**IN THE HIGH COURT OF NEW ZEALAND**
**AUCKLAND REGISTRY**
**COMMERCIAL LIST**

**CIV-2007-404-007237**
**[2013] NZHC 2097**

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| BETWEEN | COMMERCE COMMISSION<br>Plaintiff |
| AND | VISY BOARD (NZ) LIMITED<br>First Defendant |
| | VISY BOARD PTY LIMITED<br>Second Defendant |
| | J R S CARROLL<br>Fifth Defendant |
| | J G HODGSON<br>Sixth Defendant |

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| Hearing: | 16 August 2013 |
| Appearances: | J C L Dixon and B Hamlin for Plaintiff<br>A R Galbraith QC and S C Keene for First and Second Defendants<br>S Mills QC and W Blennerhassett for Fifth Defendant |
| Judgment: | 21 August 2013 |

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## JUDGMENT OF VENNING J

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**This judgment was re-issued and delivered by me on 21 August 2013 at 5.00 pm, pursuant to Rule 11.5 of the High Court Rules.**

**Registrar/Deputy Registrar**

**Date.....**.....

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| Solicitors: | Meredith Connell, Auckland<br>Russell McVeagh, Auckland<br>Minter Ellison Rudd Watts, Auckland |

## Introduction

[1] For the purposes of this penalty hearing only the defendants, Visy Board (NZ) Limited (Visy NZ), Visy Board Pty Limited (Visy Australia) and Mr Carroll have admitted certain breaches of Part 2 of the Commerce Act 1986 (the Act). The Court is asked to impose a pecuniary penalty under the Act on the basis of the facts, again agreed for the purposes of this proceeding only. The Commerce Commission (the Commission), the Visy companies and Mr Carroll have reached agreement on the quantum of penalty that is appropriate in each case.

## Background

*Parties*

[2] At the relevant time between January 2000 and July 2004 Visy NZ was a wholly owned subsidiary of Visy Australia. It carried on business in New Zealand as a supplier of corrugated fibre packaging (CFP). Visy NZ employed approximately 175 staff.

[3] Visy Australia supplied companies with CFP in Australia. It was one of two main suppliers in the Australian market for the supply of CFP and employed approximately 1900 staff.

[4] During January 2000 to July 2004 Mr Harry Debney was the CEO of Visy Australia. The fifth defendant, Rod Carroll, was the business manager of Visy Australia. Between January 2004 and July 2004 Mr Carroll was the general manager of Visy Board, a division of Visy Australia.

[5] Mr Carroll was familiar with the New Zealand market, having been general manager of Visy NZ prior to 2001. Andrew Gleason, the general manager for Visy NZ, reported directly to Mr Carroll by way of weekly conference calls, other calls and correspondence.

*The CFP industry*

[6] At all material times there was a market in New Zealand for the manufacture and supply of CFP. The three major manufacturers and suppliers of CFP products in New Zealand were:

(a) Carter Holt Harvey Limited (CHH);

(b) Amcor Packaging (New Zealand) Limited (Amcor NZ); and

(c) Visy NZ.

[7] As noted, in Australia there were at the time two major manufacturers and suppliers of CFP products:

(a) Amcor Australasia Ltd (Amcor), a division of Amcor Limited; and

(b) Visy Australia.

[8] Total sales by the three manufacturers and suppliers of CFP in New Zealand by value in 2004 were approximately $500 million.

[9] Between January 2000 and July 2004 Peter Brown was the managing director of Amcor and Edward Laidlaw was the group general manager, marketing and technology of Amcor. From 30 June 2000 to 1 October 2004 the sixth defendant in these proceedings, James Hodgson, was the group general manager, Amcor Corrugating Australasia. Mr Hodgson has taken no steps in these proceedings.

[10] I should record that while CHH has been referred to, the Commission does not allege in these proceedings that CHH was involved in any contract arrangement or understanding with Visy Australia or Visy NZ relating to Fonterra or the New Zealand CFP market more generally.

[11] During the relevant period, compared to Amcor NZ and CHH, Visy NZ had production capacity constraints which affected its ability to supply CFP to the South Island and the lower North Island at competitive prices.

[12] Cartel conduct by Visy Australia and Amcor in the supply of CFP in Australia has been the subject of proceedings and a judgment in that jurisdiction, including a judgment against Mr Carroll.

*The Overarching Understanding*

[13] During January to April 2000 executives of Visy Australia and Amcor in Melbourne spoke and reached the following Overarching Understanding:

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

(b) Visy Australia and Amcor would not compete for each other's major Australian customers;

(c) If, for one reason or another, Visy Australia did enter into a contract for the supply of CFP with a principal customer of Amcor, Visy Australia would not prevent or seek to prevent Amcor from entering into a supply contract with a customer or customers of Visy Australia in order to replace the lost CFP product volume and vice versa;

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

(e) Visy Australia would appoint Mr Carroll as its nominated contact person for the purpose of implementing the understanding and Amcor would appoint Mr Laidlaw.

[14] Although New Zealand customers or components of the trans-Tasman customers' accounts were not expressly referred to, to the extent the trans-Tasman customer accounts were tendered for and negotiated in Australia, giving effect to the

Overarching Understanding in Australia had the potential to also capture the New Zealand component of trans-Tasman customers' tenders.

[15] In 2001 Visy Australia and Visy NZ extended the Overarching Understanding to the New Zealand components of trans-Tasman accounts, through entering the Coca Cola Understanding and entering and giving effect to the Goodman Fielder Understanding. The Overarching Understanding in respect of Australia was extended to only one New Zealand tender involving Mr Carroll. This was the Fonterra tender in 2004. The position of the Visy defendants is that the effect on the New Zealand market was limited.

*Coca Cola*

[16] In about February 2001 Coca Cola (referring to both the New Zealand and Australian operations) requested a proposal from Amcor for the supply of CFP to Coca Cola's businesses in Australia, New Zealand, and Papua New Guinea. At the time Visy Australia and Visy NZ had contracts for supply to Coca Cola in both Australia and New Zealand due to expire in December 2001. From January to March 2001 Visy Australia entered an understanding with Amcor that Amcor would not seek to enter into a contract for the supply of CFP to Coca Cola and Amcor would quote prices to Coca Cola above the prices Visy quoted. Although Visy Australia and Amcor entered into such an understanding it was not put into effect.

*Goodman Fielder*

[17] On 20 March 2001 the Australian and New Zealand operations of Goodman Fielder Ltd (GFL) requested proposals for the supply of CFP to GFL in Australia and New Zealand. At the time GFL was supplied by Amcor in both Australia and New Zealand. In early 2001 Amcor and Visy Australia entered an understanding that Visy would not seek to enter into contracts for the supply of CFP to GFL and if GFL requested Visy Australia to provide a quote, Visy Australia would quote prices higher than the prices Amcor quoted to GFL.

[18] Between March 2001 to April 2001 Mr Carroll and Mr Laidlaw had a discussion in which Mr Carroll said to Mr Laidlaw words to the effect that Visy

Australia was not interested in picking up the GFL account. Mr Laidlaw provided Mr Carroll with some of Amcor's pricing levels and Mr Carroll said words to the effect that Visy Australia would quote prices above the pricing levels provided in its tender to GFL. For the purposes of these proceedings only Visy NZ does not deny that Mr Carroll also engaged in the conduct described above with apparent or ostensible authority to act on behalf of Visy NZ.

[19] During April and May both Visy Australia and Amcor submitted proposals to GFL for its trans-Tasman business. GFL held the belief Visy Australia's prices were overall higher than Amcor's. As a result Amcor and GFL entered a written agreement on 23 November 2001 and for supply of CFP to Goodman Fielder in Australia. On 14 December 2001 Amcor NZ entered an agreement with GFL NZ for the supply of CFP in New Zealand.

*The Fonterra tender*

[20] In January 2004 Mr Carroll attended a meeting with Visy NZ and Fonterra representatives to describe Visy Australia and Visy NZ's business and capabilities. In January 2004 Visy Australia was the main incumbent supplier to Fonterra in Australia in relation to two of its businesses, Bonlac and Peters & Brownes. In addition Visy NZ was the incumbent supplier to Tip Top in New Zealand. Over 75 per cent of Visy Australia and Visy NZ's supply to Fonterra at the time was the supply by Visy Australia to Bonlac and Peters & Browne.

[21] Visy NZ submitted a tender proposal to Fonterra in or around 31 March 2004. Visy NZ's tender in respect of Tip Top was one per cent higher than the existing pricing. Visy NZ had a Tanabe gluer machine which enabled it to supply a speciality tub carton, which comprised a significant portion of the Tip Top business of Fonterra at a low cost. That gave Visy NZ a cost advantage in relation to the Tip Top business. Amcor or CHH would have been required to make a similar investment in packaging machinery or to incur the cost of outsourcing the work.

[22] Visy NZ was, however, at a disadvantage compared to Amcor NZ and CHH due to its limited capacity and lack of South Island and lower North Island plants in respect of the balance of the contract.

[23] AFPA, representing Amcor NZ and Amcor submitted a tender on 1 April 2004 for the supply of CFP to all of the Fonterra businesses that had been put to tender. AFPA's tender was 3.5% higher than its existing contractual prices. CHH submitted a tender in March 2004 for all the Fonterra business except Bonlac. CHH's tender was five per cent lower than AFPA's.

[24] Between July 2000 and November 2004 Mr Carroll and Mr Laidlaw met some 30 to 40 times to discuss issues or matters arising from the Overarching Understanding. At some time between April and June 2004 Mr Hodgson asked Mr Laidlaw to ask Mr Carroll about Visy's intention in relation to the Fonterra tender. Mr Laidlaw and Mr Carroll subsequently had conversations during which:

- Mr Laidlaw asked Mr Carroll how Visy intended to respond to the Fonterra tender and Mr Carroll said words to the effect Visy would be seeking to retain the supply of CFP to Tip Top in the Fonterra tender.

- Mr Carroll said to Mr Laidlaw words to the effect Visy did not have the capacity or the geographic coverage to meet the CFP requirements of all the companies in New Zealand subject to tender; and

- Mr Laidlaw said to Mr Carroll words to the effect Amcor had been asked to submit a revised proposal for the supply of CFP to Tip Top that would require a substantial investment in new packaging machinery and Amcor would be providing an updated proposal to Fonterra.

[25] As a result of these conversations there arose an understanding between Mr Carroll and Mr Laidlaw that Visy NZ would seek to retain the Tip Top business and that Amcor would seek the balance of the Fonterra business. No actual tender prices were exchanged. Mr Carroll engaged in the conduct described above as agent for Visy Australia and Visy NZ with apparent or ostensible authority but not actual authority to act on behalf of Visy NZ. Mr Gleason formally reported to Mr Carroll through their regular contacts between New Zealand and Australia which enabled Mr Carroll to intervene or direct, if he saw fit, Visy NZ's pricing for the Fonterra tender.

[26] I note Mr Mills' QC submission on behalf of Mr Carroll that the discussion between April and June 2004 followed the submission of tenders.

[27] Further negotiations followed between Visy NZ, Amcor NZ, CHH and Fonterra. As a result Amcor NZ and Amcor obtained Fonterra business to the value of approximately $28 million per annum and Visy NZ retained the value of the Tip Top business of approximately $2 million per annum.

[28] The existence of anticompetitive conduct between Amcor and Visy was made public by Amcor in stock exchange filings on 23 November 2004. Significant publicity followed. Fonterra then issued another RFP for supply of CFP to all Fonterra businesses in 2005. In December 2005 Fonterra entered into a further contract with Visy NZ to supply the Tip Top business and a contract with CHH to supply the balance of the Fonterra business (replacing Amcor).

**Breaches**

[29] For the purposes of these proceedings only Visy Australia does not deny that for the purposes of s 4 of the Commerce Act 1986 it carried on business in New Zealand in respect of the specific instances of supply or possible supply of CFP to Coca Cola, Goodman Fielder and Fonterra.

[30] The Coca Cola, Goodman Fielder and Fonterra Understandings each contained provisions that had the purpose or likely effect of controlling or maintaining the prices submitted in tenders for the supply of CFP products by Visy NZ/Visy Australia and Amcor NZ/Amcor in competition with each other.

[31] Giving effect to the Overarching Understanding by entering into the Coca Cola, the Goodman Fielder and the Fonterra Understandings had the same prohibited purpose or likely effect as entering into customer specific understandings.

[32] The conduct of Visy in giving effect to the Overarching Understanding and entering the Coca Cola Understanding, and entering into and giving effect to the Goodman Fielder and Fonterra Understandings was conduct affecting the market in New Zealand for the purposes of s 4 of the Act.

[33] Visy Australia and Visy New Zealand admit their conduct prescribed breached ss 27(1) and (2) of the Act via s 30. Mr Carroll accepts that his conduct resulted in him being directly or indirectly knowingly concerned in, or a party to, Visy NZ and Visy Australia breaching s 27(2) of the Commerce Act 1986 via s 30 in respect of entry into the Fonterra Understanding. I record that no employee of Visy NZ knew about the contravening conduct.

**Sentencing procedure**

[34] Under s 80 the Court imposes the penalty. However, as confirmed by the Full Court in *Commerce Commission v New Zealand Milk Corporation Ltd*[1] there can be no objection to a joint view of the parties on submissions as to penalty nor to such a view being reached as a result of negotiations so that it represented what could be described as a settlement. Such settlements are in the interests of the parties, the community and the judicial system, enabling early disposal of the proceedings and encouraging a realistic view of culpability and penalty and avoiding the need for a full hearing.[2]

[35] In the present case the Commission has adopted the approach applied in previous cases to setting the appropriate penalty under s 80. The steps are to:

(a) determine the maximum penalty;

(b) establish an appropriate starting point for the offending that achieves the objective of deterrence, in light of relevant factors; and

(c) adjust the starting point for mitigating/defendant specific factors.

**The maximum penalty**

[36] The timing of Visy Board and Visy NZ's breaches require the Court to consider both the former and current penalty regimes under the Act, as they straddle May 2001. Before May 2001 the statutory maximum for companies provided by

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1 *Commerce Commission v New Zealand Milk Corporation Ltd* [1994] 2 NZLR 730.
2 See also *Commerce Commission v Alstom Holdings SA* [2009] NZCCLR (HC).

s 80 was $5 million per breach. After May 2001 the maximum penalty for companies increased significantly. In the present case it is accepted the maximum penalty that could be imposed on either company per breach for each breach of the Act after May 2001 would be $10 million.

[37] Having admitted six breaches of the Act Visy NZ and Visy Australia are each liable for the maximum pecuniary penalties of:

(a) $5 million in respect of three admitted breaches;

(b) $10 million per breach in respect of the three remaining admitted breaches.

In total this comes to $45 million. That assessment includes a separate penalty for giving effect to the Overarching Understanding which is reflected by the customer specific breaches.

**The starting point**

[38] The Court must bear in mind that general and specific deterrence is an important factor in cases of this nature. In *Telecom Corporation of New Zealand Ltd v Commerce Commission* the Court of Appeal accepted the observations of the High Court that by increasing the available maximum penalties in 2001 Parliament had sought to send a:[3]

> "much stronger signal ... that the deterrence objective will only be served if anti-competitive behaviour is profitless".

[39] In the present case the Commission has adopted a single starting point in respect of both entry into and giving effect to all the admitted Understandings. The following factors are relevant to the starting point in this case.

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[3] *Telecom Corporation of New Zealand Ltd v Commerce Commission* [2012] NZCA 344 at [53].

*Importance and type of market*

[40] The CFP market in New Zealand is a significant market with sales totalling approximately $500 million in the 2004 year.

[41] In that regard, the value of the supplies of CFP by Visy is relevant. In the case of Coca Cola in 2001 it was approximately $7 million. The total value of New Zealand Goodman Fielder business, the subject of the 2001 tender, was approximately $7.5 million per annum. The total value of Visy NZ's supply to Tip Top from August 2004 to July 2005 was approximately $2 million. The total value of the Fonterra CFP tender, including Tip Top, was approximately $30 million per annum.

*The nature and seriousness of the contravening conduct*

[42] The conduct, namely price fixing, is at the serious end of the spectrum of the conduct prohibited by the Act. It is deemed anti-competitive per se.

*The role of the defendants*

[43] I accept the submission there is little to distinguish between Visy and Amcor.

*Intention*

[44] The conduct was deliberate.

*The degree to which the conduct was initiated or condoned by senior management*

[45] The conduct was engaged in by Mr Debney and Mr Carroll, each of whom was a senior manager at Visy Australia in Australia. As noted however, no employee at Visy NZ, senior or otherwise, was aware of the conduct. From Visy's point of view the conduct related to three tenders in the periods January to March 2001 (Coca Cola), mid 2001 (Goodman Fielder) and April to July 2004 (Fonterra). From Mr Carroll's point of view, for the purposes of these proceedings he was only directly involved in the Fonterra tender.

*Duration of conduct*

[46] The conduct spanned three tenders: the Coca Cola and Goodman Fielder in 2001 and Fonterra in 2004.

*The potential commercial gain to Visy and Amcor and harm caused by Visy and Amcor*

[47] The parties cannot agree the amount of commercial gain. In particular, Mr Galbraith QC submitted there is no proper evidential basis to draw any inference that Visy achieved any commercial gain from its conduct. In New Zealand that gain was negated by the presence of CHH. However, I accept the submission by Mr Dixon for the Commissioner that there was at least potential for gain. That is the purpose of the conduct in the first place.

[48] Further while there was the presence of CHH in the New Zealand market, Visy could still proceed on the basis of the understanding with Amcor. Next, that was an advantage, as Allan J observed in *Commerce Commission v Geologistics International (Bermuda) Limited*:[4]

> ... although the Court is required to pay particular attention to the actual commercial gain resulting from the conduct, the potential gain or harm associated with that conduct is of equal significance.

[49] I do note that as to harm, Mr Galbraith made the point it was not alleged that any customer suffered any loss through the contravening conduct. The conduct did however have the potential for gain to Visy.

[50] I accept that Mr Carroll did not receive any commercial gain from his conduct.

*Market share*

[51] As noted Visy NZ was one of three major manufacturers and suppliers of CFP at the time.

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[4] ` *Commerce Commission v Geologistics International (Bermuda) Limited* HC Auckland CIV-2010-404-5490, 22 December 2010 at [22].

*Size and resources of the defendant*

[52] Visy Board and Visy NZ are large privately held entities. Visy NZ's annual sales turnovers are around NZ$100 million.

*The comparison with other cases*

[53] Consistency with other sentencing decisions is important in this as in any area of sentencing. However, each case will be fact dependent.[5]

[54] In suggesting the penalty the parties have referred to *Koppers Arch, Whirlpool, Freight Forwarding* and the *Air Cargo* cases.[6] I agree with counsels' assessment that the most relevant cases are *Koppers Arch* and *Whirlpool.* Although the market in *Koppers Arch* was smaller, it involved a greater number of understandings and lasted for a longer period. The starting point was $5.7 million. In *Whirlpool*, the starting point was $4 to 6 million. On that basis the Commission submits that in the case of Visy a starting point in the range of $4.5 million to $5.7 million is appropriate.

*Australian penalties*

[55] Visy Australia has been penalised in Australia in relation to the entry into, and its giving effect to in Australia of the Overarching Understanding leading to the imposition of a highest cartel penalty awarded to date in that jurisdiction of AUD$36 million.

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5 *Commerce Commission v Telecom Corporation of New Zealand Ltd* (2011) 13 TCLR 270 (HC).

6 *Commerce Commission v Koppers Arch Wood Protection (NZ) Ltd* (2006) 11 TCLR 581 (HC); *Commerce Commission v Whirlpool SA* HC Auckland CIV-2011-404-6362, 19 December 2011; *EGL; Geologistics; Commerce Commission v Deutsche Bahn AG* HC Auckland CIV-2010-404-479, 13 June 2011; and *Commerce Commission v Cargolux Airlines International SA* HC Auckland CIV-2008-404-8355, 5 April 2011; *Commerce Commission v British Airways plc* HC Auckland CIV-2008-404-8347, 5 April 2011; *Commerce Commission v Qantas Airways Ltd* HC Auckland CIV-2008-404-8366, 11 May 2011; *Commerce Commission v Japan Airlines Co Ltd* HC Auckland CIV-2008-404-8348, 29 June 2012; *Commerce Commission v Emirates* HC Auckland CIV-2008-404-8349, 27 July 2012; *Commerce Commission v Korean Air Lines Ltd* [2012] NZHC 1851; *Commerce Commission v Singapore Airlines Cargo Pty Ltd* [2012] NZHC 3583; *Commerce Commission v Cathay Pacific Airways Ltd* [2013] NZHC 843; *Commerce Commission v Thai Airways International Public Co Ltd* [2013] NZHC 844; *Commerce Commission v Malaysia Airlines System Berhard Ltd* [2013] NZHC 845; *Commerce Commission v Air New Zealand Ltd* [2013] NZHC 1354.

*Mr Carroll's position*

[56] In relation to Mr Carroll the Commerce Commission notes that as general manager with oversight for Visy NZ his conduct was integral to the understanding reached by Visy NZ with Amcor in relation to the Fonterra tender. His conduct was deliberate. It is accepted, however, Mr Carroll did not receive any personal gain.

[57] In Mr Carroll's case, reference can be made to the penalties imposed on other executives in previous cases: Messrs Greenacre, Mullen, and Newell;[7] Dr Rogers and Dr Elder.[8] Counsel agree the case of *Newell* is most relevant. Mr Newell was a senior executive in the *Koppers Arch* case. The starting point for his penalty was $40,000 reduced by 50 per cent to $20,000.

[58] Mr Carroll has been penalised for his role in being a party to giving effect to the Overarching Understanding in Australia. He was ordered to pay a personal pecuniary penalty of $AUD500,000. He also suffered reputational damage from publicity.

[59] In the present case, having regard to those factors, and the individual maximum penalty of $500,000 the Commission supports the starting range of $35,000 to $40,000 for Mr Carroll. Mr Mills argues for $30,000 to $40,000.

**Mitigating factors**

[60] The Commission accepts that there should be a reduction for mitigating features, in this case such as admission of liability. After the protests to jurisdiction were ultimately dismissed on appeal in August 2012 resolution was reached in the first half of this year before discovery was completed.

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7 *Commerce Commission v Koppers Arch Wood Protection (NZ) Ltd*, above n 5.

8 *Commerce Commission v Ophthalmological Society of New Zealand Inc* [2004] 3 NZLR 689 (HC).

*Co-operation*

[61] Visy Australia and Visy NZ co-operated with the Commission, including by providing voluntary disclosure of documents that the Commission had no compulsory jurisdiction to acquire and by procuring Visy Australia's former CEO.

*Compliance program*

[62] Visy has introduced a comprehensive compliance program in response to the investigations into its conduct.

*Previous conduct*

[63] No previous contraventions are known.

[64] The mitigating factors for Mr Carroll are his admission of liability, the fact he has no previous contraventions and the significance of the penalty of $AUD500,000 imposed in Australia.

**Penalty**

[65] In the circumstances the Commerce Commission supports a penalty in the region of $3.15 to $4.275 million in this case and suggests $3.6 million is appropriate. Visy says that the penalty of $3.6 million is at the top of the range, but accepts it. Visy has also agreed to pay costs of $50,000.

[66] In the case of Mr Carroll the penalty suggested is $25,000. Mr Carroll accepts the recommended penalty of $25,000.

**Summary/Result**

[67] In the circumstances, and in light of the penalties imposed in similar cases, and the penalty imposed in Australia I accept the recommended penalties in the case of Visy NZ and Visy Australia and Mr Carroll are appropriate. In the case of Visy, it is agreed the penalty is to be imposed on the second defendant, Visy Australia.

[68] The second defendant is to pay the Commerce Commission the sum of $3.6 million by way of penalty. The second defendant is also to pay a contribution towards the Commerce Commission's costs and disbursements in the sum of $50,000.

[69] Mr Carroll is to pay a penalty of $25,000.

[70] The parties seek an order directing that distribution of this judgment to any person other than themselves be deferred for 48 hours following delivery with a prohibition on publication or reporting of the judgment during that period. That is to enable the parties to make an appropriate application to the Court regarding confidentiality or to advise there are no confidentiality issues. There will be an order accordingly.

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Venning J