

**IN THE DISTRICT COURT  
AT NEW PLYMOUTH**

**CRN 06043500833-40**

**COMMERCE COMMISSION**  
Informant

**Ben Vanderkolk  
and Associates**

**27 SEP 2007**

v

**KNIGHT BUSINESS FURNITURE LIMITED**  
Defendant

Hearing: 4 September 2007

Appearances: Mr B D Vanderkolk with Mr E J McCaughan for informant  
Mr A S McIntyre for defendant

Judgment: 14 September 2007

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**RESERVED JUDGMENT OF JUDGE D A ONGLEY**

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[1] Eight informations were laid against the defendant company under the Fair Trading Act 1986, four alleging a false representation in trade concerning the place of origin of goods, and four alternative informations alleging that the company, in trade, engaged in conduct that was liable to mislead the public as to the nature, manufacturing process or characteristics of the goods. The goods that are the subject of the charges are office chairs respectively marketed under the names ISO, EVO, ZED and FORM. The two provisions of the Fair Trading Act are here set out:

#### **10. Misleading conduct in relation to goods -**

No person shall, in trade, engage in conduct that is liable to mislead the public as to the nature, manufacturing process, characteristics, suitability for a purpose, or quantity of goods.

#### **13. False representations -**

No person shall, in trade, in connection with the supply or possible supply of goods or services or with the promotion by any means of the supply or use of goods or services, -

...

(j) Make a false or misleading representation concerning the place of origin of goods.

[2] The charges relate to representations made by the Defendant in advertising material in the period 1 October 2003 to 31 October 2004 that the four models of office chairs were "NZ made". The defendant supplies a large range of office chairs to up to 150 resellers. About half of its resellers were supplied with the four models the subject of the charges. At the relevant time, the defendant also produced a number of brochures, including a separate brochure for each of the four models.

[3] The chairs are built in New Zealand using components manufactured in Taiwan, China and Italy to the defendant's specifications.

[4] The imported components are, first, a 5-star base which rests on castors and supports a vertical shaft. The shaft is a gas lift assembly which provides a stable cushioning effect. A mechanism with levers to operate functional features of the chair is attached to the top of the gas lift and positioned under a plastic seat pan supporting a moulded plywood seat. All of those subassemblies are manufactured overseas. When assembled, they lack only seat upholstery and a seat back. The upholstery for both the seat and the back consists of New Zealand manufactured foam which is either moulded or cut and fixed in place with New Zealand fabric. The attachment called a back strap, connecting the seat pan and the seat back, is also made in New Zealand. Incidental parts are a gas lift cover made overseas, and a back strap cover made in New Zealand.

#### **Evidence - Dr Taylor**

[5] Evidence for the informant was given by Dr Malcolm Taylor, Mechanical Engineer specialising in manufacturing in the Department of Mechanical

Engineering of University of Canterbury. Dr Taylor described the construction as a number of major subassemblies, each different in its function and able to be manufactured quite independently of the others and in different countries. The four major subassemblies are

1. 5-star base and castors
2. Gas lift
3. Chair mechanism and Back strap
4. Seat and Back

[6] The importance of the 5-star base and castor subassembly is to support the chair to enable the user to move it effortlessly across a flat surface. The 5-star base is manufactured using an injection moulding machine worth \$500,000 to \$750,000 and requiring considerable expertise to maintain and operate. It is best suited to medium-high volume production runs due to the high cost of the moulds. A large machine of say 400 tonnes is necessary to clamp the heavy steel mould halves shut whilst being filled with molten plastic. Making the special steel mould is a highly specialise process involving computer-aided drawing, simulated stress analysis and tooling mould design allowing for efficient flow of molten plastic, cooling channels and effective ejection of the moulded part. The tooling may cost in the range of \$100,000 to \$150,000 if produced in New Zealand. Once an investment has been made in the set up and tooling, a 5-star base part could be moulded every two minutes or so.

[7] The castors are each made up of 5 or 6 parts. An injection moulding process is used to manufacture the wheel halves and the axle/pivot support. The machine and tooling would cost of the order of \$150,000 to \$200,000 overall. The plastic parts could probably be injection moulded at a rate of one set per minute. Necessary equipment for other parts used in the castors may cost about \$150,000, then each castor wheel requires individual manual assembly and each would take about one minute to produce.

[8] The imported components would have been assembled at Knights by a low-skilled operator using hand tools, taking about two minutes for each assembly.

[9] The gas lift is a cylinder filled with an inert gas to a predetermined pressure. A rod is forced into the cylinder, displacing some of the gas which exerts pressure to push the rod out again. The gas lifts are imported from an overseas manufacturer and supplied to Knight as a complete unit ready for attachment to the 5-star base, probably for less than \$15 each. The gas lift would have been carefully designed to support the weight of a person and appropriate materials selected, comprising a cylinder, a piston, a hardened rod, seals, gaseous medium and small attachment parts. The units are produced on specialised machines to close tolerances. The value of equipment to produce gas lifts would be \$250,000 to \$350,000. The gas lifts used in this office chair would be made in high volume with low unit cost.

[10] A low skilled operator would be able to fit the gas lift to the 5-star base as a two minute task. The gas lift is fixed in place using a tapered fit without bolts and is retained with a spring clip. The injection moulded shroud over the gas lift is positioned manually before lowering the chair onto the gas lift.

[11] Dr Taylor considered that the chair mechanism and back-strap subassembly would be the most complex subassembly in terms of the number of parts and manufacturing effort. He described it as manufactured from 2-3 mm sheet steel pressed and welded to create a housing that accommodates springs and levers for actuating the chair's adjustment features such as height, forward and backward tilt. The back-strap is made in New Zealand in a similar fashion from pressed steel. The hydraulic press and tooling would be more diverse and less costly than for the base components, including sheet metal stampings to form springs, plastic lever handles, steel rods, small pins and pivots and a number of fasteners. The time to build the mechanism would be 30 to 90 minutes. After careful manual assembly, the whole unit is exported to New Zealand as a module ready for attachment to the underside of the chair. There is little that Knight need to do the chair mechanism and backstrap apart from fixing it to its mating subassemblies using basic fasteners.

[12] Referring to the New Zealand design component, Dr Taylor defined design to mean "the development of specifications of a product that will be functionally sound, have eye appeal, and will give satisfactory performance for an adequate life" He noted that the defendant defined design as "establishing the features, functions and

look that are needed to meet the NZ market's requirements", but he considered that little adaptation would be required to the base, gas lift adjustment mechanism for NZ conditions. He said that the chairs used standard office chair subassemblies and components which have been constructed after engineering analysis in matters such as thickness of the web in the 5-star base, material properties of the spring in the mechanism, or the fatigue life of the gas lift rod. In his opinion, meeting the New Zealand market's requirements barely falls within the full definition of design and that the defendant's input to the shape of the seat and back foam, and their technical design input to the total office chair is minor.

[13] It was common ground that the key steps in the New Zealand part of Knight's manufacturing process for the seat and back subassemblies were as follows:

- a) Wooden seat pan or seat back inners, made from plywood are sprayed with glue;
- b) Moulded foams or cut foams are attached to the wooden seat pan or seat back inners;
- c) The top of the seat or back foam is sprayed with glue;
- d) The upholstery fabric, cut in accordance with the model of the chair being created, is fitted to the top of the seat pan or seat back;
- e) The upholstering fabric is drawn around the wooden frame and secured with staples at the back of the seat pan or seat back;
- f) The plastic seat pan or seat back outer is fitted over the plywood seat pan or seat back inner.

[14] Dr Taylor said that the seat and back subassemblies are the most visual and obvious parts of the office chair principally because they consume the largest surface area and volume of the product, but from a technical and difficulty point of view in manufacture he considered their importance to be much less significant when compared to the other three major subassemblies. He estimated the above steps to be completed in less than 30 minutes and considered that the technical skills are not sophisticated but are characteristic of an upholsterer's job. The fabric would be cut to a simple patterned shape probably with a dedicated machine. Cutting the seat and back foams from a block of preformed foam would take a few minutes with tooling

costing less than \$500. Moulded foam shapes made from chemicals in liquid form poured into a batch of open moulds is a process taking only a few minutes.

[15] Dr Taylor said that the moulds would probably be obtainable for \$1000 to \$3000, shaped with milling machines and conventional machine shop technology costing approximately \$75,000 to \$125,000. The shape of the mould could have been constructed using CAD but the gentle curves of the seat or back foam are not as demanding on the required machining and tooling as the parts of the chair produced overseas. The fabric may be glued and fitted with the help of an upholstery press costing around \$1000 to \$3000. Dr Taylor listed the steps required for final assembly of the chair and estimated that a competent upholsterer would complete the final assembly of one chair in less than 15 minutes. The work could be done by a trained but low skilled person with a minimum of low cost hand tools.

[16] The brochures promoting the four models of chairs referred to in the informations will be referred to in the evidence of Mr S A Herd below. Each is a double A4 size coloured glossy sheet folded at the centre. On the front is a photograph of the chair with its model name twice displayed prominently with a short description of its main attribute for example "The finale of ergonomic design" in the case of the ZED model. When opened, the inside surfaces contain further photographs and information displayed in a clean and informative manner that can be easily assimilated. On the back is another photograph with dimension information in small print at the foot. In a band down the right side of the back of the brochure there is, at the top, a silver fern and the description "NZ MADE" and at the foot an "E" logo and the word ERGO.

### **Professor Todd**

[17] The informant called Sarah Todd, Professor of Marketing at University of Otago. Her evidence addressed the question: What would the average New Zealand consumer assume the words "NZ made", accompanied by a silver fern, mean in the context of an office chair? She also considered whether any research has been conducted in New Zealand in relation to the effects of "place of origin" representations on consumer behaviour? In particular:

(a) Will consumers pay a higher price for a product which is advertised as “NZ Made”?

(b) Will consumers have different expectations regarding quality when they buy a product which has been advertised as being “NZ Made”?

[18] She said that the influence of “made in” information combined with the price that a buyer is prepared to pay varies depending on the consumer’s knowledge and beliefs about a particular country, the product itself being considered, the prominence given to the “made in” information, the consumer’s past experience with both the particular product category and the apparent country of origin, and their motivation to consider all information supplied regarding the product. There are therefore a daunting range of variables. In Professor Todd’s opinion, the prominence of the “NZ made” information in this case, together with the associated image of the silver fern, is likely to impress a consumer as an important point of difference for this brand of office chair when compared with others. A consumer may reasonably believe that the chair was made in NZ, rather than just being designed or assembled here.

[19] Professor Todd said that country of origin effects have been much debated in the academic literature over the past three or four decades, paralleling the growth in globalisation and, in particular, the move by companies to outsource aspects of the production process. Published research demonstrates the important role played by “made in” labels in consumers’ product evaluations reached an age of acceptance and maturity by the mid-late 1980s. While the exact workings of the country of origin effect remain slightly more controversial, there is no doubt that such labels powerfully influence people’s perceptions of and attitudes towards products and brands. There is general consensus that the origin of the product or brand is an important criterion in individuals’ consumption decision making, and some studies indicate that consumers are prepared to pay a premium price for products from particular countries.

[20] There is a likely patriotic effect. New Zealand consumers have been exposed to the indirect effects of increased consumption of imports and there have been a number of “Buy NZ Made” campaigns run in the media. While the effectiveness of

such campaigns is debated, they have generally tended to emphasise similar themes, including the quality, durability and style of locally made products, the impact on jobs and national economic prosperity. Conclusions from various studies indicate that the average consumer does support “protectionism” and is highly aware of “Buy Local” issues. Quality is one of the key attributes that is inferred by consumers on the basis of the country of origin information supplied. Nevertheless, the actual quality of the product is something consumers indicate they are not easily prepared to trade-off.

[21] Academics have broken down the construct of “country of origin” into more specific concepts such as “country of manufacture”, “country of design” and “country of assembly”. “Country of manufacture” is the actual location in which the product was manufactured, and is factual information that should be manifested in the “made in” label according to Professor Todd. “Country of origin” then refers to the “home country” of the product that consumers infer, based on the information supplied. In Professor Todd’s opinion, given the words “NZ Made” and the use of the silver fern, consumers viewing the promotional materials in this particular case would infer NZ to be the country of origin, or “home country”. She said that the term “country of origin” is somewhat simplistic, and misleading in itself, in that it implies a single place of origin for products. Bearing this in mind, researchers in the area have concluded that it is image of the country that is associated with the product that is relevant.

[22] While the “multicitizenship” of products has been explicitly recognised in some academic studies, this does not mean that the average consumer necessarily understands that “NZ made” may refer only to the design or assembly, but is rather likely to infer that the entire product was literally made in New Zealand. Consumers who are motivated or able to carefully evaluate the specific information provided in a thoughtful and deliberative fashion are said to use “central route processing”. The “peripheral route” is used by consumers who are either not motivated or unable to critically evaluate all relevant information, and therefore form attitudes on the basis of simple associations such as brand name or stereotypical images of the country in which the product is made. Another classification that is made refers to “low involvement consumers” for whom the purchase decision carries little financial,

personal or social risk. Brand or country of origin information acts as a mental shortcut as they are looking to avoid unnecessary information processing, as when people consider the perceived quality of a Swiss watch. Studies indicate that brand names are the most common summary statistic used, and suggest that country of origin is arguably another. In this particular case, the use of the silver fern, a symbol of national pride for New Zealanders, is likely to be relied on heavily by low involvement consumers viewing the information supplied.

[23] Country of origin information is particularly important in the purchase of durables, a broad category that office chairs fit within. Observational research has shown that country of origin information was significant information either requested by the customer or promoted by the salesperson as a positive feature, leading to the conclusion that it was used as much as the brand itself in decisions to buy durables. In Professor Todd's opinion, given the average consumer's knowledge of New Zealand's manufacturing and production capabilities, office furniture is likely to be a product category for which the term "NZ made" is likely to be taken at face value, contrasted with electronic products and computers where the description is likely to be interpreted differently or more sceptically. In addition, the silver fern is a strong symbol of national identity inviting a positive response from some consumers.

[24] Dealing with the appearance of the brochures, Professor Todd said that the dominance of the words "NZ Made", reinforced by the image of a silver fern, both in terms of the location and size of the font used, indicates that the producer considered this important information, with the actual chairs' specifications being in much smaller, lighter font at the bottom of the page.

[25] In answer to questions in cross-examination, Professor Todd said that she is not an expert in retailer behaviour, nor in ergonomics. The point of her evidence is that the country of origin representation is held up as a point of difference while comfort and ergonomics are natural for office chairs, that is to say not a significant point of difference.

## **Mr Herd**

[26] Mr S A Herd gave evidence for the defendant. He is a senior executive and manager of Knight Group NZ Limited formerly known as Knight Business Furniture Limited, having changed its name on 30 November 2006. He said that the company has been in the office furniture business for twenty years and has developed office chairs with a view to achieving a consistently high standard through prototyping, testing and consulting with members of the public and professional occupational therapists. The four models in this case were all targeted above the level of the mass produced imported product.

[27] Mr Herd said that in early 2003 Knight was aware that at least two of its competitors had been advertising their office chairs as “NZ Made” for some years and were actively promoting the “Buy NZ made” campaign. Knight considered that many of its models were made using exactly the same amount of imported and New Zealand componentry and processes as its competitors. He said that the four models described as “NZ Made” were designed and made specifically to meet the ergonomic needs of the varying population of New Zealand. Mr Herd described the variety of options offered by Knight, such as variable seat sizes, different lumbar sizes, seat slides for different leg lengths, soft wheeled castors, braked castors or large diameter castors, fixed or adjustable armrests and width formats, headrests, downsized seats and backs, differing gas lift heights, footrests and special needs fabrics for medical reasons, corporate logos or office decor. Mr Herd considered that those options contributed to the essential character of the chair and were not available for any fully imported office chair.

[28] Mr Herd said that the company engaged the “Buy NZ Made” campaign using a prepared order form that stated:

“For a product to carry the ‘Kiwi’ mark it must be substantially transformed in NZ and meet the requirements of the Fair Trading Act.”

The expression “substantially transformed” is significant as the test that the defendant asks the Court to accept as apposite in this case.

[29] The company decided that although some parts of these chairs were imported, the chairs were nonetheless substantially transformed in New Zealand through Knight's manufacturing process to produce an end product with an essential character. Consideration was given to using an "NZ Made" endorsement on the four office chairs EVO, FORM, ISO and ZED. Much later in 2006, Knight obtained membership of the "Buy New Zealand Made" campaign, but the company has not used the label or marketing device pending the outcome of the prosecutions.

[30] The alleged representation was contained in a brochure produced in late 2003. Different brochures following the same design and format were printed for each of the chairs in question. Only the four models, EVO, FORM, ISO and ZED were advertised as being "NZ Made". ISO was the lowest of the range of four chairs and the other three were promoted with the following marketing descriptions:

EVO – "a new era in comfort";

FORM – "the chair your back's been aching for";

ZED – "the finale of ergonomic design".

[31] The branding which shows "NZ Made" with a silver fern was developed in-house by Knight and was not an attempt to pass off the "Buy NZ Made" triangular labelling and swing tags because the company had not been certified to use that logo.

[32] In addressing the ergonomic quality and comfort of the chairs, Mr Herd said that an ergonomic chair with the best combination of castors, gas lift, mechanisms, and back and seat rests are of very little use or significance without the correct posture, support and comfort which can only be given by correct use of upholstering foams. Knight dedicated much time, effort and expertise to ensure the foams and foam moulds defined an essential character of the chairs. Working with foam suppliers in Auckland and Wellington, the company investigated suitable moulds and foam densities for cut and moulded foams. The moulded foams were manufactured in Wellington by ACMA Industries and the cut foam used with the ISO model was manufactured in Auckland by Dunlop. Mr Herd considered that New Zealand foams are rated as being among some of the best in the world and said that Dunlop developed an exclusive fire-resistant foam for Knight that complies with

the requirements of the Australian and New Zealand standards. He said that the moulded foams and cut foams, far exceed the quality, substance, elasticity, resilience, and longevity found in the vast majority of imported chairs.

[33] The EVO office chair, during its prototyping stage, was taken to a major office furniture retailer in Hamilton for trailing with the result that an extended back-bar was designed for better top-back support and greater durability. That differed from imported products.

[34] Mr Herd said that well over two thirds of the cost of each of the chairs is attributed to the New Zealand design and manufacturing costs. He provide the following average comparative costs of overseas and New Zealand content in each of the four chairs:

**Landed cost in New Zealand**

Castors (x5)	1.50
Base	7.00
Gas lift	4.00
Gas lift cover	0.35
Mechanism	11.00
Back inner/outer	5.50
Seat ply/cover	5.00
Total (excl GST)	\$34.35

**Cost incurred in New Zealand**

Moulded foams (back)	10.00
Moulded foam (seat)	8.00
Glue & staples	2.00
Fabric	12.00
Labelling (AFRDI approved)	2.50
Wrapping	1.50
Labour (picking, cutting, gluing, upholstering, stapling, assembly, QC, and wrapping) 50 minutes x \$40 per hour	36.00
Portion of mould costs plus research & development (10%)	7.20
Total (excl GST)	\$79.20
Relevant percentages:	
Imported items:	30.26%
NZ manufacturing/production costs:	69.74%

[35] The company provided detail of the manufacturing process to the informant and the informant's witnesses referred to it in evidence.

[36] The brochures were distributed to about 65 reselling customers. Catalogues were produced at various times for the larger range of Knight chairs and a customer could ask for more brochures. Sometimes they went as individual brochures and sometimes as a complete package.

[37] When cross-examined, Mr Herd said that the "NZ Made" description was decided upon after the Commerce Commission Guidelines were seen by the management of the company. It appeared that he may not have examined the guidelines himself before the brochure was produced, but the point was not clear in evidence. The document in question was published in 1999 titled "Fair Trading and Place of Origin". The relevant extract is as follows:

"The Commission recommends that the following points are considered when deciding how to represent the origin of goods.

- It is the consumer's understanding of origin that matters, not a technical or cost analysis, or a tariff definition of a product's overseas content. For example, it is misleading to represent an imported product as 'Made in New Zealand' because it is packaged here and the cost of the packaging is the largest part of the cost. Where a product got its essential character - that is, where the product became what it is - is important to consumers, not the origin of the packaging.
- The Fair Trading Act does not require manufacturers to list the origin of all the ingredients or components in a product. Origin is not decided by reference to the individual components of a product. It is important to consider the natural meaning of the words that have been used to represent the origin of the goods. For example, it would be misleading to label the orange juice which was bottled in New Zealand as imported concentrate as 'Made in New Zealand'. It is imported concentrate which makes the juice, not the water which is added to reconstitute it, or the bottling. An accurate label would be 'Bottled in New Zealand from imported concentrate'.
- Many products are assembled in New Zealand from components manufactured in various places. In cases like this, the use of more explicit terms about origin than 'Made in' may avoid misrepresenting the place of origin. Products can be described using phrases such as "Assembled in New Zealand from imported components", or "Sewn in Fiji from New Zealand materials".

[38] The four brochures used the name ERGO for the product line and did not carry the name KNIGHT, which appeared on other catalogues and brochures for

wholly imported chairs. Mr Herd said that the company was comfortable using the “NZ Made” on the ERGO range when the brochure was released some time between 2002 and 2004. The ERGO name and the “NZ Made” description both appeared prominently on the back of the brochures. Mr Herd agreed that prominence was intended and said that information was placed on the back because it would have been confusing on the front of a brochure designed with clean outlines.

[39] Mr Herd was cross-examined about the concept of “substantial transformation” which he had become acquainted with from the “Buy NZ Campaign” order form. He said that the transformation was from a box of castors and gas lifts and a stack of ply and foams. As a businessman, he would say the components had been absolutely transformed. He was also encouraged by the facts that others in the industry adopted a New Zealand made description. He did not directly answer the question whether the company recognised that the Commerce Commission Guide warned that products assembled in New Zealand from components manufactured in various places may require more explicit terms about origin than “Made in” in order to avoid misrepresenting the place of origin. He said that if the Commerce Commission had directed the use of “NZ made using overseas components” the company would readily have complied.

[40] Mr Herd was also cross-examined on the claim that the mould and the comfort of the chair is its most dominant feature, with reference to the features described in the brochures that did not emphasise those features by comparison with other features. The brochure touched on various marketing attributes of which ergonomics and comfort were no more or less prominent than other characteristics of the chairs such as adjustments, durability, styling and warranty.

[41] In 2005 Knight obtained “blue tick” accreditation by the Australasian Furnishing Research and Development Institute trading as Furntech and as AFRDI for the ZED, EVO and FORM models tested as “Level 6 – Severe Commercial”. At the time encompassed by the charges, the defendant had work in progress for AFRDI approval and there was no change between the models the subject of these charges and those approved by AFRDI. The purpose of obtaining approval was so that resellers could be confident that selected chair models meet international standards

adopted by Australia and New Zealand. Mr Herd testified that the AFRDI process required special density and durability requirements. After testing Knight changed from a five year guarantee to a ten year guarantee. The testing process was concerned with durability rather than user comfort, but that is of no moment.

[42] For a comparison between imported chairs and those labelled in the brochures as "NZ Made", the defendant produced a fully imported office chair supplied in New Zealand by Knight and competing on the same level as the ISO model. It was returned within 12 months with 50 to 60 mm resting foam height reduced to 20 mm through use. The ZED model used for comparison was in regular use for over two years and the foam of 50 mm resting height at production was apparently unaffected by use.

### **Mr Trembearth**

[43] Mr D J Trembearth is a Certified Professional Ergonomist and a full-time safety and ergonomics consultant with specific experience through the observation and rendering of advice in regard to office chairs in their selection, testing and advice to organisations prior to purchase. He has provided advice to many organisations including financial corporations, government and transport agencies and has prepared and given expert evidence on unsafe seating systems involving office workstations and various modes of transport.

[44] Mr Trembearth noted that there are about fourteen components that make up a typical office chair. These include:

- (a) 5-star base;
- (b) castors;
- (c) gas lift;
- (d) gas lift cover;
- (e) mechanism with levers to operate function features;
- (f) back strap (connecting the mechanism and seat pan to back of the chair);
- (g) back strap cover;
- (h) plastic seat pan (outer);
- (i) plywood seat (inner);
- (j) back foam (moulded or cut);

(k) upholstery for seat pan and back.

[45] The process involved in the manufacture of a chair involves a systematic procedure. The main steps involved include:

- (a) wooden seat inners are sprayed with glue;
- (b) moulded seat foams or cut seat foams are attached to the wooden seat inners;
- (c) the top of the seat foam is sprayed with glue;
- (d) the upholstering fabric, cut in accordance with the model of chair being created, is fitted to the top of the seat pan where it is held in place by the glue;
- (e) the upholstering fabric is drawn around the wooden frame and secured firmly with staples at the back of the seat ply;
- (f) the plastic seat pan outer is fitted over the plywood seat inner;
- (g) the seat-adjusting mechanism is fitted to the plastic seat pan outer;
- (h) a similar process occurs with the back assembly to the point where it is ready to be joined with the chair mechanism;
- (i) the castors are fitted to the 5-star moulded base;
- (j) the gas lift is fitted onto the 5-star base; it then has a gas lift cover fitted over it;
- (k) a metal back strap is attached within the plastic outer moulding of the back. The back strap is inserted into the mechanism on the bottom of the seat pan in order to enable the back of the chair to be attached to the seat pan. This back strap has a back strap cover fitted to it;
- (l) the 5-star base with gas lift is attached to the bottom of the seat pan; and
- (m) the chair is bagged ready for sale.

[46] Mr Trembearth explained that AFRDI applied a Standard developed under a Memorandum of Understanding between AFRDI and Standards Australia which is published as a Joint Australian/New Zealand Standard. AFRDI acts as an agency for the development of the text of the Standard which is then reviewed by an appropriate Joint Standards Australia/New Zealand Committee.

## Law

[47] Apart from the New Zealand cases in point, useful comparisons can be derived from cases decided in the Federal Court of Australia under the Trade Practices Act 1974. In *Netcomm (Australia) Pty Ltd v Dataplex Pty Ltd* (1988) 11 IPR 375 the Court considered advertisements for a modem assembled in Australia and advertised with the words “Made in Australia” and “Australian Built”. The product was substantially designed by an American corporation which wrote the software and made the printed circuit boards. The components were manufactured in various countries outside Australia and the Australian company mounted them into a case with a power supply unit, power switches, fuse circuits and other mechanical and electrical assembly components. Gummow J decided that “Made in Australia” was a misleading statement concerning the place of origin of the goods, but that “Australian Built” or “Built in Australia” were not false or misleading representations concerning the place of origin of the goods. He said that to locate the place where the goods were built did not carry with it the implication or suggestion that the materials or components used in that process themselves were constructed in Australia or that the technology employed in design of the goods emanated from Australia.

[48] In *Trade Practices Commission v QDSV Holdings Pty Ltd t/as Bush Friends Australia* (1994) 128 ALR 551 the Federal Court considered the meaning of “Made in Australia” in relation to soft animal toys. A koala toy was designed by the respondent. The fur fabric was produced in China and where it was cut into shape and sewn together, leaving the head and torso separate and inside out. The eyes and noses were produced in Hong Kong or Taiwan and the koalas were completed at the respondent's factory at Dungog using all imported pieces except for the filling which was produced in Australia. Evidence was given that 17% of the average production cost was paid for the imported material and 83% was the average local content component.

[49] Davies J held that the ordinary meaning of the words “Made in Australia” was that enunciated by Gummow J in *Netcomm*. He found that the koalas were manufactured partly in China and partly in Australia. The koalas were designed in

Australia. The work in China was done specifically for QDSV and production was supervised by an employee of QDSV. He said that if the “substantial transformation” or “essential character” test were applied in the present case, he would hold that the component parts were transformed into a toy koala in Australia from merely component parts. The goods obtained their essential character in Australia, having regard to evidence that the skill exercised in Australia in filling the head and the torso, and in sewing the parts together at the correct angle, was crucial to achieving the desired result. However the correct test to apply was the “substantial manufacture” test and the label was therefore found to be misleading as to origin.

[50] In *Australian Competition and Consumer Commission v Lovelock Luke Pty Ltd* (1997) 39 IPR 439, a manufacturer of an air conditioning unit that included an imported compressor unit, labelled the unit as “Made in Australia”. All componentry except for a compressor unit was manufactured in Australia, and the unit was entirely assembled in Australia. Lockhart J said:

“The question of origin labelling was addressed in the Trade Practices Amendment (Origin Labelling) Bill 1994 (Cth) which has lapsed. In general terms, that bill provided that the description ‘Made in Australia’ could not be used unless the goods acquired their essential character or quality in Australia.

In this area of the discourse it is desirable that rigid rules are not set down; the words of the statute speak clearly enough. Whether an article of commerce is ‘Made in Australia’ must be determined by reference to the circumstances of each case. Some articles may consist of parts manufactured either wholly abroad or partly abroad yet fully assembled here. It may be apposite in some cases to refer to such articles as being Australian made because the purchasers or potential purchasers know that the parts are manufactured either wholly or partly abroad. In the case of some goods the meaning conveyed by the expression ‘Australian Made’ may be that all the components are manufactured in Australia and assembled here. In some cases where the goods are designed may be irrelevant; this was the view adopted by Sheppard J in *Thorp*. In the case of other articles the fact that they are designed in Australia may be important in considering the question whether they are ‘Made in Australia’. I cannot emphasise enough the need to look at each particular set of facts to determine the answer to this question.”

[51] The air conditioner met “substantial manufacture” test for marketing it as made in Australia, whereas the product in the *Netcomm* case failed that test.

[52] In *Australian Competition & Consumer Commission v Unilever Australia Ltd* (1997) 40 IPR 354 the Court considered an alleged misleading representation concerning the place of origin of goods by representing that tuna in John West tuna was caught from South Australia or was sourced from South Australia when a significant proportion was not caught in Australian fishing waters. The canning process was long and complex and Mansfield J in the Federal Court found that the product which resulted was distinctly different from the raw ingredients. It was decided that it was not misleading to use "Australian Made" and that the use of the word "made" did not inherently convey that the raw ingredients of the John West Tuna product, even a dominant ingredient, were of specific prominence. It was not shown that the place of origin of that raw tuna ingredient was, or capable of being, of significance to the consumer.

[53] In *Marcol Manufacturers Limited v Commerce Commission*. [1991] 2 NZLR 502, Tipping J considered a representation concerning the place of origin of imported leather jackets made in Korea. A label below the collar read "Marcol Christchurch New Zealand", and a swing tag giving information about cleaning carried the words "Marcol Manufacturers Ltd 157 Madras Street Christchurch New Zealand". Tipping J held that the label on the collar, and also in combination with the swing tag conveyed a message apt or likely to mislead the mind of the average New Zealand shopper into thinking, contrary to the fact, that the jacket was made in Christchurch. The correct approach to the question of determining the hypothetical representee is to ask whether the material alleged to amount to a particular representation would be viewed as such by the average New Zealand shopper, and whether such a shopper would derive from it a message which is in fact misleading, which will be the case if the representation leads the mind of the representee into error.

[54] In *Carter Holt Harvey Limited v Cottonsoft Limited* [2004] 11 TCLR 161 Harrison J in the High Court considered a representation of the place of origin of toilet tissue produced in a four stage process in which wood is (1) made into fibre, (2) pulped, (3) changed from a bale of pulp to a continuous sheet of tissue, and (4) converted into the end product. Cottonsoft used the "New Zealand Made" logo applied to tissue imported from Asian countries which it converted to toilet tissue,

only the last of those four stages having been carried out in New Zealand. In framing the correct test to be applied for determining a breach of s13(j) of the Act, Harrison J said:

[22] The test for determining whether CottonSoft is or was in breach of s 13(j) is objective: would the mind of the average New Zealand shopper probably be misled by CottonSoft's representations as to the origin of its tissue products? This yardstick imposes its own challenges and, arguably, an artificiality. In divining the mental composition or inclination of the average shopper a Judge must attempt to embrace and synthesise a range of arguably irreconcilable states of mind, intelligence, preferences and prejudices. However, the average shopper's mind is known to be likely to examine such things as promotional packaging in a relatively casual and unwary manner, to work more by impression than analysis, and to be prone to some looseness of thought (*Marcol Manufacturers Ltd v CC* [1991] 2 NZLR 502, Tipping J). Although this last qualification is of some personal comfort, I must not construe it as a wholesale licence to determine CHH's claim by impression alone, shorn of any pretence of judicial reasoning.

[55] And in cataloguing various tests that have been applied in Australia, Harrison J said:

[24] Among the tests devised by Judges for determining whether a representation that goods were made in Australia was false or misleading were inquiries into whether (a) the goods were substantially manufactured in Australia (*Thorp v CA Imports Pty Ltd* [1990] ATPR 50,962 (40-996); (1989) 16 IPR 511 (FCA)); (b) a significant step in the manufacturing process took place outside of Australia (*Trade Practices Commission v QDSV Holdings Pty Ltd (t/a Bush Friends Australia)* (1994) 128 ALR 551; [1995] ATPR 40,107 (41-371) (FCA)); (c) the activities preceded and resulted in transition from non-existence to existence (*Korczynski v Wes Loftus (Aust) Pty Ltd* (1985) 62 ALR 225); or (d) a reference to being Australian made was to the origin, beginning, source or cause of the product's existence (*Netcomm (Aust) Pty Ltd v Dataplex Pty Ltd* (1988) 81 ALR 101; (1988) 11 IPR 375).

[56] In discussing the application of the effect of the representation on the mind of the average shopper, he said:

[30] In my judgment a statement on packaging material that a product is made in New Zealand is a representation not so much about the source and origin of its raw materials but about the place where it was produced or manufactured. The average shopper is alive to the modern economic reality that some New Zealand companies manufacture products here from imported raw materials. He or she would accept as true a statement that goods are made in New Zealand even if the raw materials originate elsewhere provided the manufacturing process occurred substantially here.

[31] The comparative example given in argument by Mr Wilson of a men's suit is apposite. They are traditionally made by local companies from wool grown in Europe and spun or woven in woollen mills there and exported in

rolls. The New Zealand manufacturer unrolls the wool, cuts it into patterns according to designs, sews it into trousers or a jacket, and presses the garment into shape. In the trade, this is known as a cut, make and trim operation. The suit is then ready for sale.

[32] In this process the end product is significantly different in form and function from the raw material (Mr Wilson's test) or, alternatively, it can be accurately said that the suit was substantially manufactured here (Mr Simpson's test). All relevant steps and procedures which preceded and resulted in forming or composing the goods occurred here, even though the wool was grown and woven into cloth in Europe. In these circumstances a local manufacturer fairly represents that the suit is New Zealand made, although for promotional purposes it will invariably advertise the name and location of the woollen mills on a separate label placed on an inside jacket pocket.

[57] Harrison J had regard to the base characteristics of the product, a sheet of tissue constituted outside New Zealand and which remained unchanged through subsequent processes. He considered that there was no real distinction between a "substantial manufacture" test and an "essential character" test. He said that *"both require a quantitative assessment of the origins of significant change. Determination of whether or not goods were made in New Zealand is very much a question of fact and degree, and impression"*.

[58] Since August 1998 the Trade Practices Act in Australia provides a *"safe harbour"* in relation to place of origin representations. A representation regarding a country of origin of goods will not be misleading if the goods have been *"substantially transformed"* in that country, and 50% or more of the cost of producing or manufacturing the goods is attributable to production or manufacturing processes that occurred in that country. A good will be *"substantially transformed"* if it undergoes a fundamental change in form, appearance or nature such that the good existing after the change is new and different from the good existing before the change. In applying the amendment, a meaning would still have to be given to the word *"transformed"* and also to *"production or manufacturing process"*. In the present case, the defendant would say that the manufacture of seat padding and final assembly of the parts into a chair is enough, and that it accounted for more than 50% of the cost. By contrast, it was observed in *Cottonsoft* that the essential transformation was from wood pulp to tissue, and in *Thorp v CA Imports Pty Ltd* that transformation was the cutting and sewing of fabric to form the casing for a stuffed Koala. Cutting down bulk into smaller items for sale has not been regarded as

transformation, and there appear to be no reported cases in which assembly of parts has been regarded as transformation.

[59] It is noted that another legislative attempt to formulate the origin of goods for the purpose of representation was the Trade Practices Amendment (Origin Labelling) Bill 1994 referred to in the above extract from *Lovelock Luke* and discussed extensively in *TPC v QDSV Holdings*. The New Zealand legislature has not attempted a formula. The Australian 1998 amendment does not assist in this case.

### **Informant's submissions**

[60] Mr Vanderkolk for the informant submitted that an office chair consists of a number of subassemblies, each contributing to the overall functionality of the chair. Substantial manufacturing processes are required to construct each subassembly. Once a subassembly is produced, its only practical use is as part of an office chair and each subassembly is crucial to overall functionality of the chair. The defendant's involvement in the manufacturing process is limited to the initial design of the "look" of the chair, the manufacturing of the seat foam, and the assembly and finishing of the chairs. All other aspects of the manufacturing process are undertaken outside New Zealand.

[61] The range was available nationwide through a range of over 60 retail stores and there was no restriction on the kind of consumer who could purchase one of the office chairs. The brochures were clearly designed to be the type of material able to be easily absorbed by any person who is in the market for an office chair.

[62] The representation "NZ Made" is broad and is not qualified by any other explanation of the origin of components. Furthermore, the stylised silver fern on the back page of the brochure is designed to have an emotional impact on New Zealand consumers. Where no other origin details are provided, some consumers will inevitably assume that the chairs are entirely manufactured in New Zealand. Other consumers may be aware that some of the components of the chair are likely to have been sourced from overseas, but will assume that the chair is substantially manufactured in New Zealand. The informant submits that the average New

Zealand shopper would consider that a representation that the chair was “NZ Made” meant that either:

- The chair was wholly manufactured within New Zealand; or
- The chair was substantially manufactured in New Zealand..

[63] The informant says that the chair is not substantially manufactured in New Zealand. The manufacture of the seat foam and the final assembly cannot be viewed as being more substantial manufacturing processes than the processes involved in producing any one of the other important subassemblies such as the five star base, or the under-seat mechanism.

[64] The informant draws on the *Netcomm* and *QDSV* cases as comparable fact situations where important componentry was manufactured overseas, before being assembled in Australia. The assembly process required no more skill than the assembly of the chairs in this case, and in both of the Australian cases a representation of Australia origin was found to be misleading.

[65] The informant submits that the “essential character” test is inappropriate in this case. Once the components have been gathered together in New Zealand they have no other practical use than as part of an office chair and the essential character exists before assembly.

[66] Finally, the informant says that the same considerations would establish a representation liable to misled, prohibited by s10 of the Act.

#### **Defendant’s Submissions**

[67] Mr McIntyre for the defendant submitted that the case most analogous to the present facts is the air conditioner case of *Lovelock Luke* in which the Court considered it important to have regard to the nature of the product and the expectations and likely understanding of purchasers. In a time of increasingly global manufacturing processes, purchasers were not likely to think that “Made in Australia” would mean that the air conditioners were wholly made in Australia. The compressor, the condenser and the evaporator were all vital components of the air

conditioners, and the air conditioners were found to be substantially manufactured in Australia even though the compressors had been made offshore.

[68] Mr McIntyre noted that the 1999 Guide booklet issued by the Commerce Commission referred to the *Unilever* case where the word “Made” did not inherently convey that the raw ingredients of John West Tuna, even a dominant ingredient, were of significance to the consumer when the complex processing and canning was done in Australia resulting in a product distinctly different from the raw ingredients. From the *Cottonsoft* judgment, he noted that:

- (a) the test for determining a breach of Section 13(j) of the Act is objective and is whether the mind of the average New Zealander would probably be misled by representations as to the origins of source materials;
- (b) a statement on packaging material that a product is made in New Zealand is a representation not so much about the source and origin of its raw materials but the place where it was produced or manufactured;
- (c) a product will be “substantially manufactured” in New Zealand when the process of working up material into forms suitable for use in its ultimate form takes place in New Zealand. Where a production process which creates the base characteristics of a product or which remain unchanged through subsequent processes, takes place outside New Zealand, that product cannot be said to have been made in New Zealand;
- (d) Harrison J thought it pertinent to ask where the product had assumed its distinctive characteristic and ultimately found on the facts of the case that there had been misleading representations made by Cottonsoft because the product was substantially manufactured outside New Zealand.

[69] The *Cottonsoft* case went to appeal as *Carter Holt Harvey Limited v Cottonsoft Limited* (2004) 8 NZBLC 101, 588. Mr McIntyre noted the observations of the Court of Appeal that s9 as opposed to s13 might be thought appropriate for cases involving conduct amounting to a statement which is literally true but likely to be taken in another and incorrect way by those to whom it is addressed. The Court said:

[42] As we have noted, the language of s 13(j) differs from that of s 9. There may be something of a difference between “conduct” (including representations) which is “misleading or deceptive or is likely to mislead or deceive” and a “representation” which is “false or misleading”. Where the allegation relates to conduct which is said to be “likely to mislead”, the emphasis is very much on the impact of the conduct in question on the mind of the person to whom it is directed. On the other hand, in relation to s 13(j), there is at least scope for argument that what constitutes a “representation” should be determined objectively with less allowance made for the possibility of subjective misinterpretation by the person to whom it is made. Given that s 13(j) carries criminal sanctions it may be that it should be construed more strictly than s 9.”

[70] Mr McIntyre accepted the “average shopper” approach in this case and submitted that the result will be the same as the traditional approach to the question whether conduct is “misleading ... or is liable to mislead” under Section 10.

[71] Applying the legal principles to the specific facts of this case, Mr McIntyre submitted:

- (a) In respect of each of the four chairs, the chair designs are created into what they are in New Zealand;
- (b) The chair seat pans and backs have foam added and contouring completed in New Zealand;
- (c) Seat pans and backs are upholstered in New Zealand;
- (d) All components are entirely assembled in New Zealand;
- (e) The chairs were prototyped with a view to ultimately testing them against AFRDI standards, in New Zealand.

[72] Applying the *Lovelock Luke* test of “essential character” as an important factor in considering how to represent the origin of goods, the following factors need to be considered:

- (a) The office chairs were in each case wholly designed and assembled in New Zealand;
- (b) Whilst the basic rudimentary components were made outside New Zealand, the essential aspects of the chairs, which make them the models that they are, were designed and made in New Zealand: and

(c) The parts of the chair made and designed in New Zealand are all vital components of the office chairs in each case, constituting their individual points of difference. As pointed out by Mr Herd and Mr Trembearth, the key points of difference for Knight is the density, thickness and contouring of the foams used and the ergonomic output which this produces.

[73] Taking into account that the average New Zealand shopper would not expect all of the components of the chair to be necessarily made in New Zealand the question to ask is whether the assertion that the product is New Zealand made is a misleading representation in the sense that it might lead the average shopper into error. Mr McIntyre drew a distinction between the *Cottonsoft* type of case where raw ingredients are worked up into a finished product through a series of manufacturing processes turning trees into tissue, and this type of case where individual manufactured components are combined pursuant to a design to produce a finished product. The circumstances are similar to *Lovelock Luke*. Here the focus is on the issue of “essential character” or “substantial transformation”. Thus the real issue in a case like this is where the product became what it is. Mr McIntyre referred to the current Australia legislation in which a statutory definition of “substantial transformation” is that:

“Goods are substantially transformed in a country if they are undergo a fundamental change in that country in form, appearance or nature such that the goods existing after the change are new and different goods from those existing before the change.”

[74] Referring to the *Marcol* judgment, Mr McIntyre noted that the fundamental change in that case occurred in Korea even though the leather material originated in New Zealand, and he argued that by analogy the fundamental change in the present case occurred in New Zealand. The photographed component parts show only the rudimentary elements of an office chair. The product is not usable or saleable as an office chair until after a fundamental change in form and appearance. That is achieved by significant design, manufacturing and work input in New Zealand. It is not a case where overseas components are simply assembled in New Zealand.

[75] Mr McIntyre also drew on the Australian amendment as a realistic definition of the amount of manufacture and design input required to justify a country of origin

description. He referred to Mr Herd's evidence that average apportionment of cost was about one third overseas and two thirds in New Zealand. Therefore the goods have been substantially transformed in New Zealand and more than half the cost is attributable to production or manufacturing processes in New Zealand. Substantial transformation under the amendment is defined as a fundamental change in form, appearance or nature such that the goods existing after the change are new and different goods from those existing before the change.

[76] Mr McIntyre submitted that the Australia amendment enacted in the wake of *Lovelock Luke* is appropriate for a New Zealand Court to follow notwithstanding the absence of mirror legislation in terms of an amendment to the Fair Trading Act.

### **Decision**

[77] The quality of the chairs is not in doubt. The defendant's evidence is of good quality in both the mechanical construction and the seat and back design and padding. The foam is specified for its combination of density and flexibility so that the seat upholstery will not flatten or deteriorate with constant use. Mr Herd testified that since 2002 when Knight promoted these four models as "NZ Made", 8000 to 10,000 were sold out of a total manufactured output of approximately 70,000 office chairs. Mr Herd was not aware of any complaint from a retailer or an end user about those four models.

### **The representation**

[78] Mr McIntyre submitted that the defendant did not make any misleading representation because there was no proof that a reseller would have been misled and no proof that a buyer from the reseller would have received any representation from the defendant. The fact basis for this submission was that a reseller would probably have been aware that chairs produced in New Zealand must have a substantial overseas content because the base and support structure cannot be economically fabricated in New Zealand. I accept that resellers may well be aware that office chairs are either imported complete or built up from imported subassemblies. The evidence as it stands favours an inference in favour of the defendant that the "NZ Made" claim would not have been particularly likely to mislead a reseller. The

informant did not set out to prove the contrary and the evidence is not strong enough to prove a misleading representation on that basis.

[79] The second part of this submission is that the brochures were issued to the resellers and not to individual retail purchasers. The defence proposition is that proof is lacking to the effect that an individual buyer, an average New Zealand shopper, would have been influenced by a representation made in material distributed to the reseller. Mr Vanderkolk submitted that there is no requirement for proof that the representation in the brochure did influence a buyer, but only that it was capable of doing so and was likely to mislead in the sense that it was “apt to mislead”.

[80] The brochure was a marketing publication distributed to resellers engaging with members of the public. It is a reasonable inference that resellers would use the material to promote a sale of the defendant’s product or to assist individual buyers in making a choice between available and competing products. I find it proved that the brochure was a representation that was likely to be presented to some buyers and would have been capable of influencing them. It was material logically available to buyers making a choice or a decision about purchase of a chair.

#### **Whether likely to mislead**

[81] Whether the representation was misleading depends on evidence that it was likely to mislead, bearing in mind the observations of Harrison J in *Cottonsoft* that the average shopper is alive to the modern economic reality that some New Zealand companies manufacture products here from imported raw materials, and that he or she would accept as true a statement that goods are made in New Zealand even if the raw materials originate elsewhere provided the manufacturing process occurred substantially here.

[82] A shopper to whom this brochure was shown, and who saw the silver fern and “NZ Made” description on the back of the brochure would inevitably believe the description was intended to distinguish this product as one of New Zealand origin from other products that are not of New Zealand origin. That would indicate to a potential buyer that the product has a distinctive quality. I find that a buyer is likely

to gain the impression that the chair has been substantially manufactured in New Zealand. It is most unlikely that a buyer would understand that the chair differed from wholly imported chairs only because the seat and back were made with New Zealand foam and fabric.

[83] Whether or not the representation is misleading depends on there being a significant difference between the true position and the information conveyed by the representation. The informant alleges that the information likely to be conveyed to a buyer is that the product is substantially manufactured in New Zealand, whereas the true position is that it is substantially manufactured outside New Zealand and is assembled in New Zealand with only some parts originating in New Zealand.

[84] The defendant favours tests that refer to “substantial transformation” or “essential character”. The informant favours a “substantial manufacture” test. The cases illustrate that there is no universal test that can be applied to many different kinds of products. The substantial transformation and essential character tests can be sensibly applied in cases of clothing manufacture and food canning, but those processes are quite different from the assembly of mechanical parts which is the basic problem in this prosecution. At one extreme is the assembly in New Zealand of parts entirely designed and manufactured overseas, and at the other extreme the assembly of parts manufactured in New Zealand.

[85] *Lovelock Luke* is an illustration of circumstances and degree where the product complied with the representation even although parts were introduced from outside Australia. The degree of Australian manufacture was enough to meet a “substantial manufacture” test when one essential component was manufactured outside Australia.

[86] I accept the informant’s submission that an “*essential character*” test is not helpful when considering the assembly of components. The assembly in New Zealand of parts manufactured entirely overseas might be described as New Zealand built, but could not be described as NZ made without creating a misleading impression in the mind of a New Zealand shopper. Assembly from parts might be regarded as a change in essential character when creating a working product different

in kind from its components. It is a test that can be sensibly applied to a transformation stage in the course of manufacture, but not to an assembly stage of parts acquired for the specific purpose.

[87] Since August 1998 the Trade Practices Act in Australia provides a “safe harbour” in relation to place of origin representations. Under that amendment, a representation regarding a country of origin of goods will not be misleading if the goods have been “substantially transformed” in that country, and 50% or more of the cost of producing or manufacturing the goods is attributable to production or manufacturing processes that occurred in that country. A good will be “substantially transformed” if it undergoes a fundamental change in form, appearance or nature such that the good existing after the change is new and different from the good existing before the change. The yardstick of a “fundamental change in form” reflects a distinction made by Harrison J in *Cottonsoft* between the cut, make and trim operation in the case of clothing and the cutting and rolling process for toilet tissue. The difference depends on the nature of the product and requires an evaluation of fact and degree in the particular case.

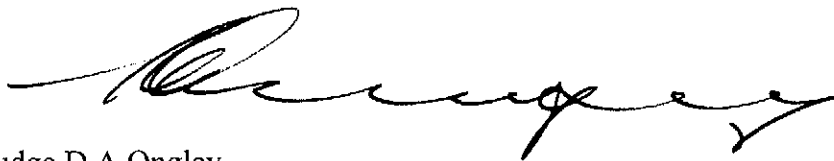
[88] In this case there was plainly a larger extent of overseas manufacture of components for assembly into an office chair. Approaching this case as a question of fact and degree, I find that the overriding importance of the overseas origin of part of the product was the creation of the whole base and mechanical structure and a substantial part of the seat and back frame which could then be assembled at negligible cost in New Zealand. The New Zealand input of specification of the parts manufactured offshore, and assembly in New Zealand after the manufacture and fabrication of the foams and upholstery, with some optional fittings available on purchase in New Zealand, was not enough to justify describing the chairs as “NZ Made”.

[89] While a purchaser could also take comfort in available recourse to the New Zealand maker of these office chairs in the event of breakdown of the product, that does not have a bearing on the substance or impression of the representation as to origin.

[90] I find that the defendant did make a misleading representation as to origin of the office chairs. While the seat and back foam were important components for comfort and ergonomic support, they were not a major part of the overall product. There are various ways of looking at the value to be given to constituent parts. One approach would be to look at functionality, in which case the mobility, under-seat support structure, mechanical adjustment mechanism and seat pan are all major features. Another approach is to look at cost, in which case there is a different result when taking the actual cost of overseas components compared with taking the notional cost of manufacturing those components in New Zealand.

[91] The defendant's argument emphasises a point of difference, in terms of ergonomic support and comfort, between routinely imported chairs and the four chairs in question. In my view that is not enough to support a representation that the chair is New Zealand made. While it would not be misleading to represent that the seat and back were New Zealand made, even though the shaped ply parts are imported, in my view the chair as a whole does not answer the description "NZ Made" that was published on the brochure in conjunction with a silver fern logo. The brochure that was designed to be used to promote the sale of the chairs was likely to mislead an average New Zealand shopper as to the origin of the goods.

[92] For those reasons, the defendant will be convicted on the four informations laid under s13(j) of the Fair Trading Act 1986. The four alternative informations will be dismissed.

A handwritten signature in black ink, appearing to read 'D. A. Ongley', written in a cursive style.

Judge D A Ongley  
District Court Judge