market in Australia.
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> (Footnotes omitted.)

Submissions for Mr Carroll

[133] At the heart of the Commission's case for jurisdiction against Mr Carroll is the existence of alleged acts or omissions to which the claims relate being done or having occurred in New Zealand. Mr Mills submitted that the sole available acts or omissions available concerned the meeting with Fonterra representatives in January 2004, this being the same basis relied upon for the conclusion concerning Mr Carroll in the High Court judgment. There was no warrant to go beyond the existing pleading. In respect of conduct said to have been engaged in by Mr Carroll in connection with the apple box price understanding, Mr Mills submitted that it could not be relied upon as the protest against that cause of action against Mr Carroll in respect of that understanding was upheld. And the Commission has not appealed against that order. We disagree. The fact that a particular cause of action could not proceed is not critical. What is critical is the existence of evidence demonstrating an act or omission in New Zealand and whether that conduct is alleged to relate, and

arguably does relate, to the overarching understanding.[89] We reject therefore the appellant's first submission.

[134] Next Mr Mills emphasised that any application or implementation of the overarching understanding in respect of major customers was intended to occur on a case by case basis. Thus its extension to trans-Tasman customers, or major customers operating in CFP markets in New Zealand, depended on a decision of the participants as to such application. We agree that this view is open on the evidence currently available. But what a New Zealand Court is concerned about for jurisdictional purposes is the existence of a good arguable case that the requirements of r 6.27(2)(j) are met on the causes of action pleaded. This is where Mr Mills, in respect of the evidence of acts or omissions concerning the Fonterra understanding and the overarching understanding focussed most attention.

[135] The appellant therefore submitted that the application of one or both of these understandings needed to be separately proved and be existing at the time when Mr Carroll came to New Zealand in January 2004 for his "routine" visit to the Visy Board NZ Wiri plant. Mr Mills submitted that it was not established on the evidence that the meeting with Fonterra representatives that occurred on the same visit was other than an innocent commercial discussion about the forthcoming Fonterra tender. Mr Mills drew attention to the particulars of the pleading on the question of timing, which currently refer (perhaps erroneously)[90] to meetings in July 2000 and later.[91] He submitted that, if the application of the overarching understanding to the Fonterra tender did not occur until then, it was more likely that Mr Carroll's participation in the January meeting was entirely innocent. Moreover, Mr Mills argued it was incongruous that the timing of events was as pleaded when the tender by Visy interests was submitted to Fonterra on 31 March 2004. Mr Mills developed 11 points of detail to support this main proposition.

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89 The pleading in respect of the fourth cause of action at paragraph 55 (the overarching understanding) makes it clear that the Commission relies on the engaging in particular conduct including conduct referred to "in the causes of action pleaded against Carroll below". It would be open to the Commission to include particulars of such conduct in any amended pleading, notwithstanding that the cause of action will not be pleaded.

90 We note that paragraph 133 of the pleading dealing with the Fonterra understanding refers in the particulars to such understanding being arrived at between April and June 2004.

91 As pleaded at paragraphs 45 and 46 of the second amended statement of claim.

Our evaluation

[136] We do not accept these submissions. First, the pleading of the entering into of the Fonterra understanding is not limited to events in and after April 2004. Paragraph 133 of the second amended statement of claim pleads that the Fonterra understanding was entered into "in early 2004". Timing will be a matter of evidence and inference. No doubt it will be clarified in any amended pleading. Second the events concerning the attendance by Mr Carroll at the meeting with Fonterra representatives on or about 21 January 2004 need to be seen in context. We have described the background and particular context at [76]–[79] and need not repeat it. Within Visy Board Mr Carroll was the senior executive with responsibility for pricing of products to major (including trans-Tasman) customers and the prices to be included in tender documents for such customers.

[137] The starting point for analysis is the evidence of Mr Archer of Fonterra. First the purpose of the Fonterra meeting was to discuss Visy Board's participation in the Fonterra RFP process. Mr Carroll is said to have assured Fonterra representatives that Visy Board was keen to participate. This conduct itself could have been highly relevant to Fonterra's commercial position. Had Visy Board said it would not be participating in some parts, or all, of the tender, Fonterra might well have needed to review its strategy and how the tender process would be advanced. Second, a meeting of this nature early in the tender process is an important preparatory step for the reasons described at [83] above. We also consider, addressing Mr Mills point that more than preparation is needed, that it is arguable Mr Carroll's conduct went beyond that. Third, there is other conduct which is likely to have occurred in New Zealand in which Mr Carroll was involved. This is discussed at [84] above.

[138] On the facts available at this stage there is more than enough to put Mr Carroll's contention of innocent involvement for all conduct occurring in New Zealand in another light. We consider there is a good arguable case under r 6.27(2)(j) against Mr Carroll and a serious issue to be tried on the merits. This is on the basis that Mr Carroll engaged in conduct (acts or omissions) to which the claims relate in New Zealand during the period January to November 2004

concerning the overarching understanding and the Fonterra tender. This aspect of Mr Carroll's appeal therefore fails.

Limitation question

[139] We have already discussed the pleading of the three causes of action against Mr Carroll. To put the present point in context we need to give some more detail on the timing of amendments introduced by the Commission on 8 October 2010, just prior to the hearing before Heath J. The pleading in paragraph 55 is that Mr Carroll allegedly breached s 27(2) of the Act "[b]y engaging in the conduct referred to at paragraphs 45 and 46 above and in the causes of action pleaded against Carroll below". Such conduct refers inter alia to entering into the Fonterra understanding which is pleaded at paragraph 133 to have occurred in early 2004. One of the particulars pleaded is that:

> In early 2004, Carroll on behalf of Visy Board attended a meeting with Fonterra representatives in Auckland in preparation for a forthcoming Fonterra tender.

[140] Mr Mills submitted that it was only permissible for the Commission to introduce a fresh cause of action if it was not statute barred.[92] Here the amendment to the pleading of Mr Carroll's attendance at the January 2004 meeting in Auckland amounted to the introduction of a fresh cause of action that was statute barred. Counsel submitted that, in the light of the decision of the Supreme Court in *Poynter v Commerce Commission*, the claims under s 27 of the Act could not succeed without the amendment, as some conduct by Mr Carroll occurring in New Zealand had to be included. Accordingly he submitted that the amendment gave rise to materially different legal consequences and therefore introduced a fresh cause of action. Counsel for the Commission accepted that, if the amendment did introduce a fresh cause of action, then it is statute barred. But the Commission argued that the amendment had not rendered the pleading entirely different from that which was pleaded earlier so as to create a fresh cause of action against Mr Carroll. The essence of the pleading had not changed and no fresh cause of action arose merely

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[92] Rule 7.77(2)(a) of the HCR.

from the particularisation of evidence as to where Mr Carroll engaged in the conduct concerned.

[141] The applicable principles to determine whether an amendment creates a fresh cause of action are summarised by this Court in *Transpower New Zealand Ltd v Todd Energy Ltd*:[93]

> (a) A cause of action is a factual situation the existence of which entitles one person to obtain a legal remedy against another (*Letang v Cooper* [1965] 1 QB 232 at 242 – 243 (CA) per Diplock LJ);
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> (b) Only material facts are taken into account and the selection of those facts "is made at the highest level of abstraction" (*Paragon Finance plc v D B Thakerar & Co (a firm)* [1999] 1 All ER 400 at 405 (CA) per Millett LJ);
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> (c) The test of whether an amended pleading is "fresh" is whether it is something "essentially different" (*Chilcott v Goss* [1995] 1 NZLR 263 at 273 (CA) citing *Smith v Wilkins & Davies Construction Co Ltd* [1958] NZLR 958 at 961 (SC) per McCarthy J). Whether there is such a change is a question of degree. The change in character could be brought about by alterations in matters of law, or of fact, or both; and
>
> (d) A plaintiff will not be permitted, after the period of limitations has run, to set up a new case "varying so substantially" from the previous pleadings that it would involve investigation of factual or legal matters, or both, "different from what have already been raised and of which no fair warning has been given" (*Chilcott* at 273 noting that this test from *Harris v Raggatt* [1965] VR 779 at 785 (SC) per Sholl J was adopted in *Gabites v Australasian T & G Mutual Life Assurance Society Ltd* [1968] NZLR 1145 at 1151 (CA)).

[142] The question is therefore whether the amendment to the pleadings changes the claim against the defendant so that it is something essentially different from what it was before the amendment. A change of that nature can, as is clear from paragraph (c) of the passage from *Transpower* above, occur as a result of an alteration in matters of fact. In determining whether a particular factual amendment has the effect of inserting a new cause of action, it is helpful to refer to three cases that have considered amendments altering factual matters.

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[93] *Transpower New Zealand Ltd v Todd Energy Ltd* [2007] NZCA 302 at [61] (referring to *The Ophthalmological Society of New Zealand Inc v The Commerce Commission* CA168/01, 26 September 2001 at [22]–[24]). Leave to appeal refused: *Transpower New Zealand Ltd v Todd Energy Ltd* [2007] NZSC 106.

[143] The first is *Smith v Wilkins and Davies Construction Co Ltd*,[94] referred to in paragraph (c) of the summary above. In that case, the plaintiff filed proceedings against his employer in negligence after suffering injuries from a workplace accident. The relevant part of the original pleadings claimed that the defendant's injuries were caused or contributed to by the defendant's negligence in failing to provide a safe system of work in a number of respects. Later, the plaintiff, after the expiry of the limitation period, sought to amend that section of the statement of claim by replacing it with an allegation of failing to provide a safe system of work in some of the same respects pleaded earlier. But a new factual particular of breach was introduced.

[144] McCarthy J noted that the amendment introduced:[95]

> … a new matter of fact which, at this stage, I must assume to be causative and not merely part of the narrative, for whereas the allegations discarded, or some of them, suggested that the plaintiff had climbed up the legs of profiles to the position from which he fell, the new allegations suggest that he was lifted there by holding on to the hook or the wires of a crane.

The Judge did not, however, consider this "substantial alteration of the facts" to amount to the introduction of a fresh cause of action. He analysed the issue in this way:

> The issue is, I think, put as clearly as anywhere in the words of Lord Wright M.R. in *Marshall v. London Passenger Transport Board* [1936] 3 All E.R. 83, as being whether the new pleading involves "a new departure, a new head of claim, or a new cause of action" (*ibid.*, 87). *In other words, is it something essentially different from that which was pleaded earlier? Such a change in character may be brought about, in my view, by alterations in matters of law or of fact, or both. Alterations of fact could possibly be so vital and important as by themselves to set up a new head of claim. On the other hand, more often alterations of fact do not affect the essence of the case brought against the defendant.* ... In each case it must, I consider, be a question of degree.
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> The claim against the defendant here is founded on breach of the duty thrown on an employer to take reasonable care not to subject his employees to unnecessary risk. That general duty has subdivisions, one of which is the duty to provide, in appropriate cases, a safe system of work: ... Another associated with it, or perhaps a subdivision of it, is to provide proper and safe equipment to carry out the tasks set. Here, under para. 4 (a), a failure in the duty to provide a safe system is alleged. That failure is detailed in a

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94 *Smith v Wilkins and Davies Construction Co Ltd* [1958] NZLR 958 (SC) at 961 per McCarthy J.

95 At 961.

> number of sub-allegations. *These subdivisions have now been altered, but the main character of the substantial allegation remains. The claim is still one founded on the duty of an employer to take proper care for the safety of his servants, and it still embodies, as the branch of that particular duty relied on, the assertion that there was a failure to provide a safe system of work.* It is to be observed that no alteration has been made in the facts contained in para. 3. There is admittedly an alteration in the facts behind the sub-allegations in para. 4 but that, as I see it, amounts to no more than an alteration in particulars and circumstances.
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> (Emphasis added.)

[145] McCarthy J thus acknowledged that, although the pleading of new facts is in theory capable of creating a fresh cause of action, it will be rare that factual matters are so vital as to affect the essence of the case brought against the defendant. McCarthy J's analysis of those factual amendments may be contrasted with his reasoning in respect of further amendments that were made in *Smith v Wilkins and Davies Construction Co Ltd*, which went to the legal basis of the claims against the defendant. The plaintiff added to the statement of claim two paragraphs alleging that the defendant had committed a breach of statutory duty. That allegation, unlike the claim in negligence, was based entirely on the new facts pleaded (that is, that the plaintiff was lifted up by the crane). The Judge found that those amendments did create a new cause of action. The allegation of breach of statutory duty was completely new in both fact and law: it was new in law because breach of statutory duty is a specific common law claim that is different from a claim in negligence; and it was new in fact because it was based entirely on a fact that was not pleaded or even hinted at in the original statement of claim.

[146] A similar approach has been taken in two later cases where it was argued that an amendment to a statement of claim inserting new facts amounted to the introduction of a new cause of action.[96] The theme running through all three cases is that in order for an amendment to amount to a new cause of action, there must be a change to the legal basis for the claim. That can, in theory, occur through the addition of new facts, but only if the facts added are so fundamental that they change the essence of the case against the defendant. If the basic legal claims made are the

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[96] *Seddon v Ryans Carriers Ltd* (1992) 6 PRNZ 355 (HC) and *Bryan v Philips New Zealand Ltd* [1995] 1 NZLR 632 (HC).

same, and they are simply backed up by the addition or substitution of a new fact, that is unlikely to amount to a new cause of action.

[147] We do not consider that the Commission introduced a fresh cause of action by amending the pleading to include conduct by Mr Carroll in New Zealand. The amendment to the pleadings is purely a factual one. The fact inserted is, as the Commission accepts, an important one. Without it the claim would not have been able to meet the jurisdictional requirements of r 6.27(2)(j). However, the importance of the pleaded fact to the success of the claim is not the test; the question is whether the amendment has changed the essential nature of the claim. In our view, it did not. The amendment added an additional fact that is undoubtedly relevant in part to establishing the New Zealand courts' jurisdiction to deal with the Commission's claim against Visy Board.[97] But it did not change the essential nature of the claim against Mr Carroll in any way. The basis of the Commission's claim against Mr Carroll is still, as it has always been, that Mr Carroll breached s 27 of the Act through his conduct in relation to the extension of the overarching understanding in relation to the New Zealand market. The same is the case with the pleading of the Fonterra understanding against Mr Carroll. Accordingly, the addition of the January meeting to the statement of claim did not amount to the pleading of a new cause of action that was time-barred.

[148] For the above reasons the ground of appeal based on the limitation point fails.

Result

[149] For the reasons discussed above the appeal by the Commission in CA312/2011 is allowed. The cross appeal by Visy Board in CA312/2011 is dismissed.

[150] The respondent, Visy Board, must pay the appellant costs for a complex appeal on a band A basis and usual disbursements.

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[97] We have also held that jurisdiction could have been established under s 4 of the Act: at [85]-[86]. That basis of jurisdiction is not dependent upon the attendance by Mr Carroll at the January meeting with Fonterra representatives.

[151] The appeal by the appellant in CA351/2011 is dismissed. Mr Carroll must pay the respondent costs for a standard appeal on a band A basis and usual disbursements.

[152] For completeness we include the following orders consequential upon the outcome of the two appeals. These mirror the orders, with appropriate changes, made by Heath J at the conclusion of the High Court judgment. We order that:

(a) If the Commission files and serves a third amended statement of claim, restricted to pleading those causes of action against Visy Board that we have determined can proceed, and to those causes of action against Mr Carroll that Heath J determined can proceed, then the Commission's applications to set aside the protests to jurisdiction shall be granted. The third amended statement of claim shall be filed and served on or before 28 September 2012.

(b) If a third amended statement of claim complying with order (a) is not filed and served on or before 28 September 2012, the Commission's applications to set aside the protests to jurisdiction will be dismissed.

(c) The case is remitted to the High Court for further case management.

[153] By consent the confidentiality orders made by Heath J in the High Court are to continue provided however that such orders are varied by order of this Court to the extent only that the reasons set out in this judgment may be published in the news media. Any application to vary or set aside such orders is to be made to the High Court.

Solicitors:
Commerce Commission, Wellington for Appellant in CA312/2011 and for Respondent in CA351/2011.
Russell McVeagh, Auckland for Respondent in CA312/2011
Minter Ellison Rudd Watts, Auckland for Appellant in CA351/2011