

Competition Alert

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Russell McVeagh successful in obtaining unanimous Supreme Court decision in relation to the extra-territorial reach of the NZ Commerce Act

In the unanimous decision of the Supreme Court in Poynter v Commerce Commission,¹ released on 16 April 2010, a legal team led by Julian Miles QC and Russell McVeagh competition partner Sarah Keene was successful in an appeal seeking to overturn successive decisions of the High Court and Court of Appeal which purported to extend the extra-territorial application of the Commerce Act 1986 ("Commerce Act").

The Supreme Court justices, Elias CJ, Tipping, Blanchard, McGrath and Wilson JJ, in two clear and comprehensive judgments, upheld the argument on appeal that the Commerce Act does not apply to non-New Zealand residents who do not carry on business in New Zealand, in circumstances where the Commission is unable to point to any conduct engaged in by that person within New Zealand.

This decision provides welcome clarification of the application of the Commerce Act to conduct by non-New Zealand resident individuals. More broadly, it is expected this decision will discourage the New Zealand judiciary from finding a foreign person is subject to New Zealand's Commerce Act in the absence of a clear evidential basis for bringing that person's actions within statutorily prescribed categories of persons and conduct set out in ss 4 and 90 of the Commerce Act.

Background

For the individual concerned, the Supreme Court decision in *Poynter v Commerce Commission* represents the final salvo in the long running wood chemicals cartel proceedings.

Proceedings were initiated in April 2005 against 8 companies and 7 individuals in the wood chemicals sector, arising from an investigation by the New Zealand Commerce Commission ("Commission") that commenced in May 2002. Twelve of the defendants, including all of the individuals named, were Australian residents at the relevant time, the Commission having elected not to proceed against any New Zealanders. The Commission alleged that the companies and individuals had breached the Commerce Act by variously:

- » Sharing price information;
- » Reducing price competition;
- » Agreeing not to compete for each other's longstanding or significant customers; and
- » Keeping prices at a level above that which would have prevailed in a fully competitive market.

Each of the three groups of companies involved admitted breaching the Commerce Act and received financial penalties.² By early 2008, the Commission had also either settled or discontinued their proceedings against all of the individual defendants, with the exception of Mr Harris, Mr Akle and Mr Poynter. Each of the three defendants argued strongly that the Commission was unable to show a good arguable case against them on the facts, and that the Commerce Act did not extend to them, as all conduct alleged to have been engaged in by them occurred entirely outside New Zealand.

The Commission's Case

Mr Poynter was a senior manager within the Fernz Group for a relatively short period from mid-1997 to mid-2001. The General Manager of Fernz' wood preservative chemicals business in Australia and New Zealand, Mr Greenacre, was his immediate subordinate in the corporate chain, also based in Australia.³ Mr Greenacre admitted to engaging in cartel conduct in periods before, during and after the period in which he reported to Mr Poynter.⁴

The Commission conceded that Mr Poynter:

- » Neither resided nor carried on business in New Zealand; and
- » Never himself engaged in any conduct within New Zealand, for example, by attending any relevant meetings in New Zealand, nor did he make any communications into the jurisdiction by telephone, email or otherwise.⁵

Section 4(1) of the NZ Commerce Act provides:

4 Application of Act to conduct outside New Zealand

(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.

In addition to denying any involvement in conduct that might breach the Commerce Act, Mr Poynter also said that as s4(1) of the Commerce Act did not apply to him in light of the Commission's concessions, the Commission had no jurisdiction to bring the action.

"The Commission conceded that Mr Poynter neither resided nor carried on business in New Zealand and never himself engaged in any conduct within New Zealand."

The Court of Appeal Decision

The Commission successfully argued in both the High Court and Court of Appeal that s 4(1) was not an exhaustive statement of the jurisdictional reach of the Commerce Act. Both lower Courts considered it necessary to extend jurisdiction beyond the plain language of s 4(1) in order to plug a perceived 'loophole' in the Commerce Act. In the Court of Appeal, in which these arguments were developed more fully, the Commission established jurisdiction on agency and conspiracy grounds.

The Conspiracy Argument

The Commission argued that if they were able to establish that the individual had knowledge of or somehow participated in an illegal arrangement overseas, the Commerce Act applied to that person's conduct on the basis that, as a participant in a conspiracy, when any other individual acts pursuant to that conspiracy in New Zealand, that action is attributable to all persons party to the conspiracy. The New Zealand actor is thus deemed at common law to have acted as agent on behalf of all co-conspirators in implementing the conspiracy in New Zealand.

The Court of Appeal said that as section 80(1)(f) of the Commerce Act provides for pecuniary penalties for any person that conspired with another person to contravene the Commerce Act then, by reference to the common law and equivalent provisions in the Crimes Act 1961, this extends the jurisdiction of the Commerce Act such that if

one person implements an anti-competitive understanding with the consent and authority of others overseas then the actions of all fall within the jurisdiction of the Commerce Act. In the Court of Appeal's view it was:

... consistent with the policy and scheme of the Act that an overseas principal who implements, through a person or entity in New Zealand, an anti-competitive understanding formed overseas but directed at a New Zealand market be subjected to the jurisdiction of the New Zealand courts even if he or she has not personally acted in New Zealand.⁶

The Agency Argument

The Court of Appeal further accepted that if a person who reaches or authorises an anti-competitive understanding overseas uses another person based in New Zealand as an instrument (including an 'innocent agent') to give effect to arrangements designed to affect a market in New Zealand, then that overseas person is deemed by s 90 or some broader, 'non-technical' concept of agency, to have engaged in conduct in New Zealand.⁷

Summary

The Court of Appeal's decision meant that New Zealand courts would have jurisdiction for any acts or omissions that amounted to entering into, consenting to, or authorising an anti-competitive understanding that is "directed at a New Zealand market" and is ultimately "implemented" in New Zealand. This seemed to bring the extra-territorial application of the Commerce Act almost into line with the US effects doctrine.

The Supreme Court Decision

The Supreme Court granted leave to appeal on the question of law as to the extraterritorial reach of the Commerce Act.

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In its decision, the Supreme Court diverged sharply from the reasoning employed by the Court of Appeal, and delivered a forceful check to the 'policy' based approach taken by the lower Courts. In particular, the Supreme Court was careful to reinforce:

- » The general presumption that express statutory language or a process of necessary implication is required for a statute to achieve extraterritorial effect;
- » The Commerce Act has expressly spoken on the extent of its extraterritorial scope in s 4 (and, as noted above, the Commission had conceded that s

4(1) did not apply); and

- » Therefore, the Courts must be confined to the express terms of the Act and not seek to import additional extraterritorial effect based on “policy grounds”:

Under the guise of applying the scheme and policy of the Act, the Court of Appeal construed it as justifying the attribution to Mr Poynter of the conduct of others within New Zealand when that construction did not represent a necessary implication from the terms of the Act.⁸

The Supreme Court rejected both the Conspiracy Argument and Agency Argument and in doing so overturned the decisions of the High Court and the Court of Appeal. The Supreme Court’s reasoning was as follows:

- » *The Conspiracy Argument:* The reference to “conspiracy” in section 80(1)(f) of the Act does not say anything about extraterritoriality. In the Supreme Court’s view, s 80(1)(f) neither expressly nor impliedly extended the operation of the Act to people who are resident overseas and do not personally carry on business in New Zealand:

...we cannot accept that simply by including the concept of conspiracy as one of the means by which the Commerce Act can be contravened, Parliament has in any way signalled, let alone with the necessary clarity, that the Act was meant to extend to overseas conspirators simply on account of their entering into the conspiracy overseas or via the implementation of the conspiracy in New Zealand without their coming to New Zealand.⁹

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- » *The Agency Argument:* Section 90 of the Commerce Act describes the circumstances in which the Commerce Act attributes conduct by servants or agents to a principal. The Supreme Court said this section may attribute conduct to a company in certain circumstances, but that as between fellow employees it could not be said

that the Fernz Group employees that implemented the cartel in New Zealand were either servants or agents of Mr. Poynter:

In this case it cannot, for reasons already given, be said that the conduct of the actors in New Zealand was undertaken on behalf of Mr Poynter. It was undertaken on behalf of the corporate body or bodies by whom they were all employed. One employee does not undertake conduct on behalf of another employee, even if that other employee is directing or encouraging that conduct. Nor can the New Zealand actors be regarded as the servants or agents of Mr Poynter for reasons which are essentially the same as those applying to the ‘on behalf of’ analysis.¹¹

“[I]t could not be said that the Fernz Group employees that implemented the cartel in New Zealand were either servants or agents of Mr. Poynter.”

For these reasons, the Supreme Court upheld Mr. Poynter’s protest to jurisdiction, dismissed him from the proceedings, and awarded him costs in the Supreme Court, High Court, and Court of Appeal.

Implications of the Decision

The Supreme Court judgment in *Poynter* provides welcome clarification of the Commission’s ability to pursue overseas residents under the Commerce Act and confirms that the extraterritorial application of the Commerce Act is narrower than the Court of Appeal had set out.

“It is now clear in the case of alleged liability of individuals, that a foreign executive who is not resident in New Zealand nor carrying on business in New Zealand and who has not engaged in any relevant conduct within the jurisdiction, including by sending communications (for example emails or phone calls) into New Zealand, will not be caught by the Commerce Act.”

The statement by the Supreme Court as to the extraterritorial application of the Commerce Act is welcomed by competition law practitioners generally. It is now clear in the case of alleged liability of individuals, that a foreign executive who is not resident in New Zealand nor carrying on business in New Zealand and who has not engaged in any relevant conduct within the jurisdiction, including by sending communications (for example emails or phone calls) into New Zealand, will not be caught by the Commerce Act.

The decision is less likely to have a material impact on the question of the circumstances in which foreign companies may be liable under the Act, because of the breadth of the deeming provisions in section 90, coupled with the Supreme Court’s acceptance of the approach adopted in *Bray*.¹² That analysis suggests that where the Commission can show

that employees of a foreign company sent communications to New Zealand implementing an illegal arrangement the Court is likely to have jurisdiction, potentially also in circumstances where employees of a locally based subsidiary might be regarded as agents of the foreign company for the purposes only of implementing within New Zealand an illegal arrangement reached overseas.¹³ Therefore, we expect that the Commission is likely to continue to seek to rely on statutory and conventional common law agency relationships to bring overseas companies within the jurisdiction of the Commerce Act.

However, with the majority of the Commerce Commission's cartel proceedings and investigations involving foreign entities, no doubt the jurisdictional issues will continue to be hotly debated.

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In the meantime, practitioners and clients can again be confident that one basic presumption of statutory interpretation, that statutes only have extraterritorial reach to the extent that is expressed in a clear and unambiguous language in the statute, remains good law in New Zealand.

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1. *A R Poynter v Commerce Commission* [2010] NZSC at [38].
2. The companies involved have received the following fines: \$1.75 million for the Osmose Group, \$3.6 million for the Koppers Group and \$1.9 million for the Fernz Group.
3. *Harris v Commerce Commission* (2009) 12 TCLR 379 at [14].
4. *Commerce Commission v Koppers Arch Wood Protection (NZ) Ltd (settled) & Ors* (HC, Hugh Williams J, 4 October 2006) at [24].
5. *A R Poynter v Commerce Commission* [2010] NZSC at [20].
6. *Harris v Commerce Commission* (2009) 12 TCLR 379 at [46].
7. *Ibid.*, at [45]-[46].
8. *A R Poynter v Commerce Commission* [2010] NZSC at [79].
9. *Ibid.*, at [67].
10. *Ibid.*, at [56].
11. *Ibid.*, at [70].
12. *Bray v F Hoffman-La Roche Ltd* (2002) 190 ALR 1.
13. For example, as in *Bomac Laboratories Ltd v F Hoffman-La Roche Ltd* (2002) 7 NZBLC 103,626, jurisdiction may be found if an employee of a subsidiary company is found to be acting as an agent of the overseas parent company for the purposes of implementation of the cartel.

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