

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

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

CIV-2018-404-002659

Under Parts 1 and 5 of the Fair Trading Act 1986

Between **Commerce Commission**
Applicant

And **viagogo AG**
Respondent

Submissions in support of interlocutory application for interim injunction

29 January 2019

Next event: Hearing (5 February 2019 at 10:00am)

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May it please the Court:

1 Introduction and summary of submissions

- 1.1 This is an application by the Commerce Commission (the **Commission**) for interim injunctions to prohibit the respondent, viagogo AG (**Viagogo**) from continuing to make false and misleading representations to New Zealand consumers.
- 1.2 Viagogo is a Swiss company which operates a ticket reselling website. The website lists for sale tickets to events, concerts and performances around the world, including in New Zealand. Viagogo makes a number of false and misleading representations to consumers purchasing tickets from its website, in breach of ss 9, 11 and 13 of the Fair Trading Act 1986 (**FTA**).
- 1.3 Viagogo is the subject of regulatory enforcement action around the world. It has repeatedly failed to engage with the Commission about its conduct, which continues to mislead New Zealanders on a daily basis.

The conduct

- 1.4 On its New Zealand-facing website (www.viagogo.com/nz, the **Website**), Viagogo represents that:
 - (a) tickets to events are scarce and likely to sell out (the **Scarcity Representations**), when tickets are typically available from other sources, often in significant quantities;
 - (b) tickets are available for purchase at particular prices (the **Price Representations**), when Viagogo also adds substantial unavoidable fees at the final stages of the purchasing process; and
 - (c) Viagogo provides guaranteed tickets to events (the **Guaranteed Tickets Representations**), when it cannot provide that assurance, and when its terms and conditions allow it to provide refunds instead of replacement tickets.
- 1.5 Viagogo deploys the representations to place pressure on consumers to purchase tickets. The Website rushes consumers through the purchasing process – with the Scarcity Representations, pop-up messages and countdown timers – reassuring them along the way with the promise that the tickets will guarantee entry to the coveted event. Then, right before the consumer is to confirm their purchase, Viagogo discloses the full extent of its additional fees, which typically add another 30-40% on top of the listed price.
- 1.6 The Website also makes little mention of Viagogo’s position as a ticket reseller, save for a brief mention on the Website’s homepage. Absent that context, the representations, together with Viagogo’s use of keyword advertising to appear at the top of Google search results, create the impression that Viagogo is an

official ticket provider which can guarantee consumers entry to events. That is of importance to consumers in and of itself, and especially given the particular representations at issue:

- (a) The Scarcity Representations create the impression that Viagogo is an official ticketing source, as the claims it makes about the availability of tickets imply that it has access to ticketing information. In reality, Viagogo does not have access to this information, and its knowledge about the availability of tickets is no greater than that of the general public.
- (b) The Guaranteed Tickets Representations create the impression that Viagogo has commercial arrangements which allow it to provide valid tickets for events in all cases. In reality, Viagogo cannot give that assurance. Viagogo does not own the tickets listed on the Website, takes no steps to verify tickets listed by others, and has no arrangements with primary ticketing sources to allow it to acquire valid tickets when called upon under the guarantee. As such, Viagogo simply cannot provide what it purports to offer.

The extent of the issues

- 1.7 The Commission has received hundreds of complaints regarding Viagogo, numbering 761 as at the date of these submissions. In 2018 the Commission received more complaints about Viagogo than any other trader, by some margin. For instance, between 1 January and 31 October 2018, the Commission received 449 complaints from consumers about Viagogo,¹ almost as many as it did for the next two most-complained about traders (Vodafone² and Spark³) combined.
- 1.8 Most of the complaints arise from consumers who have been misled regarding one or more of the representations outlined above. A sample of these consumers have provided affidavits in support of the interim injunctions sought.. Many report having felt pressured to complete purchases quickly, and having been charged significantly more than they had expected. Others have deposed how the tickets they purchased were invalid, and how Viagogo was unable (or unwilling) to provide them with replacement tickets.
- 1.9 The Commission continues to receive complaints about Viagogo at record levels. It has attempted to engage with Viagogo over the course of a long-running investigation, but the company is uninterested in engaging with the substance of the Commission's concerns. The Commission has also tried to educate consumers about the risk of trading with Viagogo, but that has not stemmed the flow of complaints. Enforcement action has become necessary.

The orders sought

- 1.10 The form of the interim orders sought is set out in **Appendix 1** to these submissions.⁴ Those orders will ensure that consumers receive more accurate

¹ Affidavit of Veronika Andreeva (29 November 2018) (**Andreeva First Affidavit**) at [18].

² The Commission received 255 complaints regarding Vodafone New Zealand Limited in this period: Andreeva First Affidavit at [19].

³ The Commission received 208 complaints regarding Spark New Zealand Trading Limited in this period: Andreeva First Affidavit at [19].

information about the tickets being offered for sale by Viagogo, which will in turn help to stem the prejudice arising from Viagogo's conduct. At the same time, the orders present only a minimal constraint on Viagogo's business; the orders require only that Viagogo changes particular text on the Website, and that it discloses key information sooner and more prominently.

- 1.11 The orders have been sought on an interim basis, reflecting the time it will take to obtain a hearing of the substantive orders also sought. Viagogo has declined to accept service in New Zealand, despite having instructed solicitors here. It will take some six months for service to be effected in Switzerland, which must occur through diplomatic channels and follow the formal translation of all materials filed (itself a significant task). In the meantime consumers are misled on a daily basis. The Commission has sought interim orders to stem the ongoing harm to consumers, pending service on Viagogo and the trial process.
- 1.12 In the circumstances, the Commission respectfully submits that it is desirable and appropriate for the Court to grant the injunctions sought.

2 Background: Viagogo's business

- 2.1 Viagogo is a ticket reselling company which operates in over 100 countries, including New Zealand.⁵ The company operates an online ticketing website which allows third parties (**Sellers**) to list for sale tickets to particular sporting, entertainment and cultural events.
- 2.2 Viagogo is not an official ticket selling company in respect of any events held in New Zealand.⁶ As noted above, it does not own the tickets listed for sale on the Website,⁷ and nor does it take steps to verify whether the tickets listed by others are genuine.
- 2.3 Viagogo's business can be contrasted with those of the main stakeholders in the primary ticketing industry, being:⁸
- (a) promoters, who bring events to the country, select the venue, set the ticket price, and determine how many tickets are released for sale at any one time;
 - (b) venue operators, who host events at venues they operate, and typically provide staff on the day of the event; and

⁴ The Commission will also seek orders at trial in respect of other conduct by Viagogo – namely its representations in Google advertisements to be an “official” ticket selling website, and its use of an unfair contract term.

⁵ 9 August 2018 letter from MinterEllisonRuddWatts (annexed to the Andreeva First Affidavit as VA-11) at [1.2].

⁶ See the affidavits of [REDACTED] (16 November 2018) ([REDACTED] Affidavit) at [6], [REDACTED] (9 November 2018) ([REDACTED] Affidavit) at [6], [REDACTED] (13 November 2018) ([REDACTED] Affidavit) at [11], [REDACTED] (19 November 2018) ([REDACTED] Affidavit) at [6], and [REDACTED] (23 November 2018) ([REDACTED] Affidavit) at [8].

⁷ As per clause 1.2 of Viagogo's terms and conditions (annexed as VA-16 to the Andreeva First Affidavit).

⁸ Andreeva First Affidavit at [87].

- (c) ticketing agents, who are authorised (in most cases by the venue operator, or otherwise by the promoter) to sell tickets to consumers.
- 2.4 Viagogo does not have any contractual relationships with New Zealand promoters, venue operators or ticketing agents.⁹ The tickets sold on the Website are supplied entirely by non-official sources, including other consumers and those purchasing tickets for the purpose of reselling them at a profit.
- 2.5 Viagogo has sold tickets to New Zealand consumers since at least 2014.¹⁰ It engages in significant marketing efforts directed at New Zealand consumers, as outlined in more detail in the sections below.
- 2.6 The Commission has previously attempted to invite Viagogo to cease making the representations of its own accord, having sent multiple letters to Viagogo, and entities and individuals associated with it, since the Commission’s investigation commenced in June 2017. The first time the Commission received a response from Viagogo (through its New Zealand lawyers) was after having informed the company of its intention to file proceedings.¹¹

The purchasing process

- 2.7 The only way to fully appreciate how Viagogo has orchestrated the purchasing process is to view how that process unfolds in real time. The Commission has filed recordings showing the appearance of the Website during two test purchases,¹² and proposes to play aspects of this footage at the hearing.
- 2.8 To purchase tickets through the Website, a consumer must progress¹³ through a number of different webpages, being:
- (a) The **Homepage**, which advertises tickets available for particular events, and which allows the consumer to search for particular events.
 - (b) The **Event Page**, which displays the dates, times and venues for events for which tickets are available via the Website.
 - (c) The **Loading Screen**, which contains representations as to how many other persons are currently “viewing this event”, and as to the number of “tickets left” for that event.
 - (d) The **Ticket Selection Pages**, which allow the consumer to select the number of tickets they wish to purchase and the location within the venue where they wish to be seated, and display prices for tickets on offer.
 - (e) The **Pre-Purchase Page**, which states that the consumer has “entered the waiting room for these tickets” or is in the “waiting area”.

⁹ Andreeva First Affidavit at [89], [REDACTED] Affidavit at [6], [REDACTED] Affidavit at [6], [REDACTED] Affidavit at [11], [REDACTED] Affidavit at [6], [REDACTED] Affidavit at [8].

¹⁰ Andreeva First Affidavit at [15].

¹¹ See the 9 August 2018 letter from MinterEllisonRuddWatts (annexed to the Andreeva First Affidavit as VA-11).

¹² Recordings of which are annexed to the Andreeva First Affidavit as VA-17 and VA-19.

¹³ Consumers who are directed to the Website by clicking on a link in an advertisement are typically directed straight to the Event Page, bypassing the Home Page.

- (f) The **Checkout Stage**, which includes a timer counting down from the specified time, with a representation that the tickets “will no longer be reserved” once that time has run out. The Checkout Stage consists of a number of webpages, in the order set out below, requiring the consumer to:
- (i) confirm the number of tickets they wish to purchase (the **Confirmation Page**);
 - (ii) provide personal information, including their name, email address and phone number (the **Personal Details Page**);
 - (iii) confirm the method of delivering the tickets to the consumer (the **Delivery Method Page**);
 - (iv) select a payment method (the **Payment Method Page**);
 - (v) enter their payment information (the **Payment Details Page**);
 - (vi) provide a billing address (the **Billing Address Page**);
 - (vii) confirm that the details provided at the Checkout Stage are correct (the **Details Check Page**); and
 - (viii) if the consumer accesses the Website from a mobile device, a page containing information regarding how the consumer will receive their tickets (the **Information Page**).
- (g) The **Order Confirmation Page**, which contains a link for the consumer to confirm their purchase.

2.9 For the most part the Website resembles those used by official ticketing agents;¹⁴ it allows the consumer to select particular events, the number of tickets they wish to purchase, and the section in the venue where they wish to be seated. The Website also produces a list of tickets available, with prices next to each. The Website later requires consumers to provide billing and delivery information, consistently with that requested by most online retailers.

2.10 As the consumer navigates those pages, however, they are met with repeated instances of the Scarcity, Price and Guaranteed Tickets Representations. The effect is as described above; together, the representations tell consumers that Viagogo is offering them what may be the last chance they will have to get guaranteed tickets to the chosen event.

Viagogo’s revenue model

2.11 Viagogo derives revenue through two channels:

- (a) fees charged to consumers purchasing tickets through the Website; and
- (b) fees charged to Sellers for tickets sold through the Website.¹⁵

¹⁴ An example of which is annexed to the Andreeva First Affidavit as VA-09.

¹⁵ Viagogo typically deducts 10% of the Initial Price as its fee to the Seller; see the [REDACTED] Affidavit, exhibit MEC-09.

- 2.12 As to the former, the price a consumer will pay for tickets includes:
- (a) an amount set by the Seller (the **Initial Price**); and
 - (b) a number of unavoidable fees (collectively, the **Viagogo Fees**), which include:
 - (i) a percentage-based fee described as the “Booking Fee” or the “GST and Booking Fee” (referred to in these submissions as the latter); and
 - (ii) a fixed fee described variously as the “Delivery Fee”, the “Secure Delivery Fee” or the “Handling Fee” (also referred to in these submissions as the latter).
- 2.13 For much of the purchasing process, the only amount a consumer will be shown is the amount of the Initial Price.¹⁶ The existence of the Viagogo Fees are mentioned, but only in passing, and with no particular prominence given to them.
- 2.14 Viagogo only discloses the amounts of the Viagogo Fees towards the very end of the purchasing process, at the point when the consumer is most likely to have psychologically committed to purchasing the tickets.

Enforcement action

- 2.15 Viagogo’s business practices have been the subject of enforcement action in a number of jurisdictions, including Switzerland, the United Kingdom and Australia.¹⁷
- 2.16 In New Zealand, the Commerce Commission has repeatedly attempted to engage with Viagogo about its business practices and the impact those practices are having on New Zealand consumers, but this engagement has been to little practical effect.

3 The issues in this application

- 3.1 This is an application for an interim injunction on a *Pickwick* basis. While Viagogo’s lawyers have been provided with a copy of all of the materials filed with the Court, they have not responded other than to return them and indicate Viagogo will take no part in these proceedings unless and until it is served through diplomatic channels in Switzerland. As such, the Court (or the Plaintiff) does not have the benefit of a formal opposition from the Defendant to define the matters at issue.

¹⁶ See annexure VA-18 to the Andreeva First Affidavit (figures 3A-3D).

¹⁷ Andreeva First Affidavit at [92](c).

- 3.2 However, as noted above, Viagogo’s solicitors have written to the Commission, in cognisance of this proceeding, and setting out the basis on which they say orders should not be made. As such, the issues for the Court to decide can be identified. They are:
- (a) Whether the Court has jurisdiction over Viagogo, in circumstances where:
 - (i) It has not yet been served; and
 - (ii) It intends to protest jurisdiction;
 - (b) If the Court does, whether the test for an interim injunction under s 41 of the FTA is made out, namely whether:
 - (i) There is a serious question to be tried;
 - (ii) The balance of convenience favours such an order; and
 - (iii) Such an order is generally in the interests of justice.
- 3.3 Counsel are conscious of the obligations upon them in an *ex parte* application. As such, these submissions are lengthy in an attempt to be comprehensive.

4 The interim injunctions

The test

- 4.1 Sections 41(3) and (4) of the FTA empower the Court to grant interim injunctions “if in the opinion of the Court it is desirable to do so”. The cases involving injunctions granted under s 41 have emphasised public interest considerations; declarations have been granted under this provision where there was a risk that consumers would be misled as to the nature of the goods or services offered,¹⁸ or over the identities of competing traders.¹⁹
- 4.2 It is unclear whether the reference to “desirability” in ss 41(3) and (4) is intended to replace the traditional approach to the granting of interim injunctions. That approach is well-established:²⁰
- (a) First, there must be a serious question to be tried (or put another way, the claim cannot be frivolous or vexatious);
 - (b) Second, the balance of convenience must favour granting the order (a step which requires the Court to consider the positions of the parties if the order was granted, and if it was not); and
 - (c) Third, an assessment of the overall justice is required as a check on the position reached following the analysis on the other two steps.

¹⁸ *Alpine Guides (Westland) Ltd v Buckton* (1993) 5 TCLR 444.

¹⁹ *Magellan Corp Ltd v Magellan Group Ltd* (1995) 6 TCLR 598.

²⁰ *American Cyanamid Co v Ethicon Ltd* [1975] AC 396, [1975] 1 All ER 504 (HL), as summarised by the Court of Appeal in *NZ Tax Refunds Ltd v Brooks Homes Ltd* [2013] NZCA 90, (2013) TCLR 531 at [12].

- 4.3 Regardless of whether or not s 41 ousts the three step methodology used in the traditional approach, in practice the same considerations are likely to be engaged.
- 4.4 The balance of convenience test ordinarily requires consideration of whether an undertaking as to damages would be a sufficient remedy to the defendant in the event the substantive claim was unsuccessful. Section 41 modifies that test in two ways:
- (a) First, the Court cannot require the Commission to give an undertaking as to damages;²¹ and
 - (b) Second, the Court cannot take into account the fact that the Commission is not required to give an undertaking as to damages when determining the application for an interim injunction.
- 4.5 The High Court Rules allow interim injunctions to be sought with or without notice in particular circumstances.²² The *Pickwick* procedure²³ is something of a half-way house between the two; the application is advanced as a without notice application, but the respondent is given all of relevant materials, and has the opportunity to advance submissions at the hearing should it wish to do so. It has been observed that the procedure will usually assist the Court by knowing “what contentions may be advanced against the grant, and what is the general line of the evidence in opposition that is likely to be filed when the applicant later moves on notice”.²⁴ That is the case here.
- 4.6 Applications advanced on a *Pickwick* basis do not involve formal notice to the respondent. As such, the High Court Rules require the Court to determine whether the application can properly be dealt with without notice.²⁵ Beyond that, the test for an interim injunction remains the same, regardless of whether the application is advanced with or without notice.
- This case*
- 4.7 Viagogo’s representations have misled New Zealand consumers. The particular ways in which the representations have done so are expanded on in the sections below.
- 4.8 The matters relied upon to support the case for an injunction in respect of the Scarcity, Price and Guaranteed Tickets Representations are set out in sections 5, 6 and 7 below (respectively). But in general terms, the Commission

²¹ FTA, s 41(5).

²² High Court Rules, rr 7.19(4), 7.23.

²³ See *Pickwick International Inc (GB) Ltd v Multiple Sound Distributors Ltd* [1972] 1 WLR 1213, [1972] 3 All ER 384. Though synonymous with the decision in *Pickwick International*, the decision in that case notes that the procedure had been in use for some time.

²⁴ *Pickwick* at 1214, 385.

²⁵ HCR, rr 7.23, 7.46(2). The Court may decline to hear an application absent notice where there are particular issues on which it requires assistance from the respondent: see *Edwards v Podiatrists Board of New Zealand* [2018] NZHC 612, where Churchman J declined to allow an application for a stay of a professional disciplinary decision to proceed without notice. In that case his Honour considered that the Court was “likely to receive material assistance from the views of the respondent on the issue of whether there is still a risk to the public in allowing (even on an interim basis) the applicant to practice podiatric surgery” (at [21]).

respectfully submits that it is appropriate that interim injunctions be granted in this case, since:

- (a) on the terms of s 41, it would be desirable for the Court to restrain conduct which on its face breaches the FTA, and which would cause consumer detriment if allowed to continue;
- (b) on the traditional test, there is a serious question to be tried, the public interest favours interim injunctions in order to prevent further consumer harm, and the overall justice of the matter weighs firmly in favour of the orders; and
- (c) on either approach, the time that will likely be necessary to serve proceedings in Switzerland, and then to bring the matter to trial, will mean that Viagogo will be able to continue to engage in the conduct for some time if the orders are not granted.

4.9 The interim injunctions are necessary to prevent ongoing prejudice to consumers. The Commission announced its intention to file these proceedings on 15 August 2018.²⁶ Since then:

- (a) Viagogo has continued to make the representations to New Zealand consumers; and
- (b) consumers have continued to be misled by those representations.

4.10 Taking each of these in turn, there is evidence from the Commission's lead investigator, Ms Andreeva, that demonstrates that Viagogo continues to make the representations, and in largely the same form.²⁷

4.11 There is also evidence that consumers are continuing to be misled by the representations, as evidenced by the flow of complaints the Commission has received since announcing these proceedings.²⁸

4.12 Interim injunctions are also necessary in that Viagogo has refused to acknowledge other attempts by the Commission to have it cease making the representations of its own accord. The Commission has attempted to contact Viagogo, and other entities and individuals connected with it,²⁹ on a number of occasions since 2017. Where the Commission has attempted contact by email, there is evidence of the emails having been delivered and read by Viagogo, but no responses have been received.³⁰ The Commission has also delivered hard copies of these letters, but has not received a response to those either.³¹ The only response from Viagogo came after the Commission had indicated its intention to file proceedings against it.

²⁶ Andreeva First Affidavit at [17].

²⁷ Andreeva First Affidavit at [20], Affidavit of Veronika Andreeva (29 January 2019) (**Andreeva Third Affidavit**) at [9].

²⁸ Andreeva First Affidavit at [17], Affidavit of Veronika Andreeva (4 December 2018) (**Andreeva Second Affidavit**) at [9]-[11], Andreeva Third Affidavit at [23], [REDACTED] Affidavit at [36].

²⁹ Andreeva First Affidavit at [93](a)-(g).

³⁰ Andreeva First Affidavit at [93](a)-(f). Copies of the delivery documentation are annexed as VA-24, VA-25, VA-27, VA-28, VA-30, VA-32, VA-33 and VA-36.

³¹ Andreeva First Affidavit at [93](f) (the courier documentation for which is annexed to that affidavit as VA-37).

- 4.13 Viagogo has New Zealand solicitors. They have advised that they are not instructed to accept service, and that Viagogo will insist on service taking place on it in Switzerland. They were provided with all materials filed with the Court, but have returned them.
- 4.14 For those reasons, the Commission submits that it is in the public interest for the interim injunctions to be granted pending trial. All it seeks are orders that certain misleading claims not be made and better disclosure be made of certain fees. None of that will impede Viagogo's business. But Viagogo has shown disregard for the concerns identified by the Commission, and for the harm its representations have caused to consumers. The Commission has tried for some time to have Viagogo cease making the representations, but to no avail. Given the stance Viagogo has taken to date, and the ongoing harm to consumers, court orders are necessary to curb the offending conduct.

5 The power of the Court to make the orders sought

- 5.1 Because Viagogo has suggested in correspondence that the FTA does not apply to it, and it is not subject to the jurisdiction of the New Zealand Court, Counsel briefly considers the point below. Viagogo has not filed a protest to jurisdiction and full argument of the question should await the point where it does, should that ever occur.³² But for the further assurance of the Court, and in case Viagogo lodges a protest on very short notice in advance of the hearing, set out in **Appendix 2** is a much fuller analysis of the principles. It may be unnecessary for Counsel to further refer to it.
- 5.2 This Court has previously concluded that "if a material part of misleading or deceptive conduct occurred within New Zealand, the Fair Trading Act applies".³³
- 5.3 It has never been decided in New Zealand whether an overseas website directed at New Zealand consumers constitutes conduct here. The question has been decided in the affirmative in Australia³⁴ and it is submitted that the same logic should apply here, especially given the close similarity between the regulatory regimes. The reasons why are set out in Appendix 2.
- 5.4 But putting that question to one side, as part of the conduct Viagogo:
- (a) makes calls to New Zealand consumers in New Zealand; and
 - (b) sends emails to New Zealand consumers at New Zealand email addresses.

³² The Commission accepts that Viagogo could validly protest jurisdiction after interim orders are made, including if it were heard on those interim orders.

³³ *Chief Executive of the Ministry of Business, Innovation and Employment v Swastik Solution Ltd* [2015] NZHC 1913 at [19] (Commission's Bundle of Authorities (**BOA**) at **Tab 2**), citing *Douglas Pharmaceuticals Ltd v Nutripharm New Zealand Ltd* HC Auckland CP515/97, 23 December 1997 at 11-12 (**BOA, Tab 3**).

³⁴ See in particular *Australian Competition and Consumer Commission v Valve Corporation (No 3)* [2016] FCA 196 (**BOA, Tab 4**) and *Valve Corporation v Australian Competition and Consumer Commission* [2017] FCAFC 224 (**BOA, Tab 5**).

- 5.5 Both points have already been held by New Zealand Courts to be sufficient for an overseas company to be subject to the FTA:
- (a) In *Discount Premium Holidays*,³⁵ telemarketing calls made to New Zealand by a company based entirely overseas were sufficient for jurisdiction (in fact, in the context of an injunction under the FTA);
 - (b) In *Wing Hung*,³⁶ the Court of Appeal concluded that the fact emails were knowingly sent to New Zealand (from overseas) was sufficient for the FTA to apply (in the context of whether there was a “good arguable case” to that effect).
- 5.6 Viagogo also accepts payment from consumers in New Zealand dollars, which is also a connection with New Zealand sufficient to found jurisdiction on orthodox principles.
- 5.7 It is submitted therefore that while this case has novel aspects, the application is not one without precedent. On established principles, material parts of the conduct at issue have occurred here. Viagogo has plainly taken steps in New Zealand and can be said to be subject to the FTA (and therefore the jurisdiction of New Zealand Courts).
- 5.8 Lastly, it is accepted that it will be a rare case where interim relief is granted *ex parte* when service is possible. Here, relief is sought before service is effected simply because of the extraordinary length of time it will take to do so and the harm that will occur to New Zealand consumers in the meantime. Viagogo is entitled to assert its right to be served in Switzerland. But the corollary of that is a substantial delay that provides strong grounds for interim orders to hold the position while that occurs. Viagogo, by choosing that path, and determining not to appear before the Court on this application (even on the basis that it does not submit to jurisdiction), has itself laid the foundation for interim orders to be made on an *ex parte* basis.

6 The Scarcity Representations

The representations

- 6.1 Event tickets are scarce by nature. A performing artist, for instance, will usually only perform a limited number of shows in New Zealand. The tickets for each show will also be limited by the available space in the venue. For consumers the show may be their only chance to see the artist live.
- 6.2 Consumers know that there are often legions of other fans who will want to see the performer live. And with the advent of online ticket-selling, it is not unremarkable for tickets to popular events to sell out in a matter of minutes.
- 6.3 It is this context which gives the Scarcity Representations their force. Viagogo tells consumers that tickets are in high demand and short supply. It does so as a

³⁵ *Commerce Commission v Discount Premium Holidays Ltd* HC Auckland CIV-2007-404-006541, 16 November 2007 (BOA, Tab 6).

³⁶ *Wing Hung Printing Co Ltd v Saito Offshore Pty Ltd* [2010] NZCA 502, [2011] 1 NZLR 754 (BOA, Tab 7).

matter of course,³⁷ and even when tickets are available in substantial quantities from other ticket providers.³⁸

6.4 The Scarcity Representations include representations:

- (a) as to the number of tickets available, that:
 - (i) there are only a specified number of tickets left;³⁹
 - (ii) there are less than a specified percentage of tickets left for the event;⁴⁰
 - (iii) there are “only a few tickets left”;⁴¹
 - (iv) particular tickets are the “last tickets in this section” of the venue;⁴²
 - (v) a specified number of sections within the venue had “already sold out”;⁴³ and
- (b) as to demand for the tickets:
 - (i) that tickets are:
 - (A) “selling fast”;⁴⁴
 - (B) “likely to sell out soon”;⁴⁵
 - (C) “about to sell out”;⁴⁶
 - (D) “almost gone”;⁴⁷ and
 - (ii) that a specified number of other persons:
 - (A) are viewing tickets for the particular event;⁴⁸ and
 - (B) are viewing the particular ticket selected by the consumer.⁴⁹

6.5 These representations appear throughout the purchasing process. They appear from the point the consumer is first shown the listing for particular events, through to the ticket selection pages, right up until the consumer confirms their

³⁷ Andreeva First Affidavit at [46].

³⁸ Andreeva First Affidavit at [44]-[45], [50], [54].

³⁹ Andreeva First Affidavit, VA-18 at figure 2B, 3A, 3B, 3C.

⁴⁰ Andreeva First Affidavit, VA-18 at figure 2C, 3B, 3C, 6, 7, 8, 9A, 11C.

⁴¹ Andreeva First Affidavit, VA-18 at figure 1, 6, 7, 8, 9A, 11C.

⁴² Andreeva First Affidavit, VA-05 (page 5).

⁴³ Andreeva First Affidavit, VA-18 at figure 5B, 7, 8, 9A, 11C.

⁴⁴ Andreeva First Affidavit, VA-18 at figure 1, 5B, 6, 7, 11A.

⁴⁵ Andreeva First Affidavit, VA-18 at figure 4A.

⁴⁶ Andreeva First Affidavit, VA-18 at figure 5A, 6, 8, 9A, 11A, 11C.

⁴⁷ This representation appears at the Checkout Stage in the Calum Scott test purchase (Andreeva First Affidavit, VA-19).

⁴⁸ Andreeva First Affidavit, VA-18 at figures 1, 2A, 3A, 9A.

⁴⁹ Andreeva First Affidavit, VA-18 at figure 9A.

purchase. The representations pop up on screen throughout that process, constantly prodding the consumer to complete their purchase, and to do so quickly. The accompanying images – of red-warning signs and crowds in silhouette – only heighten the sense that the consumer is at risk of missing out.

- 6.6 Particular features of the Website intensify the impact of the Scarcity Representations. For instance, the representations also appear prominently on loading screens during the purchasing process, which take a significant amount of time to load.⁵⁰ The effect is to make consumers anxious and impatient, hastening them to purchase tickets.
- 6.7 Similarly, at the Checkout Stage the consumer is told that the selected tickets are reserved, but that they have a limited time to purchase them – reinforced with a timer counting down, after which Viagogo states that the tickets will be released to others for purchase.⁵¹ The machinations are obvious; people are generally loss averse, and will be more likely to complete a transaction quickly if they are told that they risk losing something that they already ‘had’.

The effect of the Scarcity Representations on consumers

- 6.8 The representations have the expected effect. This is a consistent theme from the consumer evidence filed in support of the application. Examples from that evidence include the following:
- (a) ██████████ “Throughout the purchasing process I saw a number of messages that stated there were very few tickets left and that other people were looking at the same tickets. This pressured me to complete the purchase as soon as possible.”⁵²
 - (b) ██████████ “The website made me think that if I did not buy tickets right there and then, then I would miss out. I did not have time to properly look at the website or read any of the small print because I was worried the tickets would sell out. I felt rushed to complete the purchase quickly, so I purchased four tickets.”⁵³
 - (c) ██████████ “I understood from the website that there were a limited number of tickets left for the event and that I needed to buy my ticket as soon as possible.”⁵⁴
 - (d) ██████████ “I bought the tickets even though the price had jumped up as I had the impression from the website that otherwise I would miss out.”⁵⁵
 - (e) ██████████ “I remember seeing that tickets are selling out and that other people are looking at tickets, so I thought I had to grab these otherwise my grandson would miss out on the show.”⁵⁶

⁵⁰ In the test purchases conducted by the Commission, the Loading Page appeared for 68 seconds (in both instances) and the Pre-Purchase Page appeared for between 48 seconds (for the Calum Scott purchase) and 90 seconds (for the Celine Dion purchase).

⁵¹ If the timer runs out, the consumer is given the option to continue the purchase, which starts another timer.

⁵² Affidavit of ██████████ (9 November 2018) (██████████ Affidavit) at [5].

⁵³ Affidavit of ██████████ (9 November 2018) (██████████ Affidavit) at [9].

⁵⁴ Affidavit of ██████████ (12 November 2018) (██████████ Affidavit) at [4].

⁵⁵ Affidavit of ██████████ (12 November 2018) (██████████ Affidavit) at [8].

- 6.9 The themes from this evidence are exactly what one would expect; the Scarcity Representations instil consumers with the fear of missing out on the event, pushing them to purchase tickets when they might otherwise have taken more time to consider alternative ticket providers.

The Scarcity Representations are false and misleading

- 6.10 The Scarcity Representations are not based on the actual demand or availability of tickets to particular events. As a ticket reseller, Viagogo does not have access to that information; ticketing data is held by venues, ticketing agents and promoters, who regard it as confidential.⁵⁷
- 6.11 Viagogo has no better access to ticket information than the general public.⁵⁸ Where ticketing information is not in the public domain (for example, because the show is sold out), Viagogo has no way of knowing how many tickets have been released for an event, how many are still available for sale at any given time, or how quickly tickets are selling.
- 6.12 Notwithstanding these limitations, Viagogo makes the Scarcity Representations as a matter of course.⁵⁹
- 6.13 The differences between the true number of tickets available, and the position as represented by Viagogo, can be stark. Examples include instances where:
- (a) Viagogo represented that there were “only 97 tickets left” for a Michael Bolton concert, and that this was “less than 5%” of the tickets left for this event. At the time these representations were made, Ticketmaster’s website showed that there were at least 506 tickets still available for purchase, representing over 25% of the venue’s capacity.⁶⁰
 - (b) Viagogo represented that there were “only 120 tickets left” for a performance of the Russian Ballet, and that tickets were “likely to sell out soon” and were “almost gone”. At the time those representations were made, Ticketmaster’s website showed that there were still 656 tickets available for purchase.⁶¹
 - (c) Viagogo represented that there was “Only 1 Ticket Left” for a performance of *Peter Pan Goes Wrong*, when at the same time Ticketmaster had at least 473 tickets remaining for sale.⁶²
 - (d) Viagogo represented that tickets to performances of the Royal New Zealand Ballet were sold out or in limited supply, before those tickets had even been released for sale to the general public.⁶³ Viagogo also represented that there were only 16 tickets left to a performance of *The Nutcracker*, when there were 382 tickets available for sale at that time.⁶⁴

⁵⁶ Affidavit of [REDACTED] (9 November 2018) [REDACTED] Affidavit) at [9].

⁵⁷ Andreeva Third Affidavit at [7], [REDACTED] Affidavit at [9].

⁵⁸ [REDACTED] Affidavit at [6], [REDACTED] at [7], [REDACTED] Affidavit at [12], [REDACTED] Affidavit at [7].

⁵⁹ Andreeva First Affidavit at [46].

⁶⁰ Andreeva First Affidavit at [44].

⁶¹ Andreeva First Affidavit at [45].

⁶² Andreeva First Affidavit at [54].

⁶³ [REDACTED] Affidavit at [8]-[9].

⁶⁴ [REDACTED] Affidavit at [12].

- 6.14 The Scarcity Representations depart substantially from the truth. Again, the intended effect on consumers is obvious; consumers are more likely to rush to purchase a ticket if they think it is the last left, as opposed to the 473rd.

Qualifiers do not correct the misleading effect of the representations

- 6.15 In some instances, the Scarcity Representations are accompanied by qualifiers to the effect that the representations relate only to tickets available *on the Website*. These qualifiers do not appear in most instances. But where they do, they are insufficient to dispel the impressions created by the Scarcity Representations.

- 6.16 The qualifiers usually take the form of a small icon of the letter “i”. If a consumer interacts with the icon – either by moving their mouse over it, or by touching it on a touch screen – a message displays to the effect that the Scarcity Representation relates only to the number of tickets remaining on Viagogo’s website.⁶⁵ Interacting with the icon is the only way for a consumer to view the qualifier, and there is no requirement for a consumer to view that message in order to complete their purchase.

- 6.17 The substance of the qualifiers differ markedly from the impressions created by the headline Scarcity Representations. For instance:

(a) Viagogo coupled a representation that tickets were “[a]bout to sell out” with a qualifier stating “we predict this event will sell out within the next two weeks based on the average rate of ticket sales per day over the past week applied to the remaining tickets available (assuming no additional tickets will be listed for sale) on our website for this event”.⁶⁶ At the time that qualification was made, there were 473 tickets left for the event, which was to be held later the same evening.

(b) A representation that there were “[l]ess than 1% of tickets left for this event” was coupled with a qualifier stating that this was “[b]ased on estimated venue capacity for this event configuration and available tickets remaining through this platform”.⁶⁷

- 6.18 In *Godfrey Hirst v Cavalier Bremworth*, the Court of Appeal considered whether “headline” representations accompanied by qualifying representations are in breach of ss 9 and 13 of the Act. The Court set out the following guiding principles:⁶⁸

(a) *Overall impression*: it is the “dominant message” or “general thrust” of the advertisement that is of crucial importance.

(b) *Wrong only to analyse separate effect of each representation*: as a corollary from (a), when assessing the mental impression on consumers created by a number of representations in a single advertisement, it is insufficient only to analyse the separate effect of each representation. The overall impression cannot be assessed by analysing each separate representation in isolation.

⁶⁵ See the Andreeva First Affidavit, exhibit VA-07.

⁶⁶ See the Andreeva First Affidavit, exhibit VA-07 (page 20).

⁶⁷ See the Andreeva First Affidavit, exhibit VA-07 (page 19).

⁶⁸ *Godfrey Hirst NZ Ltd v Cavalier Bremworth Ltd* [2014] NZCA 418 at [59] (footnotes omitted) (BOA, Tab 8).

(c) *Qualifying information sufficiently prominent?*: whether headline representations are misleading or deceptive depends on whether the qualifications to them have been sufficiently drawn to the attention of targeted consumers. This includes consideration of:

- (i) the proximity of the qualifying information;
- (ii) the prominence of the qualifying information; and
- (iii) whether the qualifying information is sufficiently instructive to nullify the risk that the headline claim might mislead or deceive.

(d) *Glaring disparity*: where the disparity between the headline representation and the information qualifying it is great, it is necessary for the maker of the statement to draw the consumer's attention to the true position in the clearest possible way.

(e) *Tendency to lure consumers into error*: applying principles (a) to (d), the question for the court is whether the advertisement viewed as a whole has a tendency to entice consumers into "the marketing web" by an erroneous belief engendered by the advertiser, even if the consumer may come to appreciate the true position before a transaction is concluded. Enticing consumers into "the marketing web" includes, for example, attracting them into premises selling the advertiser's product. Once a prospective customer has entered, he or she will often be more likely to buy. The misleading advertising would then have contributed to any sale. It must follow that rival traders would also have been prejudiced, although protecting them is not the aim of ss 9 and 13. That consumers could be expected to understand fully the limitations of the warranties by the time they actually purchased a carpet is no answer to the question whether the advertisement was misleading.

6.19 Applying those principles here:

- (a) *Overall impression*: The Scarcity Representations create the overall impression that the consumer must act quickly in order to purchase tickets for the event. The qualifiers do not counteract that impression in any meaningful way.
- (b) *Combined effect of the representations*: The repetition of the representations contributes to the sense of urgency. By the same token, the fact that the qualifier does not appear in all cases suggests that the information it contains is not of sufficient importance to warrant the same degree of repetition.
- (c) *Whether the qualifying information is sufficiently prominent*: The qualifying information is only visible if the consumer actively interacts with the relevant icon. Although the qualifier appears next to the Scarcity Representation, the icon is small and nondescript, with nothing to draw the consumer's attention to it. The language used in each is also relevant; the Scarcity Representations are expressed in language that is clear, crisp and compelling, and the qualifiers are vague, verbose and altogether vapid.
- (d) *The extent of the disparity*: There is a glaring disparity between the representations and the qualifiers. The Scarcity Representations convey the impression that tickets to an event will soon run out. The qualifiers

state that this only relates to tickets available from Viagogo, and is silent on whether tickets are also available from other sources (and indeed, are silent as to the fact that other sources exist at all).

- (e) *Tendency to lure consumers into error*: This aspect of the Scarcity Representations is particularly insidious. The Scarcity Representations convey the sense that the consumer has a short period of time to purchase tickets. A consumer who has been led to believe that this is true will be less likely to take the additional time required to seek out the fine print for the representations they have been exposed to.⁶⁹

6.20 As such, the qualifiers do not correct the overarching impression created by the Scarcity Representations. The qualifiers are presented in such a way that a consumer in a rush – that is, a rush induced by the headline representations – are unlikely to read them. Consumers who do read the qualifiers are unlikely to be any wiser, as the qualifiers provide little clarity on the *actual* number of tickets available to the event in question.

Order sought

6.21 The Commission submits that an interim injunction should be granted to restrain Viagogo from making the Scarcity Representations. This is because:

- (a) Doing so is desirable in the interests of protecting consumers. The Scarcity Representations are misleading, and have led consumers to make rushed purchasing decisions which they would not otherwise have made.
- (b) There is a serious question to be tried. The Scarcity Representations have had, and continue to have, a significant effect on consumers' purchasing decisions.
- (c) The balance of convenience strongly favours the interim injunction sought. The injunctions simply require Viagogo to cease making the representations; they do not pose any constraint on its ability to do business in New Zealand, so long as it does so in accordance with the FTA.
- (d) The overall justice strongly favours an interim injunction. The representations substantially depart from the truth, and induce a state of vulnerability in the consumers they are directed at.

6.22 The form of the interim injunction sought is included in **Appendix 1** to these submissions.

⁶⁹ Cf. *Australian Competition and Consumer Commission v Jetstar Airways Pty Ltd* [2015] FCA 1263, an online misrepresentation case where the Federal Court of Australia considered it relevant that consumers were able to “take time to study particular webpages” and that the information displayed on those webpages could be “viewed and digested at whatever pace the individual consumer chooses” (at [174]).

7 The Price Representations

The representations

- 7.1 As noted above, the price a consumer pays for a ticket from Viagogo is comprised of:
- (a) the Initial Price (an amount set by the Seller); and
 - (b) the Viagogo Fees (being the unavoidable fees set by Viagogo), comprised of:
 - (i) a Handling Fee (the first fee to be disclosed, which is typically in the vicinity of \$5); and
 - (ii) a GST and Booking Fee (the last to be disclosed, and which is usually in the vicinity of 30-40% of the Initial Price).
- 7.2 Viagogo uses a particularly aggressive drip-pricing strategy. For most of the purchasing process, the only price a consumer will see is the Initial Price. This is the price displayed from the Ticket Selection Page, where it is described as the price “per ticket”, without reference to fees of any kind. Viagogo only refers to the existence of fees in a section lower down the page past the various ticketing options, and in a smaller font, under a heading ‘General Notes’. That section contains several items of generic information, one of which is that:
- Prices are set by sellers and may be lower or higher than face value.
Prices exclude booking and delivery fees (applicable by transaction).
[...]
- 7.3 At no point on this page does Viagogo indicate the likely amounts of those fees.
- 7.4 Once the consumer progresses to the Checkout Stage, Viagogo represents that the Initial Price is the “Ticket Price”. Below that the page states “Not Included: Handling Fee, GST and Booking Fee”. This information is contained on the side of the page, away from the main section where the consumer is required to input their ordering information. Again, there is no reference to the amounts, or likely amounts, of those fees when the consumer reaches this page.
- 7.5 Viagogo first discloses the amount of the Handling Fee on the Delivery Method Page. The Handling Fee is disclosed as a separate line item below the “Ticket Price”, which is still listed as the Initial Price. Below that the page states “Not Included: GST and Booking Fee”.
- 7.6 While the amount of the Handling Fee ostensibly varies depending on the delivery method chosen, the variation is slight and in most cases there will only be one delivery method available for the particular tickets chosen.⁷⁰
- 7.7 It is only towards the end of the Checkout Stage that Viagogo discloses the amount of the GST and Booking Fee. This disclosure occurs late in the process, either on the third-to-last page (the Payment Details Page), or the last page (the

⁷⁰ For instance, the recordings annexed to the Andreeva First Affidavit (as VA-17 and VA-19 to VA-21) all show that one delivery option was available.

Details Check Page).⁷¹ This is the first point where Viagogo discloses the actual price to be paid by the consumer.

The effect of the Price Representations on consumers

7.8 The Price Representations have induced consumers to purchase tickets from Viagogo without being fully aware of the price they will be charged.

7.9 The consumer evidence establishes that:

- (a) some consumers (such as ██████████ had no recollection of Viagogo's fees being disclosed to them at all;⁷²
- (b) some consumers (such as ██████████ recalled seeing the price increase, but did not specifically attribute this to the imposition of fees;⁷³ and
- (c) other consumers (such as ██████████ recalled only the price that the tickets were listed at – the Initial Price – and expected that any fees would be slight.⁷⁴

7.10 The strategy also evidently drives sales. As ██████████ has described:⁷⁵

I saw that the tickets were advertised for under \$200 each, so I tried to purchase three of these. [...]

Once I had entered my credit card details, I realised that the total price of the tickets had increased to \$1,174.17. [...] I bought the tickets even though the price had jumped up as I had the impression from the website that otherwise I would miss out.

7.11 Similarly, ██████████'s evidence is that:⁷⁶

If I had more information about Viagogo at the time I bought the tickets, or if I had been told the full price of the tickets in New Zealand dollars at the beginning of the process, then I would not have bought them from Viagogo.

7.12 A great deal of the complaints received by the Commission have come from consumers who were charged more than they had expected. For the most part these expectations have been engendered by Viagogo's Price Representations.⁷⁷

⁷¹ When the Website was accessed via a desktop or a laptop until in or about November 2017, Viagogo disclosed the full amount of the Viagogo Fees on the Details Check Page only. Consumers accessing the Website via a mobile device have only ever had the full amount of the Viagogo Fees disclosed to them on the Details Check Page.

⁷² Affidavit of ██████████ (19 November 2018) ██████████ Affidavit) at [9].

⁷³ ██████████ Affidavit at [8].

⁷⁴ ██████████ Affidavit at [11], and in the email annexed to it as COP-2.

⁷⁵ ██████████ Affidavit at [6], [8].

⁷⁶ ██████████ Affidavit at [16]. ██████████ was charged in Czech Koruna, which also meant that he was charged foreign currency conversion fees.

⁷⁷ Consumers have also complained to the Commission regarding Viagogo charging them in currencies other than New Zealand dollars (as an example, see the ██████████ Affidavit at [7]-[11]).

The Viagogo Fees are not disclosed at the earliest opportunity in the purchasing process

- 7.13 Viagogo charges fees on every transaction; that is its business model. Viagogo knows the basis on which it charges fees, and the expected amounts of those fees in advance of any transactions.
- 7.14 Viagogo's position – as recorded in the letter to the Commission from Viagogo's New Zealand lawyers⁷⁸ – is that it:
- (a) discloses the existence of its fees at the same time as it first lists ticket prices;⁷⁹ and
 - (b) discloses the amount of its fees at the point when it is able to quantify them precisely.⁸⁰
- 7.15 Both aspects elide key points. As to the former, while Viagogo refers to the existence of its fees on the same webpage as it sets out ticket prices, the disclosure is not done in a way likely to be brought to the attention of consumers. In contrast to the ticket price – which is quoted at the top of the page in vivid green – the reference to fees is lower down the page, with nothing in particular to draw attention to it.
- 7.16 The relative prominence given to the Initial Price, and the relative obscurity of the reference to the Viagogo Fees, implies that the latter are insignificant by comparison. The reality is that the Viagogo Fees are substantial; in some cases, the fees have added over \$100 on top of the quoted ticket price.⁸¹ But by referring to the fees in this limited manner, Viagogo implies that its fees are so nominal as not to warrant further mention.
- 7.17 The ways in which the Website directs consumers through the purchasing process are also relevant here. For instance, Viagogo has placed the link to purchase tickets directly below the quoted ticket prices. As such, a consumer can continue with their purchase without ever seeing the section where the additional fees are mentioned.
- 7.18 The Price Representations also need to be understood in light of how the Website pushes consumers to complete purchases quickly. The Website hurries consumers through the purchasing process as fast as possible using a number of methods, including through repeated Scarcity Representations. In that context, Viagogo's claim that it puts consumers on notice about the existence of its fees if they look carefully enough is undermined by its representations that consumers will miss out on their tickets if they take too much time to complete their purchases. Viagogo cannot claim to adequately disclose the existence or extent of its fees when the rest of its Website is designed to push consumers through the "marketing web" and into a purchase as quickly as possible.⁸²

⁷⁸ See exhibit VA-11 to the Andreeva First Affidavit.

⁷⁹ Andreeva First Affidavit, exhibit VA-11 at [6.2].

⁸⁰ Andreeva First Affidavit, exhibit VA-11 at [6.3].

⁸¹ Andreeva First Affidavit at [58] (noting that Viagogo advertised All Blacks tickets for an initial price of \$342.63, which were in fact sold for \$444.91 after fees (an increase of \$102.28).

⁸² *Godfrey Hirst* at [59](e) (**BOA, Tab 8**).

- 7.19 There is also nothing preventing Viagogo from disclosing its fees in closer proximity to the quoted prices. The fact that it does not do so could well be regarded with cynicism.
- 7.20 The second aspect of Viagogo’s position relates to when it is able to quantify the amount of the fees. In their 9 August letter to the Commission, Viagogo’s New Zealand lawyers asserted as follows:⁸³
- [V]iagogo’s booking fee is calculated as a percentage of the ticket purchase price, while the handling fee is determined on a per order basis (i.e. regardless of the number of tickets). The handling fee varies based on the method of delivery selected by the buyer and his or her location. As a result, applicable fees cannot be properly determined until the prospective buyer has selected the event, the number of tickets they want to purchase and inserted their location details.
- 7.21 There are at least four difficulties with this explanation:
- (a) First, if the GST and Booking Fee is calculated as a percentage of the Initial Price, then Viagogo would know the amount of this fee at the outset of the transaction.
 - (b) Second, if Viagogo pays sales tax on the “Booking Fee”,⁸⁴ then the exact amount of that fee would conceivably vary from country to country. But even so, there is nothing to prevent Viagogo from disclosing the tax-exclusive amount of this fee from the outset.
 - (c) Third, the assertion that the Handling Fee is applied on a “per order” basis is inaccurate, since in some cases the fee is charged on a per ticket basis. The Commission’s test purchase of the Calum Scott tickets demonstrates this point.⁸⁵
 - (d) Fourth, in many cases there will only be one delivery option available for the particular tickets chosen (usually to have a download link sent by email).⁸⁶ Where there is only one delivery option available, Viagogo could disclose the amount of the Handling Fee at the outset of the purchasing process. Where multiple delivery options exist, Viagogo could simply disclose the likely range, or the minimum amount, with the exact amount to follow when a consumer selects one option or the other.
- 7.22 In short, Viagogo knows the minimum amount of the fees it will charge on every ticket sold through the Website. There is nothing preventing it from disclosing the amounts of those fees at the outset of the purchasing process. The interim order sought by the Commission simply requires Viagogo to disclose those amounts earlier and more prominently.

⁸³ Andreeva First Affidavit, exhibit VA-11 at [6.3]

⁸⁴ This factor possibly accounts for why the amount of the fee changes over the course of the test purchases. For instance, during the Celine Dion purchase (VA-18) Viagogo first lists a “GST and Booking Fee” of \$57AUD, and later lists a “Booking Fee” of \$54AUD: Andreeva First Affidavit at [77](i) and (k).

⁸⁵ Andreeva First Affidavit at [80](a)(ii), [80](c)(ii), VA-19 and VA-21.

⁸⁶ Consistent with the recordings annexed to the Andreeva First Affidavit (VA-17, VA-19 to VA-21).

The Price Representations are false and misleading

7.23 The Price Representations are effectively representations that consumers will be able to purchase tickets at the Initial Price, or thereabouts. But the Viagogo Fees materially increase the price to be paid by the consumer. Examples of the effect of those price increases include the following:⁸⁷

Event	Initial Price	Viagogo Fees	Total price	Percentage Increase
Bruno Mars concert	\$211.61 AUD	\$61.25 AUD	\$272.86 AUD	29%
Lorde concert	\$177.26 AUD	\$51.72 AUD	\$228.98 AUD	29%
All Blacks match	\$342.63 AUD	\$102.28 AUD	\$444.91 AUD	30%
West Side Story	\$128.14 AUD	\$40.12 AUD	\$168.26 AUD	31%
Ed Sheeran concert	\$129.97 AUD	\$40.48 AUD	\$170.45 AUD	31%
Celine Dion concert	\$177AUD	\$59AUD	\$236AUD	33%
British & Irish Lions Tour match	\$233.48 AUD	\$95.67 AUD	\$329.15 AUD	41%
Calum Scott concert	\$72	\$30	\$102	42%

7.24 Consumers purchasing tickets through the Website cannot avoid the Viagogo Fees. Those fees form part of the total consideration to be provided for the tickets – without agreeing to pay the fees, the consumer will not be able to purchase the tickets. By representing that the “Ticket Price” is the Initial Price only, Viagogo misrepresents the actual amount it intends to charge the consumer.

7.25 While the Viagogo Fees are given particular names, they can only be sensibly viewed as part of the overall price to be paid by a consumer for tickets. This approach is consistent with the FTA’s definition of “price”, which is defined to include:

valuable consideration in any form, whether direct or indirect; **and includes any consideration that relates to the acquisition or supply of goods or services [...], although ostensibly relating to any other matter or thing.**

(Emphasis added)

7.26 As such, while the Viagogo Fees have descriptions which ostensibly refer to other activities – such as “Handling” and “Booking” – these fees nonetheless form part of the consideration relating to the supply of tickets through Viagogo.

7.27 The timing of the disclosures is also relevant in this respect. The Viagogo Fees are disclosed late in the purchasing process, once the consumer has made their

⁸⁷ Andreeva First Affidavit at [58].

way into the centre of Viagogo’s “marketing web”.⁸⁸ The gradual disclosures contribute to this effect, since Viagogo:

- (a) First lists only the Initial Price, without any (proximate) reference to the existence of any fees;
- (b) Later discloses the existence, but not the amounts, of the Handling Fee and the GST and Booking Fee;
- (c) Subsequently discloses the amount of the Handling Fee (which is usually relatively small, priming the consumer not to expect a significant price increase); and
- (d) Then discloses the amount of the GST and Booking Fee (which is substantial, given that Viagogo derives its revenue from fees).

7.28 The net effect is that throughout most of the purchasing process, Viagogo leads the consumer to believe that tickets can be purchased at the Initial Price, when they cannot. By so doing, Viagogo makes false and misleading representations as to the prices tickets can be purchased for, contrary to ss 9, 11 and 13(g) of the FTA.

7.29 A similar approach has been adopted under the Australian Consumer Law (ACL). Section 48 of the ACL contains more detailed guidance on the manner in which prices must be disclosed, but the underlying concern is the same as in the FTA; both enactments recognise that it is misleading to lure a consumer to transact under the pretence that goods and services can be acquired at a price which is substantially lower than is in fact the case. As the Federal Court of Australia noted in *AirAsia*:⁸⁹

[...] it is necessary to have regard to the entire booking process and to the fact that, having completed it, a consumer would have become aware of the full price to be paid before committing him or herself to a purchase. It is also relevant that, on Page 2, the potential consumer was advised that the fares there quoted excluded taxes and fees.

These considerations do not, however, weigh heavily in mitigation.

The principal vice to which s 48 is directed is the seductive effect of a quoted price which is lower than the actual amount the consumer will have to pay in order to receive the relevant service. **Unless the full price is prominently displayed the consumer may well be attracted to a transaction which he or she would not otherwise have found to be appealing and grudgingly pay the additional imposts rather than go to the trouble of withdrawing from the transaction and looking elsewhere.**

(Emphasis added)

7.30 Viagogo allows consumers to progress through the purchasing process in the belief that the tickets they have selected cost substantially less than will be the case. It discloses the amounts of those fees late in the purchasing process, well

⁸⁸ To adopt the Court of Appeal’s terminology from *Godfrey Hirst*, above n.68 at [59](e) (BOA, Tab 8).

⁸⁹ *Australian Competition and Consumer Commission v AirAsia Berhad Company* [2012] FCA 1413 at [31].

after it first could have done so. As such, Viagogo's conduct in making the Price Representations breaches the FTA.

Order sought

- 7.31 The Commission submits that an interim injunction should be granted to restrain Viagogo from making the Price Representations. The reasons for that order are largely the same as those set out above for the Scarcity Representations; the conduct is misleading, the effects on consumers have been significant, and the orders would only require Viagogo to include fees when quoting ticket prices. As such, the overall justice strongly favours an interim injunction.
- 7.32 The form of the interim injunction sought is included in **Appendix 1** to these submissions.

8 The Guaranteed Tickets Representations

The representations

- 8.1 At various points in the purchasing process, Viagogo represents that tickets sold through the Website provide consumers with guaranteed entry to events. These representations take a number of forms, including:
- (a) A bolded representation at the Checkout Stage⁹⁰ that "All Tickets Are Fully Protected By Our Guarantee", which is accompanied by a further representation in smaller text which states:

Buy with confidence. We guarantee that you'll get valid tickets in time for the event.
 - (b) Representations to similar effect at various other points on the Website, including representations that "All Tickets Are 100% Guaranteed",⁹¹ that tickets are "Guaranteed to arrive in time",⁹² and simply "Tickets Guaranteed".⁹³
- 8.2 Viagogo does not, and cannot, provide this guarantee. The result is that many consumers who have purchased tickets from Viagogo have been unable to attend their chosen events at all.
- 8.3 Viagogo's terms and conditions state that it is not required to provide consumers with valid tickets in all cases. Those terms provide that "in the rare instance that a problem arises" with the consumer's tickets, Viagogo will "in its sole and absolute discretion" either provide the consumer with "comparably priced" replacement tickets, or a refund.⁹⁴ As such, the terms and conditions do not place Viagogo under any obligation to provide "valid tickets in time for the event", since its terms allow it to provide a refund instead.

⁹⁰ Specifically, on the Confirmation, Personal Details, Delivery Method, Payment Method, Payment Details and Billing Address Pages.

⁹¹ This representation appears on the pages of the Checkout Stage referred to at n.90 above. See the Andreeva Third Affidavit at [17]-[18].

⁹² This representation appears on the pages of the Checkout Stage referred to at n.90 above.

⁹³ This representation appears at the top of the Checkout Stage in the recording of the test purchase of the Calum Scott tickets (VA-19).

⁹⁴ Annexed to the Andreeva First Affidavit at VA-16, clause 1.3.

- 8.4 As a ticket reseller, Viagogo is never in a position to offer guaranteed tickets to consumers. To do so, Viagogo would be required to have valid tickets available at the time when it is called on by a consumer under the guarantee. But at that point:
- (a) Viagogo cannot guarantee that there will be other tickets listed for sale on the Website; and
 - (b) Viagogo also cannot promise to purchase tickets directly from an official source (for instance, from the ticketing agent’s website), since the tickets may have sold out at the time the consumer is denied entry to the event.
- 8.5 A number of event promoters and performers have terms and conditions which prohibit tickets from being resold, and which allow them to invalidate resold tickets.⁹⁵ A number of venues also have policies not to accept tickets purchased through resellers.⁹⁶ As such, when Viagogo lists tickets for sale to events at these venues, or managed by these promoters, it can never guarantee that *any* tickets sold through its Website will provide guaranteed entry.
- 8.6 Viagogo also does not take any steps to verify the authenticity of the tickets listed on its Website. This occasionally means that Viagogo will list tickets before tickets have gone on sale to the public,⁹⁷ or to events that have since been cancelled.⁹⁸
- 8.7 Since it does nothing to verify listings, Viagogo cannot guarantee that any tickets on its Website are valid. Nor can Viagogo verify whether or not a single ticket has been listed for sale multiple times.
- 8.8 Viagogo’s position - as set out in the 9 August 2018 letter from its New Zealand lawyers - is that:
- (a) its terms of sale require the Seller to “warrant that [they] own the tickets and are authorised to transfer or resell” them;⁹⁹
 - (b) Sellers who offer tickets for sale for artists, venues and promoters who have policies to cancel or invalidate resold tickets “do so in breach of Viagogo’s terms and conditions”;¹⁰⁰ and
 - (c) because of the above:¹⁰¹
- [V]iagogo considers that the warranty given by sellers, together with the [V]iagogo guarantee, enables buyers and sellers to use its platform with confidence. The terms of the [V]iagogo guarantee are set out in [V]iagogo’s terms and conditions. These clearly state the actions that [V]iagogo takes to guarantee that buyers will receive the tickets they have paid for in time for the event, as well as the actions it will take if a problem arises.

⁹⁵ [REDACTED] Affidavit at [7], [REDACTED] Affidavit at [17], [REDACTED] Affidavit at [11].

⁹⁶ [REDACTED] Affidavit at [8].

⁹⁷ [REDACTED] Affidavit at [8]-[10].

⁹⁸ [REDACTED] Affidavit at [14].

⁹⁹ See Viagogo’s terms and conditions and the 9 August 2018 letter from Minter Ellison Rudd Watts (at 7.2) (annexed as VA-16 and VA-11, respectively, to the Andreeva First Affidavit).

¹⁰⁰ Andreeva First Affidavit, VA-11 at 7.3.

¹⁰¹ Andreeva First Affidavit, VA-11 at 7.5.

- 8.9 Those justifications can be easily dismissed. The terms and conditions depart substantially from the headline representations. They are insufficient to change the impact of them on consumers. Moreover, the “warranty” provided by Sellers cannot justify the guarantee. The whole point of the guarantee is that Viagogo will step in when Sellers have failed; and as such the “warranty” has already by definition been breached.

The effect of the Guaranteed Tickets Representations on consumers

- 8.10 Consumers have acted in reliance on the Guaranteed Tickets Representations. In most cases the reliance is implicit; consumers are unlikely to pay substantial sums for tickets if they do not provide an assurance of entry to the event.

- 8.11 In other cases, consumers report having relied on the Guaranteed Tickets Representations directly. For instance, [REDACTED] affidavit records that:¹⁰²

Viagogo’s website also said that I was guaranteed to get valid tickets, and that gave me comfort as I was purchasing.

- 8.12 Consumers have also faced difficulties when attempting to require Viagogo to provide them with replacement tickets. Examples include:

- (a) [REDACTED]¹⁰³ who attempted to verify her tickets to the Electric Avenue music festival before the day of the event and was told that they were invalid. [REDACTED] contacted Viagogo, who advised her that the guarantee did not apply, given that her ticket had been invalidated by the event operator.¹⁰⁴ Viagogo then invited [REDACTED] to re-list the ticket for sale on the Website.
- (b) [REDACTED]¹⁰⁵ whose tickets to a Bruno Mars concert were invalid. Viagogo offered [REDACTED] replacement tickets, but the replacements offered would have left her eight year-old son unable to see the stage.
- (c) [REDACTED]¹⁰⁶ who purchased tickets to an Ed Sheeran concert from Viagogo, only to be advised a week before the concert that the Seller was unable to provide the tickets. Viagogo first offered “replacement tickets” that did not have a seat or row number. Viagogo later sent [REDACTED] a link to choose replacement tickets, but on following it the Website stated that no replacements were available. Viagogo then advised, the day before the concert, that it could not provide replacement tickets, and provided [REDACTED] with a refund instead.

- 8.13 Viagogo’s track record in providing “valid tickets in time for” events is therefore somewhat inconsistent. It hardly befits use of the word “guarantee”.

The Guaranteed Tickets Representations are false and misleading

- 8.14 Viagogo represents that it can provide consumers with “valid tickets in time for the event”, when it cannot. This representation runs counter to every other

¹⁰² [REDACTED] Affidavit at [7].

¹⁰³ [REDACTED] Affidavit at [18].

¹⁰⁴ This stipulation does not appear in Viagogo’s terms and conditions.

¹⁰⁵ Affidavit of [REDACTED] (27 November 2018) ([REDACTED] Affidavit) at [11].

¹⁰⁶ [REDACTED] Affidavit at [19]-[21].

aspect of Viagogo's business; its status as a reseller, its terms and conditions, and the fact that it takes no steps to check the validity of tickets listed for sale.

- 8.15 The representations that tickets are "fully protected by our guarantee" and "100% Guaranteed" raise similar difficulties. The phrases suggest that Viagogo will in all cases provide the consumer with a ticket that is valid for entry to a given event when Viagogo does not, and cannot, give that assurance.
- 8.16 While Viagogo's terms and conditions contain a guarantee of sorts – a promise of replacement tickets *or a refund*¹⁰⁷ – this is not the impression conveyed to consumers. The Guaranteed Tickets Representations make no reference to refunds, and indeed one of them specifically states that Viagogo can guarantee "valid tickets in time for the event". The prospect of a refund is also unlikely to be worth much to a consumer who has lost the chance to see their favourite artist live, in what may literally be a once in a lifetime opportunity.
- 8.17 The Guaranteed Tickets Representations also create the impression that Viagogo has the ability to obtain valid tickets, when it does not. That may contribute to an impression that Viagogo is an official source (or *the* official source) of tickets to the chosen event. This also lends weight to Viagogo's other representations. The Scarcity Representations, for instance, carry much more weight if the consumer believes that Viagogo is the exclusive ticket seller for the event.

Order sought

- 8.18 The Commission submits that an interim injunction should be granted to restrain Viagogo from making the Guaranteed Tickets Representations. Viagogo cannot guarantee that it will provide tickets to events, and there is no good reason for it to continue to be able to make these representations. The conduct is misleading, and the false reassurances given to consumers have likely led many to purchase tickets when they might not otherwise have done so. This breach is in some ways especially pernicious as it underpins the rest: consumers who might be sceptical about Viagogo will be significantly reassured by a "guarantee". But the guarantee is itself misleading.
- 8.19 The form of the interim injunction sought is included in **Appendix 1** to these submissions.

9 Conclusion: interim injunctions are necessary to protect consumers

- 9.1 The Scarcity, Price and Guaranteed Tickets Representations are false and misleading, and Viagogo has no justification for continuing to make them. Indeed, it has made little serious effort to justify its conduct. Viagogo has also demonstrated that it is unwilling to cease making the representations of its own accord, despite overwhelming evidence of the harm its conduct has caused consumers.
- 9.2 In the circumstances, the Commission submits that the only course available to prevent further harm to consumers is for the Court to issue interim injunctions restraining Viagogo from continuing to make the representations.

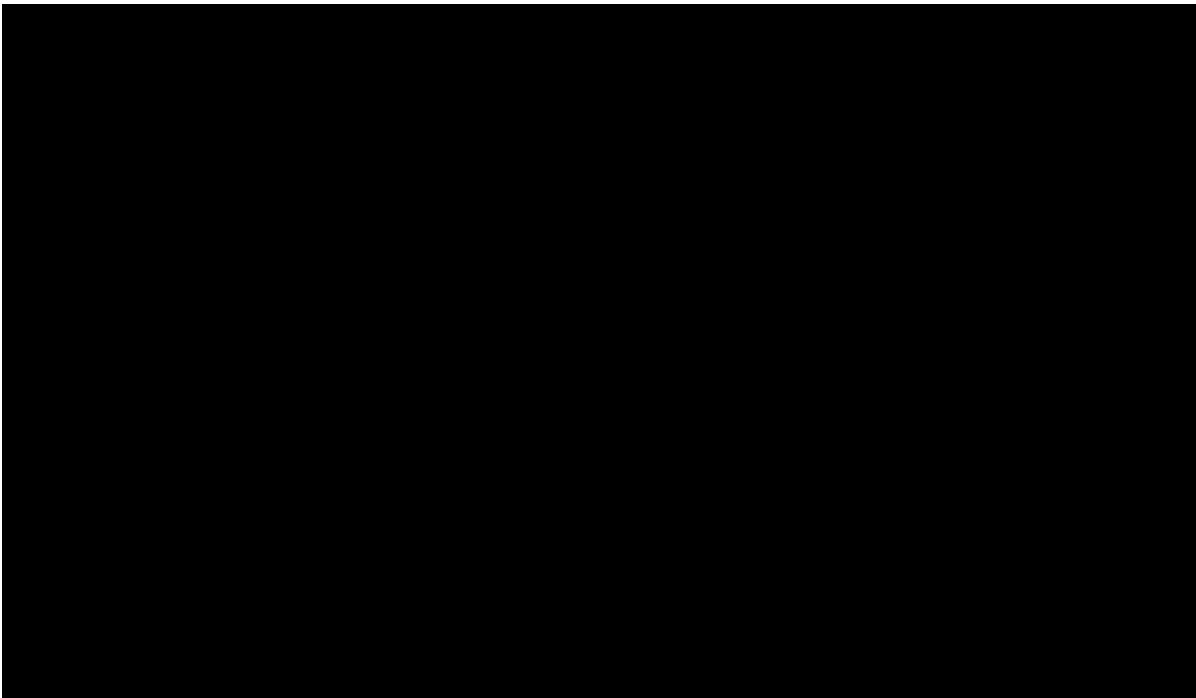
¹⁰⁷ Though in ██████████ case, Viagogo failed to provide that either.

- 9.3 The overall justice of the case also favours the granting of the injunctions. The representations continue to mislead consumers, and the orders only require Viagogo to make straightforward changes to its Website to avert further consumer harm.
- 9.4 Viagogo rushes consumers to make panicked purchases with the Scarcity Representations, deploys Price Representations to understate the amount consumers expect to pay, and gives false reassurances that the tickets provide a guarantee of entry to events consumers are heart-set on attending. That conduct plainly breaches the FTA and has no place in New Zealand.
- 9.5 Moreover, the Commission's case is sufficiently strong that orders to cease the conduct should be made now, ahead of trial and service. There is greater justice in consumers not being misled for another six months than in orders not being made against Viagogo until it has been served, especially in circumstances where it is fully aware of the proceedings and has simply chosen not to participate.

Date: 29 January 2019



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N Flanagan | A Luck
Counsel for the Commission



Appendix 2 - Jurisdiction

The reach of the FTA

- 1 The FTA applies to overseas parties¹⁰⁸ where the impugned conduct:
 - (a) occurs in New Zealand; or
 - (b) is engaged in outside New Zealand by persons carrying on business in New Zealand, to the extent such conduct relates to the supply of goods and services within New Zealand, by virtue of s 3.
- 2 Viagogo is subject to the FTA on either approach. If Viagogo is subject to the FTA, then this Court has jurisdiction over it, wherever it is situated in the world.¹⁰⁹

The first gateway: Viagogo engages in conduct in New Zealand

General principles

- 3 The FTA is domestic legislation. As such, it is presumed to have application to all conduct occurring in New Zealand.
- 4 In most cases, it will be self-evident that the conduct has occurred in New Zealand; for instance, because a New Zealand trader has made a misleading representation to a New Zealand consumer.
- 5 The case law confirms, however, that representations can be said to have been made in New Zealand where they have been directed to, and are intended to be received by, New Zealand consumers.
- 6 This is consistent with the nature of the offending conduct. The FTA attaches liability to false and misleading conduct generally,¹¹⁰ and to representations in particular.¹¹¹ A representation is made when there is a communication of some form. As Tipping J put the point in *Marcol*, for there to be a representation “[t]he representor must be communicating a statement of fact to the representee”.¹¹² The converse is also true; a statement is not a representation until it has been communicated to someone else.

¹⁰⁸ The Act also has extraterritorial effect in relation to matters covered by an international trade instrument (s 3(2)). The Act refers specifically to s 51, which extends jurisdiction to goods that are, or may be, exported to China under a Free Trade Agreement.

¹⁰⁹ *Douglas Pharmaceuticals Ltd v Nutripharm NZ Ltd* HC Auckland CP515/97, 23 December 1997 (**BOA, Tab 3**); *YPG IP Ltd v Yellowbook.com.au Pty Ltd* HC Auckland CIV-2007-404-2839, 13 July 2007 at [25]-[26] (where Allan J noted that the New Zealand Courts are the only Courts with competent jurisdiction to hear and determine applications made under the FTA).

¹¹⁰ FTA, ss 9, 11.

¹¹¹ FTA, s 13.

¹¹² *Marcol Manufacturers Ltd v Commerce Commission* [1991] 2 NZLR 502 (HC) at 506 (**BOA, Tab 9**). Though his Honour referred in the singular to a “representee” he also observed in the same passage that the representee “may of course be a specific person or group of persons or indeed persons generally such as shoppers who may come into a particular shop” (at 506).

- 7 Since a representation is made at the time when it is communicated, it follows that a representation can be regarded as having been made in the place where the person to whom it is communicated is located. That is consistent with the reasoning in *Douglas Pharmaceuticals*, where Randerson J held that “[i]f misleading or deceptive conduct or a material part thereof has occurred within New Zealand, then in my view the FTA has application even if other parts of the conduct ultimately occur beyond our shores”.¹¹³
- 8 Similarly, as the High Court of Australia observed in *Voth* (a negligent advice case):¹¹⁴
- If a statement is directed from one place to another place where it is known or even anticipated that it will be received by the plaintiff, there is no difficulty in saying that the statement was, in substance, made at the place to which it was directed, whether or not it is there acted upon.
- 9 The same reasoning applies where an overseas trader makes representations intended for New Zealand consumers, and where all of the activities required to make those representations have occurred offshore. For instance, in *Commerce Commission v Discount Premium Holidays*¹¹⁵ Cooper J considered that representations in calls from Melbourne-based telemarketers could “properly be regarded as breaches of the [FTA] occurring in New Zealand” where those calls were received by New Zealand consumers. His Honour granted interim injunctions on that basis.
- 10 In *Wing Hung Printing*¹¹⁶ – a case involving protests to jurisdiction – the Court of Appeal reached a similar view. There the court found that there was a good arguable case¹¹⁷ that the sending of an email by a foreign company to a New Zealand resident was conduct occurring in New Zealand for the purposes of the FTA.¹¹⁸

Application to website representations

- 11 The principles outlined in *Marcol*, *Douglas Pharmaceuticals* and *Discount Premium Holidays* apply equally to representations contained on websites. In any case, the question is whether a material part of the representations can be regarded as having been made in New Zealand.

¹¹³ *Douglas Pharmaceuticals Ltd v Nutripharm New Zealand Ltd* HC Auckland CP515/97, 23 December 1997 (BOA, Tab 3).

¹¹⁴ *Voth v Manildra Flour Mills Pty Ltd* [1990] HCA 55 at [63]. The underlying principle has been applied in the context of comparable provisions: see *Valve Corporation v Australian Competition and Consumer Commission* [2017] FCAFC 224 (BOA, Tab 5).

¹¹⁵ *Commerce Commission v Discount Premium Holidays Ltd* HC Auckland CIV-2007-404-006541, 16 November 2007 (BOA, Tab 6).

¹¹⁶ *Wing Hung Printing Co Ltd v Saito Offshore Pty Ltd* [2010] NZCA 502, [2011] 1 NZLR 754 (BOA, Tab 7).

¹¹⁷ This was all the Court was required to decide; the relevant High Court Rule (r 6.29(1)(a)) provided that a party serving proceedings outside New Zealand could resist a protest to jurisdiction by showing that there is a good arguable case that the proceeding could be filed without the Court’s leave (as per the circumstances listed in r 6.27), and that the court should assume jurisdiction (for the reasons in r 6.28(5)(b) to (d)).

¹¹⁸ At [106].

- 12 Two Australian authorities provide important guidance on this point. The first is the decision in *ACCC v Valve Corporation*.¹¹⁹ In that case, the Australian Competition and Consumer Commission (**ACCC**) brought proceedings against Valve, a company based in the United States, which operated an online video game distribution network (called “Steam”). Valve derived its income from game purchases and subscriptions, both of which were processed in US dollars.
- 13 Valve had no traditional business presence in Australia; its business premises and staff were all located outside the jurisdiction and the games were hosted offshore (but were transferred to Australian servers, which were maintained by local companies, to facilitate downloads). Even so, the company had a substantial subscriber and revenue base in Australia, where it boasted more than two million subscriber accounts.
- 14 Valve made representations on its website¹²⁰ which misstated the existence and effect of the consumer guarantees contained in the Competition and Consumer Act 2010 (Cth), which also incorporates the ACL. As noted above, that enactment has a comparable jurisdiction clause to that found in the FTA.¹²¹
- 15 At first instance, Edelman J observed of the website representations:¹²²
- Considered by themselves, they are general representations to the world at large. They are not representations to any person or to any Australian consumer. Until the representations were accessed, the representations were meaningless and could not be the subject of any alleged contravening conduct. But, by the time a consumer had purchased a game or downloaded Steam Client the consumer had a relationship with Valve and representations were made in Australia.
- 16 On appeal, the Full Court took the analysis a step further, finding that “there was a direct relationship between Valve and consumers in Australia”, and that this provided the context in which the website representations could be accessed and read by Australian consumers.¹²³ The Full Court also observed that where misleading conduct is alleged against a person offshore:¹²⁴
- it is necessary to ask where in substance the representations were made. If the respondent is based overseas and has a relationship with customers in Australia, it is likely that representations addressed to those customers will be taken to have been made in Australia, being the place where the customer accesses and reads the representations on his or her computer. This is likely to be the case even if the representations are available to be accessed by consumers in other countries around the world.

¹¹⁹ *ACCC v Valve Corporation (No 3)* [2016] FCA 196 (**BOA, Tab 4**).

¹²⁰ The company also made representations in subscriber agreements (which were provided when a consumer downloaded the Steam browser client, which could only be accessed through the US servers) and in online “chat logs” between support staff and Australian consumers.

¹²¹ Section 5(1)(g) of the Act provides that the Australian Consumer Law extends to “the engaging in conduct outside Australia by ... bodies corporate incorporated or carrying on business in Australia.”

¹²² At [181].

¹²³ At [135].

¹²⁴ At [134].

- 17 In other words, the principle from *Valve* is that if representations are contained on a website, and it is necessary for consumers to access that website to transact with the trader, then representations can be taken to have been made in the country where the consumer accessed them.
- 18 The second Australian authority is the decision in *ACCC v Burden*.¹²⁵ In that case, a company incorporated in New Zealand, Elusion Australia Ltd, offered e-cigarettes and related products through a website targeted at Australian consumers. The website contained misrepresentations that e-cigarettes did not contain harmful chemicals.
- 19 In that case, the ACCC submitted that the representations could be regarded as having occurred “in Australia”, given that Elusion:
- (a) stated on its website “we ship e-cigarettes & accessories Australia-wide”;
 - (b) displayed prices for its e-cigarette products on its website in Australian dollars;
 - (c) accepted payments from customers in Australian dollars;
 - (d) directed enquiries to an Australian telephone number; and
 - (e) accepted purchases of e-cigarette products by customers in Australia through its website.
- 20 Gilmour J held that “any one” of the matters identified by the ACCC would have been sufficient to demonstrate that the relevant conduct occurred “in Australia”.¹²⁶
- 21 The Australian authorities demonstrate three points:
- (a) First, representations contained on websites can be approached in much the same way as representations made through any other forum. The question is always whether the statement has been communicated; that is, whether there has been some statement of fact made in such a way that it can be apprehended by a person who may act on it. In the case of representations contained on websites, *Valve* confirms that the communication is complete at the point a consumer accesses the website, and is therefore in a position to view the relevant statement.
 - (b) Second, a representation will be made in a jurisdiction where it is apprehended by a person in that place, and the person making the representation anticipated that it would be received in that jurisdiction. In *Valve* the latter point was implicit from the Full Court’s description of a trader that “has a relationship with customers in Australia”.¹²⁷ The point is also consistent with the holding in *Voth* that a representation will be made within a jurisdiction if it is “anticipated that it will be received” in that location.¹²⁸

¹²⁵ *Australian Competition and Consumer Commission v Burden* [2017] FCA 399 (BOA, Tab 10).

¹²⁶ At [11].

¹²⁷ At [134].

¹²⁸ At [63].

(c) Third, the question of whether the representor anticipated that the representations would be communicated to a particular jurisdiction requires an objective analysis of the circumstances in which the representation was made. A single indication may be enough; in *Burden* the Court found that any one of the five factors put forward by the ACCC would have provided a sufficient basis to find that the representations were intended for consumers in the jurisdiction.

22 Those principles are consistent with the New Zealand position, at least insofar as representations made through other fora are concerned. While no New Zealand case has explored the point in detail,¹²⁹ it stands to reason that the same principles must apply equally to representations contained on websites.

This case

23 Viagogo makes representations to New Zealand consumers on the Website. The very nature of its business – supplying tickets to events – means that it is supplying a service which can only be utilised in a particular location. Where an event is held at a venue in New Zealand, it is self-evident that the targeted class of consumers will include persons in New Zealand.

24 Viagogo advertises to New Zealand consumers through sponsored search results on search engines (such as Google)¹³⁰ and through New Zealand-centric affiliate marketers (such as the “Australia & New Zealand Events” Facebook page).¹³¹ Viagogo also has arrangements with Google for advertisements to appear on New Zealand websites, such as the website for the New Zealand Herald.¹³²

25 Viagogo’s Website features a New Zealand-specific domain name. Viagogo also has another registered domain, <www.viagogo.co.nz>, which automatically redirects to the Website.¹³³

26 Viagogo directs representations on the Website to New Zealand consumers. On the Home Page alone, Viagogo:¹³⁴

- (a) displays “Top Events”, all of which are for upcoming events to be held in New Zealand;
- (b) typically pre-selects New Zealand dollars as the currency in which prices are displayed (and allows this currency to be chosen if not pre-selected);
- (c) lists a series of “Top Events in New Zealand”, with prices set out in New Zealand dollars (where that currency has been selected); and

¹²⁹ In *Zorb v Akers* [2014] NZHC 1756 Moore J proceeded on the basis that the act of operating a website accessible in New Zealand was sufficient to bring a defendant’s conduct within the scope of the FTA. That observation was made in the context of litigation where the parties had largely reached a settlement and, as such, his Honour was not required to consider the proposition in detail.

¹³⁰ Andreeva First Affidavit at [28]-[29].

¹³¹ Andreeva First Affidavit at [28], [30]-[31]. See also the affidavit of [REDACTED] **Affidavit** at [5] and SMEH-01.

¹³² Andreeva Third Affidavit at [15].

¹³³ Andreeva First Affidavit at [27] and VA-02.

¹³⁴ Annexed to the Andreeva First Affidavit as VA-01.

(d) lists a series of “Top International Events”, with prices also listed in New Zealand dollars.

- 27 Where a New Zealand consumer selects an event which is to be held in multiple locations throughout the world – for instance, where they select tickets for an international music tour – Viagogo displays the New Zealand events first, out of chronological order.¹³⁵
- 28 At the purchasing stage, Viagogo requires consumers to provide it with contact information, including their country, an email address, a billing address, and a phone number. Consumers must enter this information to complete their purchases.¹³⁶ Where a consumer enters a New Zealand billing address or phone number, or provides an email address with a New Zealand domain,¹³⁷ it will be clear to Viagogo that it is contracting with a New Zealand consumer. A consumer provides this information towards the very end of the purchasing process, but Viagogo continues to make the Scarcity and Guaranteed Tickets Representations after this information has been provided.¹³⁸
- 29 Viagogo also processes payments from New Zealand consumers made through credit or debit cards issued by New Zealand banks. Where the tickets are listed for sale by a Seller who chooses to be paid in New Zealand dollars, the entire transaction will also likely be processed in New Zealand dollars.¹³⁹
- 30 When a consumer completes a purchase, Viagogo arranges for tickets to be provided to the consumer, often by way of a download link sent to the email address provided by the consumer during their purchase (which, as above, involves Viagogo sending links to email addresses with New Zealand domains).
- 31 Viagogo clearly intends to transact, and does transact, with New Zealand consumers through the Website. The Website presents tickets for sale to events in New Zealand, detects when the Website has been accessed from New Zealand, and processes orders for customers with New Zealand billing addresses. The short point is that the Viagogo has set up the Website in a way which facilitates purchases from New Zealand consumers.
- 32 Viagogo intends for New Zealand consumers to access its Website; indeed, that is the only way consumers can transact with the company. When New Zealand consumers access the Website, that is the point when Viagogo makes the representations to them. At that point, the representations are made in New Zealand. That result is consistent with the principles from the New Zealand

¹³⁵ Annexed to the Andreeva First Affidavit as VA-18. Viagogo also lists events in the consumer’s jurisdiction first, even when doing so means that the events are listed out of chronological order; an example appears in the affidavit of ██████████ at DB 2, attachment B, which shows events in the consumer’s location for November 2017 (in that case, in Australia), ahead of earlier events in other locations (in that case, a concert in Brazil in April 2017, and concerts in the United States during May 2017).

¹³⁶ On the Personal Details Page, a screenshot of which is annexed to the Andreeva First Affidavit as VA-18 (figure 6).

¹³⁷ For instance, an email address ending with “.co.nz” or “.ac.nz”. Examples of emails sent to New Zealand domains can be seen in the material annexed to the affidavits of ██████████ (as JMM-03), ██████████ (as AC-1) and ██████████ (as JLC-01).

¹³⁸ See the Andreeva First Affidavit, VA-18, figure 11C.

¹³⁹ Through a third party payment gateway, Adyen N.V. (Andreeva First Affidavit at [40]). At least two consumer witnesses were charged in New Zealand dollars (██████████).

cases, and how the Australian cases have applied those principles in the context of online trading.

- 33 As such, Viagogo makes representations in New Zealand, and is subject to the FTA as a result.

The second gateway: Viagogo carries on business in New Zealand

- 34 As noted above, s 3 of the FTA extends the ambit of the Act to conduct by entities “carrying on business in New Zealand”. Although the phrase is not defined in the FTA, the Act defines “business” to mean:

...any undertaking –

(a) That is carried on whether for gain or reward or not; or

(b) In the course of which –

(i) goods or services are acquired or supplied; [...]

- 35 The definition of a business is deliberately broad. As Williams J observed in *Aral Holdings*, the fact that the definition includes “any undertaking” must be taken to import a broad range of economic activities.¹⁴⁰

- 36 In *Visy*,¹⁴¹ the Court of Appeal considered the meaning of the phrase “carrying on business in New Zealand” as it appears in s 4 of the Commerce Act, which is in comparable terms. In that case the defendant (*Visy*) was alleged to have been involved engaged in anti-competitive conduct in the market for the supply of corrugated fibreboard packaging, by virtue of conduct engaged in by an associated New Zealand company (*Visy NZ*).

- 37 The Court of Appeal held that the question of whether *Visy* was carrying on business in New Zealand “involves an intensely factual consideration”.¹⁴² In that case, the Court was satisfied that *Visy* was carrying on business in New Zealand,¹⁴³ particularly given the extent of its involvement in the New Zealand company’s operations, *Visy*’s presentation of itself to customers as a single business, and the fact that *Visy* communicated directly to New Zealand customers.

- 38 The Court of Appeal also acknowledged that Australian case law supported a contextual analysis. The court referred in particular to the decision of the Federal Court in *Bray*,¹⁴⁴ a case in which the Federal Court held that the phrase “carrying on business in Australia”¹⁴⁵ should be given a broad meaning.¹⁴⁶

- 39 In *Bray*, Merkel J considered that a workable approach to the question of whether a person was “carrying on business” was to ask whether the person was engaged in “activities undertaken as a commercial enterprise in the nature

¹⁴⁰ *Churchill Group Holdings Ltd v Aral Property Holdings Ltd* HC Auckland CP574-IM01, 30 September 2003 at [60].

¹⁴¹ *Commerce Commission v Visy Board Pty Ltd* [2012] NZCA 383 (**BOA, Tab 11**).

¹⁴² At [104].

¹⁴³ At [105].

¹⁴⁴ *Bray v F Hoffman-La Roche Ltd* [2002] FCA 243, cited in *Visy* at [27].

¹⁴⁵ As it was used in s 5(1) of the Trade Practices Act 1974 (Cth).

¹⁴⁶ *Bray* at [60].

of a going concern” (or in other words, whether they engaged in such activities “on a continuous and repetitive basis”).¹⁴⁷

- 40 Importantly, Merkel J rejected the notion that “carrying on business” also required the foreign entity to have a place of business within the jurisdiction. As his Honour noted, a place of business “is not a requirement of comity”. In his view, importing such a requirement would “impermissibly supplement” the Act by adding “the additional requirement of corporate presence or residence”.¹⁴⁸
- 41 The decisions in *Valve* and *Burden* also contain useful discussions on the question of whether a person is “carrying on business” in a jurisdiction.
- 42 In the first instance decision in *Valve*, Edelman J held that, if Valve’s conduct did not occur “in Australia”, then it would have “undoubtedly carried on business in Australia”.¹⁴⁹ His Honour gave a number of reasons for that conclusion, including (relevantly):
- (a) Valve had many customers in Australia, with over two million Australian subscriber accounts. As such, the company earned significant revenue from Australian customers on an ongoing basis.
 - (b) Valve incurred tens of thousands of dollars per month in expenses in Australia, particularly to store and power its servers.
 - (c) Valve had relationships with third party providers to facilitate its dealings with Australian customers.
- 43 On appeal, the Full Court confirmed that the reasons given by Edelman J established that Valve was in fact carrying on business in Australia.¹⁵⁰
- 44 The Full Court also referred with approval to the observations of the Supreme Court of New South Wales in *Gebo* that “the territorial concept of carrying on business involves acts within the relevant territory that amount to or are ancillary to transactions that make up or support the business”.¹⁵¹
- 45 Similarly, in *Burden* Gilmour J reached the conclusion that Elusion was carrying on business in Australia. His Honour did so by reference to the factors referred to above (in relation to whether the representations were made “in Australia”), but also because:¹⁵²

¹⁴⁷ At [62]-[63]. His Honour adopted this test from the decision in *Pioneer Concrete Services v Galli* [1985] VR 675, where the Supreme Court of Victoria (considering a different provision) held (at 705) that the term ‘business’ refers to “activities undertaken as a commercial enterprise in the nature of a going concern, that is, activities engaged in for the purpose of profit on a continuous and repetitive basis”. Merkel J noted (at [63]) that the “purpose of profit” was unnecessary in the present context, but otherwise adopted this test.

¹⁴⁸ At [63].

¹⁴⁹ *Australian Competition and Consumer Commission v Valve Corporation (No 3)* [2016] FCA 196 at [198] (**BOA, Tab 4**).

¹⁵⁰ *Valve Corporation v Australian Competition and Consumer Commission* [2017] FCAFC 224 at [150] (**BOA, Tab 5**).

¹⁵¹ *Campbell v Gebo Investments (Labuan) Ltd* [2005] NSWSC 544 at [34], cited in *Valve* (FCAFC) at [147], [149] (**BOA, Tab 5**).

¹⁵² *Australian Competition and Consumer Commission v Burden* [2017] FCA 399 at [14] (**BOA, Tab 10**).

- (a) Elusion marketed its e-cigarette products to consumers in Australia;
- (b) Elusion supplied e-cigarettes through its website to Australian consumers; and
- (c) Elusion derived revenue from customers in Australia.

46 On that basis, Gilmour J was satisfied that there was a “sufficient nexus” based on the nature and extent of Elusion’s business in Australia “as to give the Court jurisdiction in relation to the impugned conduct”.¹⁵³

This case

47 The question of whether a person is carrying on business in a jurisdiction is an inherently factual inquiry. The case law suggests that the analysis will usually require some evidence that the person has been either present in New Zealand, selling to New Zealand, or incurring expenses in New Zealand. A trader will be “carrying on” business in the jurisdiction where they do such activities on “a continuous and repetitive basis.”

48 To a large extent, many of the factors relevant under the first jurisdictional gateway – whether the representations are made in New Zealand – are relevant here as well. Viagogo markets to New Zealand consumers, has an established New Zealand-centric Website, sells tickets to events in New Zealand, and lists prices and accepts payments in New Zealand dollars. It also emails New Zealand consumers directly, including to provide them with links through which to download tickets. All of those factors provide evidence that Viagogo carries on business in New Zealand.

49 Viagogo also has a substantial customer base in New Zealand. The precise number of New Zealand consumers who have purchased tickets from Viagogo is unknown, but the evidence suggests that the number is likely to be substantial. For instance:

- (a) As at the date of these submissions, the Commission has received at least 761 complaints from consumers regarding Viagogo.¹⁵⁴ It has received those complaints since 2014, receiving complaints consistently (and in significant volumes) since 2017. The number of complaints is substantial, and it is inherently likely that these consumers will be but a subset of the overall number of New Zealand consumers who have dealt with the company.
- (b) The evidence from New Zealand Rugby is that it deals with a significant number of consumers who have purchased tickets from Viagogo. The affidavit filed on behalf of that organisation records that, for five All Blacks matches in 2018, a total of 494 consumers holding 947 Viagogo-purchased tickets were denied entry to those events.¹⁵⁵
- (c) Viagogo’s presence in the market also extends from major events (such as the All Blacks matches referred to above) to smaller events and venues. The evidence from the Napier Municipal Theatre, for instance,

¹⁵³ At [15].

¹⁵⁴ Andreeva Third Affidavit at [23].

¹⁵⁵ [REDACTED] affidavit at [35].

records that at least 12-20 consumers have presented Viagogo-purchased tickets at that venue.

- 50 Viagogo also derives revenue in New Zealand. It does so in two ways, in that:
- (a) when a New Zealand consumer purchases tickets, Viagogo charges that consumer the Viagogo Fees for that purchase; and
 - (b) when a ticket is sold which has been listed by a New Zealand-based Seller, Viagogo charges fees to the Seller in respect of that transaction.¹⁵⁶
- 51 Viagogo also incurs expenses arising from its activities in New Zealand. Most notably, Viagogo incurs expenses from Google advertisements and through its arrangements with affiliate marketers.¹⁵⁷
- 52 There is also evidence of Viagogo having called New Zealand consumers on telephone numbers provided for that purpose.¹⁵⁸
- 53 In all, the evidence suggests that Viagogo is an established part of the landscape of online trading in New Zealand. Viagogo conducts marketing activities directed to New Zealand consumers, derives revenue from those consumers, and incurs expenses arising from its marketing to them. Viagogo undertakes these activities in relation to what, on any view, is a substantial number of New Zealand consumers.
- 54 Viagogo has engaged in these activities on a “continuous and repetitive basis”; that point is evident from the continued complaints to the Commission, most of which arise from the same issues.
- 55 As such, Viagogo is carrying on business in New Zealand, and the FTA applies to its conduct by the operation of s 3.

¹⁵⁶ See the affidavits of [REDACTED] and [REDACTED]. These consumers were charged in New Zealand dollars, which means that the Seller asked to be paid in New Zealand dollars as well.

¹⁵⁷ Andreeva First Affidavit at [29].

¹⁵⁸ [REDACTED] Affidavit at [18]. See also the [REDACTED] Affidavit at [10], and the [REDACTED] Affidavit at [15]. [REDACTED] received a call from Viagogo after the purchaser (her mother-in-law, [REDACTED]) called Viagogo to complain ([REDACTED] Affidavit at [15]).