

**DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
COMPETITION COMMITTEE**

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Working Party No. 3 on Co-operation and Enforcement

Roundtable on the Extraterritorial Reach of Competition Remedies - Note by New Zealand

4-5 December 2017

This document reproduces a written contribution from New Zealand submitted for Item 5 at the 126th Meeting of the Working Party No 3 on Co-operation and Enforcement on 4-5 December 2017.

More documentation related to this discussion can be found at

www.oecd.org/daf/competition/extraterritorial-reach-of-competition-remedies.htm

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New Zealand

1. New Zealand is a small and open economy, in which many markets are supplied partly or entirely by imports. In addition, many large, cross-border businesses operating in New Zealand have few – if any – onshore assets. Given the small size of New Zealand, many markets are also characterised by a high level of concentration. The nature of New Zealand’s economy means that offshore mergers and cartels can have a significant and potentially disproportionate impact on competition in markets in New Zealand.

2. In cartel cases, remedies are almost always financial. Our experience has been that once territorial jurisdiction has been established in these cases, and the courts have ordered a payment be made, the parties do not resist payment. While court-imposed penalties can be enforced in Australia,¹ enforcement would be difficult in other jurisdictions. The territorial jurisdiction of New Zealand law has become clearer over the past several years, due to a series of Court decisions and a recent amendment to the Commerce Act 1986 (“the Act”).

3. The 2017 amendment to the Commerce Act (“the Amendment Act”) has clarified the extraterritorial scope of New Zealand competition law in an effort to rectify jurisdictional issues raised in court judgments and New Zealand Commerce Commission (“the Commission”) merger clearance decisions.

4. The net effect of the Amendment Act’s changes to jurisdiction² is to clarify the common law position set out in the case law discussed below. In short, New Zealand competition law is concerned with conduct that affects markets in New Zealand (which can include markets partly inside and partly outside New Zealand).

5. It is now clear that the Act applies to:

1. conduct in New Zealand by any person;
2. conduct in New Zealand by the agent of a person who is not resident or carrying on business in New Zealand;
3. conduct outside of New Zealand by a person who is resident or carrying on business in New Zealand (to the extent that the conduct affects a market in New Zealand); and
4. conduct outside of New Zealand by the agent of a person who is resident or carrying on business in New Zealand (to the extent that the conduct affects a market in New Zealand).

6. The Commission has jurisdiction over mergers which occur in New Zealand and overseas mergers affecting markets in New Zealand where the parties are resident in or carrying on business in New Zealand. In addition, the Commission has jurisdiction over mergers occurring entirely overseas:

5. which result in a substantial lessening of competition in a market in New Zealand; and

¹ Due to the operation of the Trans-Tasman Proceedings Act 2010 – see below.

² Note that the Amendment Act also made substantive changes to the law relating to cartel conduct, including for example introducing per se prohibitions on output restriction and market allocation. These changes are not discussed in this paper.

1. the parties are not resident or carrying on business in New Zealand; but
 2. the merger results in a party acquiring a controlling interest in a New Zealand body corporate.
7. In respect of these mergers, the Commission now has access to suitable remedies, primarily focused on the New Zealand body corporate.
8. On the other hand, where an overseas acquisition results in a substantial lessening of competition in a market in New Zealand but the parties do not acquire a controlling interest in a New Zealand body corporate, the Commission no longer has the jurisdiction it previously had. However, it is questionable whether the Commission could have enforced that jurisdiction in the past.

1. Jurisdiction

9. New Zealand competition law jurisdiction over extraterritorial conduct is primarily based on the principles of territoriality and nationality. These principles are set out in section 4 of the Commerce Act 1986, which now reads³:

4 Application of Act

(1AA) For the purposes of this Act,—

(a) a person engages in conduct in New Zealand if any act or omission forming part of the conduct occurs in New Zealand; and

(b) a person (person A) engages in conduct in New Zealand if another person (person B) engages in conduct in New Zealand, and the conduct of person B is deemed (by virtue of section 90) to be the conduct of person A.

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

(2) Without limiting subsection (1), section 36A extends to the engaging in conduct outside New Zealand by any person resident or carrying on business in Australia to the extent that such conduct affects a market, not being a market exclusively for services, in New Zealand.

10. Section 90, which was significantly amended in 2017, deems agent conduct to be that of the principal as follows:

90 Conduct by employees, agents, and others

(1) In proceedings under this Part in respect of conduct engaged in by a person other than an individual (person A), if it is necessary to establish the state of mind of person A it is sufficient to show that a director, employee, or agent of person A, acting within the scope of the director's, employee's, or agent's actual or apparent authority, had that state of mind.

³ Note that until August 2017, the title of section 4 was “Application of Act to conduct outside New Zealand”. Note also that s 4(1AA) was inserted in 2017, and s 4(3) (not included, but discussed below) was removed.

(2) Conduct by a person (person B) is deemed for the purposes of this Act also to be the conduct of a person other than an individual (person A) if, at the time of the conduct,—

(a) person B was a director, employee, or agent of person A, acting within the scope of person B's actual or apparent authority; or

(b) person B was a person who was acting on the direction, or with the consent or agreement (express or implied), of a director, employee, or agent of person A who was acting within the scope of the director's, employee's, or agent's actual or apparent authority.

(3) In civil proceedings under this Part in respect of conduct engaged in by an individual (person C), if it is necessary to establish the state of mind of person C it is sufficient to show that an employee or agent of person C, acting within the scope of the employee's or agent's actual or apparent authority, had that state of mind.

(4) In civil proceedings under this Part, conduct by a person (person B) is deemed for the purposes of this Act also to be the conduct of an individual (person C) if, at the time of the conduct,—

(a) person B was acting at the direction, or with the consent or agreement (express or implied), of person C; or

(b) person B was an employee or agent of person C and acting within the scope of person B's actual or apparent authority; or

(c) person B was a person who was acting on the direction, or with the consent or agreement (express or implied), of an employee or agent of person C who was acting within the scope of the employee's or agent's actual or apparent authority.

(5) A reference in this section to the state of mind of a person includes a reference to—

(a) the knowledge, intention, opinion, belief, or purpose of the person and the person's reasons for that intention, opinion, belief, or purpose; and

(b) the state of mind of a person outside New Zealand.

11. Section 3(1A) and 3(3) clarify what is meant by references to “a market” in the Act. Sections 3(1A) and 3(3) state:

(1A) Every reference in this Act, except the reference in section 36A(2)(b) and (c), to the term market is a reference to a market in New Zealand for goods or services as well as other goods or services that, as a matter of fact and commercial common sense, are substitutable for them.

...

(3) For the purposes of this Act, the effect on competition in a market shall be determined by reference to all factors that affect competition in that market

including competition from goods or services supplied or likely to be supplied by persons not resident or not carrying on business in New Zealand.

12. Section 47 of the Act contains the general prohibition of mergers or acquisitions that have, or are likely to have, the effect of substantially lessening competition in a market. Sections 47A–47D, inserted in 2017, effectively extend the Act’s merger jurisdiction beyond section 4 by allowing the Commission to take action in relation to offshore mergers affecting markets in New Zealand where the merger parties are not resident in or carrying on business in New Zealand but where a merger party acquires a controlling interest in a New Zealand body corporate. The parts of sections 47A and 47B relevant to the Act’s jurisdiction state:

47A Declaration relating to acquisition by overseas person

(6) *The Commission may apply to the High Court for a declaration under this section if an overseas person acquires, whether directly or indirectly, a controlling interest in a New Zealand body corporate through the acquisition outside New Zealand of the assets of a business or shares.*

(7) *The High Court may make a declaration that it is satisfied that—*

(a) *the overseas person has acquired a controlling interest in a New Zealand body corporate through the acquisition outside New Zealand of the assets of a business or shares; and*

(b) *the acquisition of that controlling interest has, or is likely to have, the effect of substantially lessening competition in a market in New Zealand.*

...

47B Orders against New Zealand bodies corporate following declaration under section 47A

...

(2) *If the High Court makes a declaration under section 47A in relation to an overseas person, it may make an order under this section requiring any New Zealand body corporate in which the person has a controlling interest to—*

(a) *cease carrying on business in New Zealand, in the market to which the declaration relates, no later than 6 months after the date of the declaration or any longer period specified by the court; or*

(b) *dispose of shares or other assets specified by the court; or*

(c) *take any other action (including disposing of shares or other assets) that the court considers, in all the circumstances, is consistent with the purpose of this Act.*

13. The effect of the sections set out above is that New Zealand competition law is only concerned with conduct that affects markets in New Zealand, but that actions taken overseas that affect competition in New Zealand markets can at times fall within the purview of the Act.

2. Background to 2017 Amendment Act

14. Jurisdictional issues in New Zealand competition law have arisen based on the previous wording of the Act. On several occasions, the courts and the Commission faced roadblocks in applying the previous version of the Act to certain types of extraterritorial conduct, and in developing remedies that were enforceable in practice.

15. One example of the previous drafting of the law causing confusion around jurisdiction was the relationship between sections 4 and 90, and how these sections applied to extraterritorial cartel conduct. The previous title of section 4 was “*Application of the Act to conduct outside New Zealand*”, which would suggest that the legal pathways for capturing conduct that occurred outside New Zealand should have been set out in that section. However, it was section 90 – conduct by employees, agents, and others – that contained many of the legal pathways which had been used to capture overseas defendants involved in a cartel affecting a market in New Zealand. However, the Supreme Court’s judgment in *Poynter*, discussed below, indicated that the scope of the previous version of section 90 may not have been as wide as the Commission (and lower Courts) had previously believed.

16. In the merger context, the previous section 4(3) of the Act extended the Commission’s merger enforcement jurisdiction beyond acquisitions by persons resident in or carrying on business in New Zealand – to overseas acquisitions by overseas entities – based on the competitive effects those mergers would have on markets in New Zealand.⁴ However, enforcement under this section was problematic in that where overseas acquisitions affected New Zealand markets, in some cases there were no assets in New Zealand that could be the subject of proceedings, and, in any event, any New Zealand remedies granted against offshore entities were unlikely to be able to be enforced overseas.

17. These jurisdictional issues contributed to the context behind the introduction of the Commerce (Cartels and Other Matters) Amendment Bill to Parliament in 2011, which was passed six years later in August 2017.⁵ The Amendment Act made several changes relevant to the Commission’s extraterritorial jurisdiction in relation to overseas mergers, and better provides for enforcement of remedies against New Zealand subsidiaries of overseas companies. Similarly, the Amendment Act clarified the scope of the Act’s application to offshore participants in cartels affecting New Zealand. Accordingly, the Amendment Act rectified some of the specific jurisdictional issues detailed in the case studies below.

⁴ Section 4(3) (repealed on 15 August 2017) read: Without limiting subsection (1), section 47 extends to the acquisition outside New Zealand by a person (whether or not the person is resident or carries on business in New Zealand) of the assets of a business or shares to the extent that the acquisition affects a market in New Zealand.

⁵ Commerce (Cartels and Other Matters) Amendment Act 2017.

3. Merger case study: extraterritorial jurisdiction issues pre-2017

18. An example of jurisdictional enforcement issues under the previous version of the Act was the *British American Tobacco* (BAT) case in 2001.⁶ The case related to the 1999 BAT/Rothmans global cigarette company merger, which the Commission alleged led to the merged entity acquiring a dominant position⁷ in the New Zealand markets for tobacco products and pre-rolled cigarettes. In taking action against the parties, the Commission alleged that the merger included an effective merger between BAT and Rothmans' New Zealand subsidiary companies. BAT argued that the New Zealand transaction was simply a reconstruction of those New Zealand companies, which were already under common control following the parties' global merger. In this case (an unsuccessful strike-out pleading), counsel for BAT argued that although the Commission could attempt to seek orders against BAT in the United Kingdom (by virtue of section 4(3) of the Act), its practical ability to enforce those orders in the UK was "dubious".⁸ Further, unlike the position in Australia, the Commission did not have the ability to enforce remedies against a New Zealand company if an overseas acquisition of that company raised New Zealand competition issues.⁹ The High Court agreed, stating that although the transaction affected the New Zealand tobacco markets, the Commission's theoretical jurisdiction over BAT in the United Kingdom by virtue of section 4(3) of the Act did not necessarily allow it to seek any effective remedies.¹⁰

19. The new sections 47A–47D of the Act inserted by the Amendment Act in 2017, discussed below, seek to rectify the issue identified by the High Court in *British American Tobacco* by allowing the Commission to seek a range of orders against New Zealand bodies corporate controlled by entities involved in offshore mergers with competition effects in New Zealand.

4. Cartel case studies: extraterritorial jurisdiction issues pre-2017

20. In the cartel context, the Supreme Court's 2010 decision in *Poynter*¹¹ severely limited the Commission's ability to take action against overseas persons involved in cartels affecting New Zealand markets. In this case, the Commission lodged proceedings against several executives who had participated in a cartel operating in New Zealand's wood preservative chemicals industry from 1998 to 2002. Even though these individuals

⁶ Commerce Commission v British American Tobacco Holdings (New Zealand) Limited (2001) 10 TCLR 320 (HC). Note that these proceedings ended with an out-of-court settlement rather than a hearing on the substantive issues. In settling with the Commission, BAT continued to deny liability under the Act.

⁷ Section 47 of the Act previously prohibited mergers leading to a "dominant position" in a market. Section 47 has since been amended to prohibit mergers leading to a "substantial lessening of competition" in a market, the same standard as New Zealand's restrictive trade practices prohibition in section 27 of the Act. The difference is not material in terms of the jurisdictional issue.

⁸ *British American Tobacco*, above n 6 at [29].

⁹ At [29].

¹⁰ At [73].

¹¹ *Poynter v Commerce Commission* [2010] NZSC 38, [2010] 3 NZLR 300.

lived outside of New Zealand and their alleged actions took place outside of New Zealand, the executives had directed individuals who had given effect to the cartel in New Zealand. The Supreme Court overruled the High Court (2007)¹² and the Court of Appeal (2009)¹³, which had both previously ruled that the Commission could pursue proceedings against the relevant individuals. The Commission had accepted that the relevant defendant was a foreign citizen, resident in Australia, who did not carry on business or have assets in New Zealand, and all relevant actions had taken place outside of New Zealand, so section 4 of the Act¹⁴ did not extend the Act's general jurisdiction to him.¹⁵ The Commission argued, however, that the principal/agent rules in section 90 were sufficient to extend jurisdiction to the defendant.

21. The Supreme Court disagreed, reasserting that legislation only has extraterritorial effect where Parliament makes such effect clear through wording or necessary implication; and that persons who reside overseas and are not present in New Zealand should not lightly be subjected to the jurisdiction of the New Zealand courts.¹⁶ Accordingly, the Supreme Court accepted that section 4, as it was then, was an exhaustive statement of the extraterritorial jurisdiction of the Commerce Act and that any extensions to this jurisdiction (including via the conspiracy or agency provisions in the Act) would require the Act to be explicitly amended.¹⁷ The Supreme Court also stated that the principal/agent provisions in section 90, as they were, did not allow for the attribution of the conduct and state of mind of one individual in a corporation to another (only from the person to the corporation).¹⁸ The amendments to sections 4 and 90 in the Amendment Act directly overturn the Supreme Court's rulings in *Poynter* in favour of the Commission's view.

22. During the time that the Amendment Act was being considered by Parliament, there were three other significant cartel cases addressing the extraterritorial jurisdiction of the Act.

23. In the *Air Cargo* litigation,¹⁹ the High Court interpreted the scope of the Act's definition of "market in New Zealand".²⁰ The Commission had commenced proceedings against 13 international airlines and eight airline executives (all resident in or carrying on business in New Zealand) in 2008, alleging that the airlines colluded to raise the price of air freighting cargo by imposing fuel surcharges on cargo shipments into and out of New Zealand over a period of more than seven years. Although jurisdiction regarding

¹² *Harris v Commerce Commission* [2009] NZCA 84, (2009) 12 TCLR 379.

¹³ *Commerce Commission v Koppers Arch Wood Protection (NZ) Ltd* [2007] 2 NZLR 805(HC).

¹⁴ Specifically, s 4(1).

¹⁵ *Poynter*, above n 11 at [32].

¹⁶ At [30]–[31], [63].

¹⁷ At [14]–[17], [62], [78]–[80].

¹⁸ At [9].

¹⁹ *Commerce Commission v Air New Zealand Ltd* (2011) 9 NZBLC 103,318 (HC) at [122]–[124]. The *Air Cargo* enquiry also led to proceedings elsewhere in the world, including proceedings in Australia which raised jurisdictional issues regarding a "market in Australia": *Air New Zealand v Australian Competition and Consumer Commission (ACCC)*; *PT Garuda Indonesia Ltd v ACCC* [2017] HCA 21.

²⁰ In section 3(1A), discussed above.

outbound air cargo was not disputed, the Court was asked to decide whether there was a "market in New Zealand" for the inbound air cargo services that the Commission alleged were the subject of price-fixing. The airlines argued that for cargo inbound to New Zealand the competition between the airlines occurred only at overseas ports of origin and not in New Zealand, and accordingly the Commission's inbound price-fixing claims were outside the jurisdiction of the Act. The Court determined that inbound air cargo services were supplied in a "market in New Zealand", and that the Court had jurisdiction to hear the Commission's case in full. The Court held that it was sufficient that part of the market is situated in New Zealand, noting that it saw "*the fact that part of the service takes place in New Zealand as an important facet of the reality that part of the market is in New Zealand*".²¹ In this case, the arrival and handling of cargo in New Zealand, and the demand for cargo shipments from New Zealand importers, were key factors in the Court's finding that a market for inbound cargo services existed in New Zealand. The Court rejected the airlines' argument that competition between the airlines stopped at the moment the cargo contracts were entered into at ports of origin, and found that such a narrow analysis "*does not seem ... in accord with the facts and common sense*".²²

24. In the *Freight Forwarding* litigation,²³ Kuehne + Nagel International AG (KNI) admitted to being part of a worldwide cartel based in London that called itself the 'Gardening Club'. The Gardening Club agreed to charge certain surcharges on air freight forwarding services from the UK to countries including New Zealand, ostensibly to cover the costs of increased security measures imposed in the UK. The cartel agreement was entered into overseas, and although KNI's New Zealand subsidiary had given effect to the cartel arrangements, it had not played any role in coming to the initial agreement. KNI protested jurisdiction, arguing that the Supreme Court in *Poynter* had expressly limited the Act's extraterritorial application and therefore section 90 did not allow KNI, an offshore entity, to be liable in New Zealand. The Court of Appeal disagreed, stating that section 90 could have extraterritorial effect. The Court of Appeal distinguished *Poynter* on the basis that since section 90 did not apply on the facts of *Poynter*, the Supreme Court could not in that case have been making a general statement about the extraterritorial applicability of section 90.²⁴ The Court of Appeal was also highly critical of KNI's attempt to refute facts stated in its plea agreement with the US DOJ.²⁵ KNI settled with the Commission, and in the penalty judgment against KNI, Venning J stated "*I accept the submission for the Commission that in cases with an international agreement entered into offshore and outside the jurisdiction of the Act (and where s 4 is not satisfied) the role of penalties is to deter parties from extending the operation of those agreements into New Zealand.*"²⁶ That is, in this case KNI was found liable for giving effect to the agreement by way of section 90 notwithstanding that, per *Poynter* and Venning J, section 4 may not have strictly extended the general jurisdiction of the Act to KNI.

²¹ Air New Zealand, above n18 at [194].

²² At [193].

²³ *Commerce Commission v Kuehne + Nagel International AG* [2012] NZCA 221. Penalty imposed: [2014] NZHC 705.

²⁴ *Commerce Commission v Kuehne + Nagel International AG* [2012] NZCA 221 at [42].

²⁵ At [49]–[57].

²⁶ *Commerce Commission v Kuehne + Nagel International AG* [2014] NZHC 705 at [27].

25. In the *Visy Board* case,²⁷ Visy had admitted liability in Australia for its role in illegal arrangements with Amcor, a competitor, to engage in customer allocation in Australian corrugated fibreboard packaging markets.²⁸ The Commission lodged proceedings against Visy's New Zealand operating entity (which carried on business in New Zealand), alleging that the cartel extended to New Zealand. Amcor had sought immunity in both jurisdictions. Visy protested jurisdiction for (generally) the same reasons as KNI had several months before in *Freight Forwarding*, and the same bench of the Court of Appeal rejected its arguments. The Court of Appeal restated that section 90 could extend the Act's jurisdiction to an overseas entity acting through a New Zealand subsidiary.²⁹ Unlike *Freight Forwarding*, the Court of Appeal also discussed section 4(1), commenting on the use of the word 'affect' in section 4(1) and concluding that in order to establish jurisdiction, the relevant conduct merely needed to be directed at a market in New Zealand – that is, the conduct needed to 'affect' a market in New Zealand rather than 'have a [competition] effect on' a market in New Zealand.³⁰ The Court of Appeal stated that Visy's conduct had 'affected' a market in New Zealand (using the language of section 4(1)) due to extensive visits, telephone calls, and presentations by Visy to its New Zealand customers.³¹

26. After the Court of Appeal judgment rejecting Visy's protest to jurisdiction, Visy and one of its executives admitted liability and settled with the Commission. However, the Commission continued proceedings against a particular Amcor executive who had not been included within the scope of the immunity the Commission had given to Amcor. In imposing penalties against that executive, Courtney J stated “[he] resided in Australia and conducted most of his business there. In order to bring [him] within the jurisdiction of this Court the Commission relied on [his] communications by phone and email as acts done in New Zealand,” going on to state “It is evident ... that [he] did have email communication and telephone calls, when he was in Australia, with Amcor managers in New Zealand I am therefore satisfied that [he] did undertake acts in New Zealand and, in doing so, participated in the [cartel].”³² That is, unlike in *Poynter*, the fact that the executive had phone and email contact with New Zealand was sufficient to allow his conduct to be conduct in New Zealand that was caught by the Act, even though he was domiciled in Australia, conducted business outside of New Zealand, and did not visit New Zealand during the relevant period.

5. Effects of the Amendment Act on jurisdictional issues

27. The Amendment Act has clarified the extraterritorial jurisdiction of the Act. The Amendment Act expands the Act's general reach through new sections 4(1AA) and 47A–

²⁷ *Commerce Commission v Visy Board (NZ) Ltd* [2012] NZCA 383. Penalty imposed against Visy: [2013] NZHC 2097. Individual proceedings: *Commerce Commission v Hodgson* [2014] NZHC 649.

²⁸ *ACCC v Visy Industries Holdings Pty Ltd (No 3)* [2007] FCA 1617.

²⁹ *Commerce Commission v Visy Board (NZ) Ltd* [2012] NZCA 383 at [21].

³⁰ At [33]–[34].

³¹ At [86].

³² *Hodgson*, above n 27 at [30] and [33]–[34].

47D and the amended section 90; but also removes the broad global jurisdiction in respect of mergers that previously existed in theory under section 4(3) and was discussed in the *BAT* case.

5.1. The Amendment Act's effect on mergers

28. In the merger context, although section 4(3) has been repealed, new provisions have been introduced (sections 4(1AA) and 47A–47D) which have the potential to result in more effective global merger enforcement.

29. Although the previous section 4(3) had extended the jurisdiction of the Act to overseas mergers, the *BAT* case highlighted that extraterritorial enforcement of remedies against offshore parties was, in practice, highly unlikely. Accordingly, the removal of section 4(3) does not materially affect the jurisdiction of the Act.

30. The effect of the new sections 47A–47D is that the Commission is now able to apply under section 47A to the High Court for a declaration and order if an overseas acquisition results in an overseas person³³ acquiring a controlling interest (generally, a more than 20% shareholding³⁴) in a New Zealand body corporate that has the effect or likely effect of substantially lessening competition in a market in New Zealand. In such a case, the court may make orders enforceable against any New Zealand body corporate in which that overseas person has a controlling interest, including ceasing trading in the relevant market, divestment, or any other action consistent with the purpose of the Act. To be clear, the order may be made against the relevant target entity, but may also be made against **any** other New Zealand body corporate in which the relevant overseas person has a controlling interest.

5.2. The Amendment Act's effect on cartels

31. The Act's general extraterritorial jurisdiction has been extended by the new section 4(1AA)(a) which states that the Act captures acts that occur overseas, where **any part** of the prohibited act occurs in NZ. In this respect, the Amendment Act effectively endorses the general common law approach adopted in the *Air Cargo*, *Freight Forwarding* and *Visy Board* cases, and aligns the Commission's extraterritorial jurisdiction with New Zealand's extraterritorial criminal jurisdiction.³⁵ For example, section 4(1AA)(a) makes it clear that, as occurred in *Visy Board*, even an email sent to

³³ Any person, body corporate or otherwise, that is neither resident nor carrying on business in New Zealand: section 47A(5).

³⁴ Section 47A(5). "Controlling interest" also includes, amongst other things: controlling the composition of a company's Board; controlling the exercise of more than 20% of the number of votes at a company meeting; or holding assets where holding those assets results in the overseas person having effective control of the company.

³⁵ Set out in Crimes Act 1961, s 7 as follows: "For the purpose of jurisdiction, where any act or omission forming part of any offence, or any event necessary to the completion of any offence, occurs in New Zealand, the offence shall be deemed to be committed in New Zealand, whether the person charged with the offence was in New Zealand or not at the time of the act, omission, or event."

New Zealand from Australia constitutes conduct occurring in New Zealand, because the receipt of the email happens in New Zealand.³⁶

32. The Amendment Act also extends the Act’s extraterritorial jurisdiction in relation to principal/agent issues. Section 4(1AA)(b) makes it clear that the principal/agent provisions in section 90 of the Act can have extraterritorial effect. In other words, section 4(1AA)(b) applies to conduct of agents in New Zealand, making the overseas principal liable even if they are not resident in or carrying on business in New Zealand. In this respect, the Amendment Act confirms the Court of Appeal’s approach in *Freight Forwarding* and *Visy Board*.

33. Sections 4 and 90 now have the effect that if a person, Person A, carries on business in New Zealand, or is resident in New Zealand, they are liable not just for their own conduct in New Zealand (direct liability), but can be liable for:

1. their own conduct overseas (section 4(1));
2. the conduct of their agent (Person B) in New Zealand, because it is deemed to be conduct of Person A (section 90); and
3. the conduct of their agent (Person B) overseas, because it is deemed to be conduct of Person A (combination of sections 4(1) and 90).

34. On the other hand, if Person A does not carry on business in New Zealand, nor are they resident in New Zealand, then they are only liable for their own conduct in New Zealand (including conduct partly inside and partly outside of New Zealand); or the conduct of their agent (Person B) in New Zealand (i.e. liability under sections 90 and section 4(1AA)). From the perspective of Person A’s liability, it does not matter whether the agent, Person B, carries on business or is resident in New Zealand.

35. The amendments to section 90 also overturned *Poynter* on another issue. In *Poynter*, the Supreme Court held that an employee (for instance, a manager in New Zealand) cannot be an agent for another employee (such as, as in *Poynter*, a manager in Australia) – the first individual is only the agent of the company.³⁷ The amended section 90(4) now allows a person’s conduct to be attributed to another individual.

36. However, it is unclear whether the Amendment Act has overturned the more general point made by the Supreme Court in *Poynter* (and avoided by the Court of Appeal in *Freight Forwarding* and *Visy* by distinguishing *Poynter* on the facts) that section 4 is a definitive statement of the extraterritorial jurisdiction of the Act.³⁸ The title of section 4 has been amended to state “*Application of Act*” rather than “*Application of Act to conduct outside New Zealand*”. Until such time as the amended section 4 (which now includes direct reference to section 90, thereby solving the issue raised in *Poynter*) is considered

³⁶ In this example, the relevant conduct also occurs in Australia and so may also be subject to Australian competition law.

³⁷ Above n 2 at [50]. This was the reason the Court of Appeal distinguished *Poynter* in *Freight Forwarding*.

³⁸ This point was not directly addressed by the Commerce Committee in its consideration of the Bill, although the Committee noted that the new section 4(1AA)(b) was introduced to “clarify” the relationship between sections 4 and 90 (Commerce Committee report on Commerce (Cartels and Other Matters) Amendment Bill 341–2 at 2). Parliament noted in its Third Reading debate on the Bill that the jurisdiction of the Act was to be “retargeted” by the amended section 4: (10 August 2017 724 NZPD).

by the courts, it remains uncertain whether section 4 is or is not a definitive statement of the jurisdiction of the Act.

5.3. International Cooperation in Investigation and Enforcement

37. Regardless of jurisdiction, legal and practical problems can arise in relation to international investigations. It will not always be in the interest of, for example, cartel participants to facilitate this co-operation. However, there can also be legal obstacles to providing informal and logistical assistance in investigations. Informal cooperation and assistance between agencies is most common and very important. The formal exchange of information and provision of investigative assistance can also be particularly helpful in some cases.

38. Gateway provisions in New Zealand provide for the sharing of compulsorily acquired information without consent, and for the provision of investigative assistance to other competition agencies, where a relevant Memorandum of Understanding between agencies is in place. The Commission has two such agreements in place. In 2013, the Commission signed a cooperation agreement with the Australian Competition and Consumer Commission (“the ACCC”) in relation to the provision of compulsorily acquired information and investigative assistance. In 2016, the Commission signed a mutual cooperation arrangement with the Canadian Competition Bureau (CCB) to further enhance collaboration on cross-agency competition matters. The cooperation arrangement enables the CCB and the Commission to work more closely together in terms of sharing information and providing investigative assistance.

39. Section 99C of the Act defines a co-operation arrangement as an arrangement concerning the Commission and an overseas regulator that is entered into under section 99E (a government-to-government co-operation arrangement) or section 99F (a regulator-to-regulator co-operation arrangement) for:

- (a) *the provision by the Commission of compulsorily acquired information and investigative assistance to the overseas regulator; and*
- (b) *the provision by the overseas regulator of information and investigative assistance to the Commission.*

40. Cooperation agreements with overseas regulators enliven the Commission’s ability to provide investigative assistance and exchange confidential information provided for in section 99I of the Act:

99I Providing compulsorily acquired information and investigative assistance

(1) Following a request by a recognised overseas regulator made in accordance with a co-operation arrangement, the Commission may do either or both of the following:

- (a) *provide compulsorily acquired information to the recognised overseas regulator;*
- (b) *provide investigative assistance to the recognised overseas regulator.*

(2) Before providing compulsorily acquired information or investigative assistance under subsection (1), the Commission must be satisfied that—

(a) *providing the information or assistance will, or is likely to, assist the recognised overseas regulator in performing its functions or exercising its powers in relation to competition law; and*

(b) *the provision of the information or assistance will not be inconsistent with the co-operation arrangement; and*

(c) *the provision of the information or assistance will not significantly prejudice New Zealand's international trade interests.*

...

(5) *In considering whether to provide compulsorily acquired information or investigative assistance in accordance with a co-operation arrangement, the Commission must also consider—*

(a) *whether complying with the request will substantially affect the Commission's ability to perform its other functions under this Act or any other enactment; and*

(b) *whether the recognised overseas regulator could more conveniently obtain the information or assistance from another source; and*

(c) *whether the request would, in the opinion of the Commission, be more appropriately dealt with under the Mutual Assistance in Criminal Matters Act 1992.*

41. The Commission has received and provided both formal and informal assistance on a number of international hard core cartel investigations. Examples of formal assistance that the Commission has provided include evidence compulsorily acquired from investigated parties. In terms of informal assistance, the Commission has worked with international counterparts in terms of approaches to cases (views on harm, calculating detriment, and enforcement strategies). There can sometimes be difficulties in obtaining practical investigative assistance, e.g. using overseas agencies' premises and equipment to conduct interviews.

42. The Commission also works to eliminate obstacles to, and enhance, international cooperation, and have continued our efforts to promote international co-operation through a number of channels. For example, the Commission has worked closely with international counterparts to develop more standardised waivers, develop a greater understanding of information sharing that can appropriately take place between agencies, and through the ASEAN to develop greater co-operation between ourselves and Asian competition agencies.³⁹

43. For global cartel conduct, such as in the *Air Cargo* case, the Commission has focused on conduct with a relevant jurisdictional nexus and effect in New Zealand. The Commission does consider whether the enforcement activities of another jurisdiction, including foreign remedies, may be affected – particularly in respect of penalties. When looking at whether enforcement objectives can be achieved by foreign enforcement, the Commission takes into account the approaches of foreign jurisdictions to conduct, but the Commission's focus is on conduct that affects markets in New Zealand. In other words,

³⁹ As noted in our response to the OECD Questionnaire on Developments in Cartel Enforcement Regarding the Recommendation of the Council Concerning Effective Action Against Hard Core Cartels.

the Commission would take into account a penalty imposed in another jurisdiction, but would resist any suggestion of a penalty in another jurisdiction leading to a discount on a penalty in relation to conduct that occurred in New Zealand. The Commission's general approach is to assume each jurisdiction takes action in relation to the conduct that most affects that jurisdiction. To make these assessments, the Commission liaises with foreign jurisdictions on international cartel investigations, and more generally through regular dialogue with the agencies involved.

44. In the merger context, the Commission has reviewed many mergers that cross national boundaries - these generally involve a high level of co-operation with other agencies and generally rely on the use of waivers (rather than gateways) to share information with other competition agencies. Unlike cartels, merger parties are generally incentivised to facilitate cooperation between agencies. Sometimes, investigative assistance can be limited by different jurisdictions adopting different waiver wordings. This has become less of an issue over the last three years, as the International Competition Network has put considerable effort into promoting standardised waivers which help to allow investigative assistance between competition agencies.

45. Where mergers span national boundaries, co-operation between competition agencies has been important in delivering a set of divestiture and related remedies (jurisdiction by jurisdiction) that work together.

46. For example, in 2013, the Commission cleared Thermo Fisher Scientific Inc. (Thermo Fisher) to acquire Life Technologies Corporation (Life Technologies), conditional on Thermo Fisher selling its foetal bovine serum (FBS) business to a third party.⁴⁰ This acquisition was a global transaction that was also being examined by agencies in other jurisdictions. Thermo Fisher and Life Technologies both operated in the life sciences industry, producing a wide range of products for scientific applications. Areas of product overlap included cell culture, transplant diagnostics, protein and molecular biology, although the Commission only identified potential competition issues in relation to FBS. In New Zealand, although overseas-sourced FBS could have been a functional substitute for New Zealand-sourced FBS, the regulatory requirements for importation increase the cost and difficulty of supply. Accordingly, Thermo Fisher provided an undertaking that it would sell its New Zealand assets with respect to the production of FBS, and the Commission cleared the merger.

47. By the time that Thermo Fisher applied for clearance in New Zealand, agencies in other jurisdictions had already identified competition concerns with the proposed acquisition and Thermo Fisher was in discussions with these agencies with respect to remedies. Notable in this case was the evidence that, worldwide, customers preferred New Zealand-sourced FBS for its quality and traceability, particularly due to the low risk of bovine disease contamination. Accordingly (and unusually for a New Zealand divestment), other competition agencies considering the merger also noted the divestment of Thermo Fisher's New Zealand FBS assets in their consideration of the merger.

48. Another example of international cooperation on a merger was the *Baxter/Gambro* global merger. Baxter and Gambro were both large international companies supplying a range of medical equipment and consumables, with manufacturing facilities in both New Zealand and Australia. In New Zealand, the Commission cleared Baxter International Inc (Baxter) to acquire 100% of the shares in Gambro AB (Gambro),

⁴⁰ Thermo Fisher Scientific Inc. / Life Technologies Corporation [2013] NZCC 26.

conditional on Baxter selling its worldwide Continuous Renal Replacement Therapy (CRRT) business to a third party.⁴¹ The Commission worked closely with the EC and the ACCC during its review of the proposed acquisition and during the negotiation of the global remedy with Baxter. Similar competition issues were identified across the three jurisdictions. Key physical assets were located in Europe, as well as Australia and New Zealand, and Baxter's Australian and New Zealand businesses had a number of linkages including that Baxter transported fluids produced at its Australian facility to New Zealand (and other neighbouring countries); and that Baxter's Australian and New Zealand businesses were managed by Baxter as an integrated business.

49. In both of these cases (Thermo Fisher and Baxter), the ACCC's liaison with the Commission on the proposed acquisition and remedy was even closer as a result of Commissioner cross-appointments between the two agencies – see the section below regarding trans-Tasman arrangements.

50. However, international cooperation cannot deal with every global merger that presents competition problems in New Zealand. Particular problems arise when New Zealand is the only market, or one of few markets where competition problems arise. An example of this arose in a merger clearance application in the personal lubricant market, which the Commission declined to clear in 2015.⁴² The acquisition would have seen Reckitt Benckiser, suppliers of the Durex range of personal lubricant, acquire Johnson and Johnson's K-Y lubricant brand. Together Durex and K-Y accounted for the vast bulk of supermarket and pharmacy sales in New Zealand. K-Y lubricant sold in New Zealand at the time of the application had been manufactured in Australia, but the market structure was quite different in Australia, where the equivalent merger was cleared by the ACCC. In the Commission's decision, it found that there were no significant manufacturing barriers to entry or import barriers. Most personal lubricant brands sold in New Zealand are manufactured overseas (on contract by third-party manufacturers). In addition, existing lubricant suppliers did not appear to have any capacity constraints that would prevent them expanding. However, the Commission considered that brand recognition and consumer loyalty were conditions of entry and expansion that a supplier must navigate. Negotiating this condition would require considerable sunk investment in promotion and advertising, with no guarantee of success. The Commission could not identify any other major suppliers in New Zealand or Australia that were likely to attempt large scale entry.

51. This lubricants case highlights some of the issues New Zealand can face as a small, isolated economy at the end of a global distribution chain. This was a global merger that was cleared in most countries, but had no practical remedy in New Zealand and was declined. There were no manufacturing assets in New Zealand, and an effective remedy depended on a party being able to make effective use of the New Zealand intellectual property and distribution rights. The merger was cleared subject to a divestiture in the United Kingdom, but the acquirer of those divested assets was not interested in acquiring the New Zealand rights. The Commission declined to give clearance, and Johnson and Johnson exited the New Zealand market.

⁴¹ Baxter International Inc/Gambro AB [2013] NZCC 13.

⁴² Reckitt Benckiser / Johnson & Johnson [2015] NZCC 12.

52. There can also be situations where an overseas merger is not likely to cause competition issues in New Zealand, but the remedy in an overseas jurisdiction creates a problem here.

53. A hypothetical example could be one in which Company A and Company B are players in the animal pharmaceutical industry, and are trying to merge in several different jurisdictions, including New Zealand. In the Northern Hemisphere, competition agencies are going to require the parties divest some assets to a third company – Company C. However, because the market structure is slightly different in New Zealand than it is in those other countries, and Company C has a large market share in New Zealand, the acquisition by Company C of the divestiture package is likely to result in a substantial lessening of competition in New Zealand.

54. In such a case, the Commission may take action against the parties to that acquisition under:

1. section 47 of the Act,⁴³ if the acquisition involves persons who are resident or carrying on business in New Zealand acquiring assets or shares in New Zealand or elsewhere; or
2. under sections 47A-D if the acquisition involves persons who are not resident or carrying business in New Zealand acquiring a controlling interest in a New Zealand body corporate.

55. The Commission will often try and prevent such a situation from occurring by maintaining contact with overseas agencies. If there are likely competition issues in New Zealand stemming from a divestment overseas, we could ask the agencies to carve New Zealand assets out of the divestment.

5.4. Trans-Tasman arrangements

56. Due to the proximity between New Zealand and Australia, and the closeness of the two countries' economies in terms of trade relations, there are various inter-governmental agreements and laws that specifically acknowledge these close economic ties and facilitate cooperation between the two jurisdictions.

57. There is a long history of economic cooperation between the two countries, which was cemented by the 1983 Australia-New Zealand Closer Economic Relations Trade Agreement. This is a comprehensive bilateral free trade agreement, which covers substantially all trans-Tasman trade in goods and services.⁴⁴ This was followed by the 1988 Memorandum of Understanding on the Harmonisation of Business Law between Australia and New Zealand, the 2008 Agreement on Trans-Tasman Court Proceedings and Regulatory Enforcement and the 2009 Single Economic Market Outcomes Framework. The competition policy stream in this last agreement proposed that firms operating in both markets face the same consequences for the same anti-competitive conduct, and competition and consumer law regulators in both jurisdictions are able to share confidential information for enforcement purposes.

⁴³ Section 47 is the general prohibition on mergers which substantially lessen competition.

⁴⁴ 1983 Australia-New Zealand Closer Economic Relations Trade Agreement (CER Agreement)

<https://www.mfat.govt.nz/en/trade/free-trade-agreements/free-trade-agreements-in-force/nz-australia-closer-economic-relations-cer/>

58. In terms of aligning competition law legislation, section 36A of the Act extends New Zealand’s prohibition on taking advantage of market power (section 36) to include trans-Tasman markets – that is, markets in New Zealand, Australia, or both.⁴⁵ In addition, section 4(2) of the Act specifically extends the jurisdiction under section 36A to Australia, as set out above.

59. New Zealand and Australia have also legislated to ensure closer investigative co-operation between the Commission and the ACCC. In respect of competition law jurisdiction in New Zealand, section 98H of the Act sets out the rules around the supply of information and documents in relation to section 36A, stating:

Where the Commission considers it necessary or desirable for the purposes of carrying out its functions and exercising its powers under this Act in relation to section 36A, the Commission may by notice in writing served on any person who is ordinarily resident in Australia or who carries on business in Australia, require that person—

(a) to furnish to the Commission, by writing signed by that person or, in the case of a body corporate, by a director or competent servant or agent of the body corporate, within the time and in the manner specified in the notice, any information or class of information specified in the notice; or

(b) to produce to the Commission, or to a person specified in the notice acting on its behalf in accordance with the notice, any document or class of documents specified in the notice.

60. Section 99A further states that the Commission may receive information and documents on behalf of the ACCC in respect of section 155A⁴⁶ of the Australian Competition and Consumer Act 2010 (the equivalent of New Zealand’s section 98H), as follows:

(1) “Where the Australian Competition and Consumer Commission requires any person resident or carrying on business in New Zealand to furnish any information or any class of information or produce any document or class of documents to it pursuant to section 155A of the Competition and Consumer Act 2010, the information or class of information may be furnished or the document or class of documents may be produced to the Commission for transmission to the Australian Competition and Consumer Commission.”

61. There are also agreements between New Zealand and Australian competition agencies. There are various MOUs between the Commission and the ACCC which further cement the special arrangements between Australia and New Zealand. Most recently, a cooperation arrangement between the Commission and the ACCC was signed in April 2013 which allows the Commission to share compulsorily acquired information and provide investigative assistance to the ACCC. Cooperation with the ACCC is particularly important to the Commission, since many companies operating in New Zealand also operate in Australia, and many companies similarly have customers in both countries. A significant number of investigations have cross-border implications. The information-sharing provisions together with the cooperation agreement make it easier for the

⁴⁵ Section 46A of the Competition and Consumer Act 2010 (Cth) has a similar effect in Australia.

⁴⁶ Sections 155A and B of the Competition and Consumer Act 2010 (Cth) have a similar effect in Australia.

Commission and the ACCC to share relevant information and resources, to enable each agency to be more effective in our individual markets.

62. Pursuant to the Single Economic Outcomes Framework 2009, the Commission and the ACCC also cross-appoint Commissioners to each other's agency. Cross-appointments aim to enhance co-operation and increase alignment in the administration of competition law.⁴⁷ How this works in practice is that although each agency has its own clearance regime, and makes its own decision, if a merger application is received on both sides of the Tasman the cross-appointed Commissioners are involved in both decisions. Cross-appointed Commissioners have full access to confidential information, and staff teams have regular discussions relating to markets, theories of harm and development of potential remedies. The ACCC and the Commission cooperate on these merger reviews, through informal discussions and the use of waivers. This extensive collaboration results in greater alignment of analytical frameworks, theories of harm and effective remedies. Markets may not always be the same, and competition concerns may arise in one country but not the other, resulting in different decisions and/or remedies on each side of the Tasman.

63. The Trans-Tasman Proceedings Act 2010 (TTPA) implemented the 2008 inter-governmental agreement on trans-Tasman court proceedings and regulatory enforcement, and provides for mutual enforcement and recognition of judgments between New Zealand and Australia. As set out in section 3(1) of the TTPA, that Act aims to:

1. streamline the process for resolving civil proceedings with a trans-Tasman element in order to reduce costs and improve efficiency; and
2. minimise existing impediments to enforcing certain Australian judgments and regulatory sanctions; and
3. implement the Trans-Tasman Agreement in New Zealand law.

64. Section 3(3) also states that the TTPA provides for the following matters (amongst others):

(a) recognition and enforcement in New Zealand of specified judgments of Australian courts and tribunals:

...

(g) recognition and enforcement in New Zealand of judgments (other than those imposing civil pecuniary penalties) given in Australian trans-Tasman market proceedings:

(h) recognition and enforcement in New Zealand of Australian judgments (including those given in an Australian trans-Tasman market proceeding) imposing civil pecuniary penalties:

(i) recognition and enforcement in New Zealand of Australian judgments imposing regulatory regime criminal fines.

65. The TTPA came into force in 2013 and, is yet to be used in the competition law context. However, it allows Australian judgments to be enforced in New Zealand more easily, including (but not limited to) judgments in relation to trans-Tasman market

⁴⁷ Australia-New Zealand Enhanced Co-operation – June 2014 meeting of the Working Party 3 of the OECD Competition Committee. <https://www.slideshare.net/OECD-DAF/occd-enhanced-enforcementcooperationaustraliannewzealand17june2014>

proceedings and judgments imposing civil pecuniary penalties (e.g., fines under the Competition and Consumer Act 2010).

66. The Australian Trans-Tasman Proceedings Act 2010, which extends the reach of New Zealand law into Australia, contains similar wording in its section 3 to the corresponding section of the New Zealand TTPA. This Act covers the equivalent provisions to the New Zealand TTPA described above.