Pragmatism and Cartel Prosecutions: Developments in the Law of Price Fixing in Lodge Real Estate Ltd v Commerce Commission

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I INTRODUCTION

A change in Trade Me's advertising fee structure triggered a group of Hamilton real estate agencies to collectively change the way they funded real estate advertising on the website. The Commerce Commission successfully argued that the agencies entered into a price fixing arrangement in breach of the former s 30 of the Commerce Act 1986.

The Supreme Court decision *Lodge Real Estate Ltd v Commerce Commission* represents the first substantive price fixing case decided in New Zealand's highest court.[1] The Court clarified three crucial definitions of "arrangement, "control" and "price" in prohibitions on restrictive trade practices. This note critiques the Court's approach to their interpretation, and how the Court has re-framed existing authority. It also examines what the decision means for price fixing cases to be decided under the new cartel provisions of the Commerce (Cartels and Other Matters) Amendment Act 2017. This note concludes that, despite some ambiguity around proof of parties' commitment to a price fixing arrangement, the decision represents a pragmatic approach to cartel behaviour and will likely aid prosecution for anti-competitive conduct.

II BACKGROUND TO THE CASE

Lodge Real Estate Ltd and Monarch Real Estate Ltd were two Hamilton real estate agencies of five alleged to have been party to a price fixing arrangement.[2] The agencies' principals, Jeremy O'Rourke and Brian King, respectively, faced the same allegations. The other three agencies, Lugton's Ltd, Online Realty Ltd, and Success Realty Ltd, all accepted liability and gave evidence for the Commission. All five agencies were competitors in the Hamilton residential real estate market and provided promotional and marketing services to prospective property vendors, either through their own

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1 *Lodge Real Estate Ltd v Commerce Commission* [2020] NZSC 25 [*Lodge* (SC)]. The only other price fixing case was focused on issues of extraterritorial jurisdiction: *Poynter v Commerce Commission* [2010] NZSC 38, [2010] 3 NZLR 300.

2 I refer to the five agencies collectively as "the agencies".

publications or through third parties such as newspapers or websites like Trade Me.

Trade Me is a popular online marketplace, which hosts real estate advertisements from both real estate agencies and private vendors. It was the norm for real estate agencies in Hamilton to automatically list customers' properties on the website as part of their advertising services. Trade Me traditionally charged for standard listings on a monthly subscription basis, capped at $999.[3] Hamilton agencies usually absorbed the listing cost, as the subscription cap meant standard listings after the first five or six cost nothing.

In 2013, Trade Me signalled a change to its fee structure for standard real estate listings to a fee-per-listing model, charging $159 plus GST for each listing. There was a widespread negative reaction from realtors in New Zealand. Lodge formerly paid up to $9,000 per year for Trade Me standard listings, and Monarch paid around $36,000 per year. The new fees represented an average cost of $250,000 per year each. Trade Me's communications about the proposed fee increase encouraged real estate agencies to pass the cost onto customers (that is, vendors).

In response, Mr O'Rourke, on behalf of Lodge, set up a meeting of Hamilton real estate agencies on 30 September 2013 in Monarch's boardroom. Representatives from Monarch, Lugton's, Online and Success were invited to attend.

At this meeting, the agencies were alleged to have agreed that they would all remove their standard listings from Trade Me from 20 January 2014. If a customer wished to advertise on Trade Me, the customer or salesperson (the individual real estate agent) would be charged for the cost of the Trade Me listing fee (referred to in the judgments as "vendor funding"). A further meeting took place on 16 October 2013 to the same end, followed by communications between the agencies.

Lodge, Lugton's, Online and Monarch all prepared to withdraw their standard Trade Me listings from mid-January 2014. Evidence demonstrated that the number of residential listings in Hamilton on Trade Me significantly declined.[4] By 30 July 2014 Trade Me announced its reversion to a monthly subscription fee for real estate agencies for standard listings.

The Commerce Commission alleged that the agencies had entered into a price fixing arrangement by collectively changing their Trade Me real estate listings from automatic to opt-in and passing on the cost of the listing fee to customers or the salesperson rather than the agency absorbing the cost as it had done previously.[5] The agencies all impermissibly acted at the same

3 Trade Me also offered premium listings but these cost more as they provided greater prominence on the website.

4 *Commerce Commission v Lodge Real Estate* [2017] NZHC 1497 [*Lodge* (HC)] at [173].

5 The Commission also pleaded that the principals of the two agencies, Jeremy O'Rourke and Brian King, contravened the Act or, alternatively, were parties to the agencies' contravention: *Lodge* (SC), above n 1, at [27].

time and in the same way. The Commission pleaded that the result of this arrangement was:[6]

> (a) the Hamilton agencies fixed, controlled or maintained the price, or components of the price, that customers paid for Trade Me services, online advertising services, real estate advertising services or real estate sales services;
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> (b) customers were deprived of prices or components of prices that would have been set under competitive conditions in the absence of the Hamilton agreement for such services; and
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> (c) customers who had existing listings with Trade Me removed were required to pay more if they wished to continue listing properties on Trade Me.

This arrangement was said to contravene s 30 of the Commerce Act, which prohibits people from entering into contracts or arrangements or arriving at understandings containing a provision that has the purpose, effect or likely effect of (or provides for) fixing, controlling, or maintaining the price for goods or services, or any discount, allowance, rebate or credit in relation to goods or services. That provision (until its replacement) deemed such provisions to have the purpose, effect or likely effect of substantially lessening competition in a market in breach of s 27 of the Act.[7]

The appellants denied there was an arrangement on the basis that the agencies all predictably but independently chose to remove advertising from Trade Me and pass the cost of that advertising onto customers; in other words, the outcomes were a result of conscious parallelism, rather than collusion.[8]

If an arrangement was found, the appellants argued that it did not have the purpose or effect of controlling price. This was because the Trade Me listing fee was only a small component of the overall price for real estate services, and the agencies retained a discretion to shoulder the cost.

III THE SUPREME COURT DECISION

The Supreme Court unanimously found Lodge, Monarch, and their principals to be liable for price fixing under s 30 of the Commerce Act, dismissing their appeal.[9] The decision clarified three significant issues in

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6 *Lodge* (SC), above n 1, at [20].

7 Sections 30 and 30A of the current Commerce (Cartels and Other Matters) Amendment Act 2017 are divorced from s 27 and no longer deem there to be a substantial lessening of competition — a point to which I return in Part IV below.

8 As the Supreme Court explained at n 46, "[c]onscious parallelism (sometimes referred to as tacit collusion) is the process by which firms in a concentrated market make decisions on matters such as prices by reference to the position of other market participants based on a well-founded expectation as to how other participants will react without actually colluding."

9 *Lodge* (SC), above n 1.

restrictive trade practice prohibitions: the requirements to prove an "arrangement", what amounts to "controlling" price, and, as a consequence, the definition of "price" itself. Unfortunately, the Court did not resolve the correct approach to the "purpose" and "effect" of an arrangement, preferring to leave the longstanding debate for a more suitable case.

Requirements for an Arrangement

An arrangement, which was not argued to be distinct from an understanding,[10] is something less than a legally binding contract. Its definition has become unclear in New Zealand law. Debate surrounding the requirements for an arrangement stems from the slightly differing formulations of two Lords in the United Kingdom Court of Appeal case *British Basic Slag Ltd v Registrar of Restrictive Trading Agreements*.[11] Diplock LJ took a plain meaning approach to "arrangement", finding it requires that parties make a "representation" of future conduct, communicate that representation, and evoke an expectation to act accordingly:[12]

> … it is sufficient to constitute an arrangement between A and B, if (1) A makes a representation as to his future conduct with the expectation and intention that such conduct on his part will operate as an inducement to B to act in a particular way, (2) such representation is communicated to B, who has knowledge that A so expected and intended, and (3) such representation or A's conduct in fulfilment of it operates as an inducement, whether among other inducements or not, to B to act in that particular way.

Willmer LJ highlighted mutuality of obligation (a "moral obligation") as an additional and integral part of an arrangement:[13]

> For when each of two or more parties intentionally arouses in the others an expectation that he will act in a certain way, it seems to me that he incurs at least a moral obligation to do so. An arrangement as so defined is therefore something "whereby the parties to it accept mutual rights and obligations."[14]

In the New Zealand context, the Privy Council appeared to support Diplock LJ's broader formulation in its 1990 decision *New Zealand Apple and Pear Marketing Board v Apple Fields Ltd*. This was an apparent reaction against conspiratorial interpretations of "arrangement":[15]

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10 At [30].

11 *British Basic Slag Ltd v Registrar of Restrictive Trading Agreements* [1963] 1 WLR 727 (CA).

12 At 747. There is debate over this interpretation as earlier in his judgment Diplock LJ touched on "mutuality" in that each party to an arrangement would "regard himself as being in some degree under a duty, whether moral or legal, to conduct himself in a particular way": at 746. However, his Lordship's quoted summary of the test indicates he did not consider mutuality to be essential and it has been interpreted accordingly in the New Zealand context.

13 At 739.

14 *Re Austin Motor-car Co Ltd's Agreements* [1958] 1 Ch 61 at 74 per Upjohn J.

15 *New Zealand Apple and Pear Marketing Board v Apple Fields Ltd* [1991] 1 NZLR 257 (PC) at 261.

> "Arrangement" is a perfectly ordinary English word and in the context of s 27 [of the Commerce Act] involves no more than a meeting of minds between two or more persons, not amounting to a formal contract, but leading to an agreed course of action.

By contrast, Australian competition law has long emphasised the need for parties to an arrangement to have mutuality of obligation — aligning with Willmer LJ's test.[16] Mere expectation is not enough.

The most recent New Zealand authority, *Giltrap City Ltd v Commerce Commission*,[17] formed the basis for the lower courts' decisions in *Lodge*. The Court of Appeal in *Giltrap* appeared to split along similar lines to Diplock and Willmer LJJ in *British Basic Slag*. The majority held that mutuality, obligation or duty were not necessary to establish an arrangement. Rather, there needed to be consensus and a corresponding expectation that at least one person would act in the manner envisaged.[18] McGrath J, dissenting, supported the trial judge's view that mutuality of obligation was needed.[19] He was concerned that the majority's formulation would wrongly penalise consciously parallel behaviour:

> [67] The notion of moral obligation is important because it provides a clear distinction between conduct that is collusive and that which is like-minded and parallel, but has an alternative commercial explanation. It is no part of the policy of s 27 to catch even conscious parallelism.

This case left the position in New Zealand uncertain as to whether mutuality of obligation is necessary, in addition to consensus and expectation between parties, to constitute an arrangement.

The Supreme Court's decision in *Lodge* finally resolved the debate. The Court denounced the High Court's statement that moral obligation is "irrelevant",[20] but it agreed with the Court of Appeal that there was little to distinguish the majority and minority in *Giltrap*.[21] It arguably course-corrected the Court of Appeal's reading of that majority judgment: it did not think the judgment could be interpreted as suggesting that consensus and expectation without commitment from the participants to conduct themselves accordingly could amount to an arrangement.[22] This is, perhaps, a generous interpretation in light of the fact the majority in *Giltrap* stated they did not think it appropriate for the test for an "arrangement" to be "tied

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16 See *Apco Service Stations Pty Ltd v Australian Competition and Consumer Commission* [2005] FCAFC 161, (2005) 159 FCR 452 at [45] and [47]; *Australian Competition and Consumer Commission v Leahy Petroleum Pty Ltd* [2007] FCA 794, (2007) 160 FCR 321 at [24]; *Norcast S.ár.L v Bradken Ltd (No 2)* [2013] FCA 235, (2013) 219 FCR 14 at [263]; and *Australian Competition and Consumer Commission v Australian Egg Corp Ltd* [2016] FCA 69, (2016) 337 ALR 573 at [65].

17 *Giltrap City Ltd v Commerce Commission* [2004] 1 NZLR 608 (CA).

18 At [15].

19 At [66].

20 *Lodge* (SC), above n 1, at [107], implicitly pointing to *Lodge* (HC), above n 4, at [188].

21 At [53] citing *Commerce Commission v Lodge Real Estate Ltd* [2018] NZCA 523, [2019] 2 NZLR 168 [*Lodge* (CA)] at [67]. See also [65].

22 At [53].

in any determinative way to the concepts of mutuality, obligation and duty".[23] But it foreshadowed the test then set out by the Supreme Court, which confirms mutuality of obligation is a necessary element of an "arrangement".

The Court preferred the term "commitment" to that of "moral obligation" used in case law.[24] The test for an "arrangement" now requires consensus, commitment and an expectation that those who commit will act according to the consensus:[25]

> [58] We summarise the test in this way. If there is a consensus or meeting of minds among competitors involving a commitment from one or more of them to act (or refrain from acting) in a certain way, that will constitute an arrangement (or understanding). The commitment does not need to be legally binding but must be such that it gives rise to an expectation on the part of the other parties that those who made the commitment will act or refrain from acting in the manner the consensus envisages.

The test clarifies the definition of "arrangement" in s 30 of the Commerce Act, and will undoubtedly continue to apply to ss 30 and 30A of the new Commerce (Cartels and Other Matters) Amendment Act. It arguably also applies to an "understanding" between parties, being the position taken in Australia, although argument was not heard on the point.[26] The Supreme Court acknowledged an "understanding" might be less formal than an "arrangement",[27] but nevertheless included "understanding" in its summary of the new test.[28] By reinstating mutuality of obligation, the new formulation avoids capturing consciously parallel conduct, which, as the Court noted, is not the aim of restrictive trade practice provisions.[29] The decision has brought New Zealand competition law into line with the Australian position. Though, as I discuss in Part IV, it remains to be seen whether the decision makes prosecution of price fixing more difficult.

However, the Court was not attracted to the view that there is an independent requirement to prove the existence of a commitment.[30] It is difficult to accept this reasoning when the Court also held that expectation "flows from" commitment, and parties independently deciding to act in a certain way and independently forming an expectation that others will act in a similar way will not constitute an arrangement.[31] The Court endorsed an objective assessment of whether parties have entered into an arrangement.[32] In practice, proof of commitment is therefore likely to be decisive in

23 *Giltrap City Ltd v Commerce Commission*, above n 17, at [15].
24 See *British Basic Slag*, above n 11; and *Apple Fields*, above n 15.
25 *Lodge* (SC), above n 1.
26 At [30].
27 At [30].
28 At [58].
29 At [51].
30 At [55].
31 At [55].
32 At [50].

distinguishing conscious parallelism from actual collusion. It will be critical for cases which sit at the border.

On the facts in *Lodge*, commitment was the essential determinant of the arrangement. The appellants accepted there was both consensus and expectation among the agencies but argued each had independently come to the same view and so there was no conditionality or commitment between them.[33]

As the lower courts had done, the Supreme Court found there was an arrangement.[34] It agreed with the High Court's conclusion that any independence of the agencies' decisions prior to the 30 September 2013 meeting was "undermined by the mutuality of their understanding arising from [that] meeting".[35] All of the agencies involved accepted, to varying degrees, that if one or more of them decided to absorb the new Trade Me listing fee, the other agencies would have had to react to match them.[36] A collective arrangement was needed to prevent individual agencies from using the listing fee to their competitive advantage.[37]

Even if the same decision had been made independently prior to the 30 September meeting, the Court said that none had implemented their decision before the meeting.[38] There was ample evidence from participants of a meeting of the minds from which an expectation arose that agencies would no longer absorb the Trade Me listing fee and would remove existing listings on the website by January 2014.[39] Evidence of written communications after the meeting confirmed this consensus and the agencies' commitment to the plan.[40] The lower courts' conclusion that the arrangement was given effect to was not challenged.[41]

Purpose or Effect of Fixing, Controlling or Maintaining the Price for Goods or Services

Having established an arrangement existed, the Commission also had to prove that it had the purpose or effect (or likely effect)[42] of fixing, controlling, or maintaining the price for goods or services.[43] The Supreme Court found that it did control price. This was the point on which the High Court judgment was overturned by the Court of Appeal.[44]

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33 At [59].
34 At [109].
35 At [90] citing *Lodge* (HC), above n 4, at [190].
36 At [91] and [97].
37 The Supreme Court analogised the case of *Commerce Commission v Caltex New Zealand Ltd* (1999) 9 TCLR 305 (HC) where unilateral action by one petrol station had resulted in losses, and it was only when the arrangement was entered into that the companies were able to successfully implement the same strategy at [92].
38 At [97].
39 At [97]–[101].
40 At [102].
41 At [110]–[111]; *Lodge* (HC), above n 4, at [200]; and *Lodge* (CA), above n 21, at [72]–[74].
42 The Supreme Court treated effect and likely effect as synonymous for purposes of the judgment at [25].
43 Commerce Act 1986, s 30(1).
44 *Lodge* (CA), above n 21, at [93].

1 Purpose or Effect of the Arrangement

There is long standing debate over the interpretation of "purpose" and "effect" in s 30(1): whether assessment of purpose is primarily objective or subjective and, as a corollary, whether purpose and effect are distinct concepts.[45] The dependency of the former s 30 on s 27 made it defensible to interpret "purpose" and "effect" in the two sections in a similar way. Early authority on "purpose" in s 27 recognised its legislative inclusion as broadening the scope of the conduct prohibited and allowing for a subjective analysis.[46] But in *ANZCO Foods Waitara Ltd v AFFCO New Zealand Ltd*, a majority of the Court of Appeal engaged in an objective analysis. The Court held that "purpose is not the same as effect or likely effect" but where the requisite effect, a substantial lessening of competition in the market, could not possibly occur, that also could not be the purpose of the arrangement.[47] Such an approach essentially makes the purpose limb of ss 27 and 30 redundant; it is equivalent to the "likely effect" of an arrangement. It leaves unclear whether mere attempts at price fixing can be caught by s 30.

In *Lodge*, the High Court relied on *ANZCO* in holding that the arrangement was not "effective" to fix, control or maintain price and therefore could not have had that purpose.[48] Jagose J confirmed the assessment as objective.[49] The Court of Appeal disavowed this approach, but characterised the High Court's conclusion as resting on whether the arrangement was capable of fixing, controlling or maintaining price.[50] It held that it was.[51] However, the Court of Appeal did not distinguish between the purpose and effect of the arrangement in making this finding.[52]

The Supreme Court avoided developing the law on either issue. Although the Court was concerned to clarify the scope of s 30, it took a slightly confused approach in finding that a substantial purpose of the arrangement was to control price based on both subjective and objective evidence.[53] It additionally found that controlling price was the effect or likely effect of the arrangement, although it assessed "effect" as one on the competitive process of setting price, rather than individual agencies' freedom to deviate from the arrangement.[54] Despite the opportunity

45 Roger Thornton (ed) *Gault on Commercial Law* (online ed, Thomson Reuters) at CA27.07 and CZ30.05; and Chris Noonan *Competition Law in New Zealand* (Thomson Reuters, Wellington, 2017) at 307–308.

46 *Tui Foods Ltd v New Zealand Milk Corp Ltd* (1993) 5 TCLR 406 (CA) at 409; *Commerce Commission v Port Nelson Ltd* (1993) 6 TCLR 406 (HC) at 429; and *Port Nelson Ltd v Commerce Commission* [1996] 3 NZLR 554 (CA) at 564.

47 *ANZCO Foods Waitara Ltd v AFFCO New Zealand Ltd* [2006] 3 NZLR 351 (CA) at [257] per Glazebrook J. But see [154] per William Young J. The majority judgment was affirmed in *Todd Pohokura Ltd v Shell Exploration NZ Ltd* [2015] NZCA 71 at [256].

48 *Lodge* (HC), above n 4, at [233], citing *ANZCO*, above n 47, at [257].

49 At [23(a)].

50 *Lodge* (CA), above n 21, at [78] and [83]. The Supreme Court took a similar view: *Lodge* (SC), above n 1, at [138].

51 *Lodge* (CA), above n 21, at [89].

52 A point taken on appeal in the Supreme Court in *Lodge* (SC), above n 1, at [117].

53 At [172]–[178].

54 At [163]–[164], contrasting the High Court's approach in *Lodge* (HC), above n 4, at [227].

presented by the High Court decision to affirm or depart from *ANZCO*, the Court left consideration of objective versus subjective purpose to another day.[55] The narrower objective approach to purpose in *ANZCO* remains standing.

2 Controlling price

It becomes clear, then, that the critical point — on which the lower courts divided — was what constitutes the controlling of price.[56] The Supreme Court highlighted that the two underlying issues were the definitions of "control" and "price".[57]

The phrase "fixing, maintaining or controlling" has its roots in the United States Supreme Court case of *United States v Socony-Vacuum Oil Co Inc*,[58] but there has been little New Zealand jurisprudence on the meaning of "control".[59] In *Commerce Commission v Caltex New Zealand Ltd*, the High Court supported the dictionary definition of control: "to exercise restraint or direction upon the free action of".[60] In the initial strike-out decision, Elias J had held that the Commission must establish that a component of the price is integral to the price of the good or service, so that an arrangement to change it will accordingly change overall price to the same extent.[61]

The Court of Appeal in *Todd Pohokura Ltd v Shell Exploration NZ Ltd* more recently took a different view of the concept, in obiter:[62]

> Section 30 is a deeming provision relating to provisions having the purpose or likely effect of fixing, controlling or maintaining the price for goods or services. Where the impugned control is one that by its terms limits supply, establishing the necessary effect in terms of prices would, on the face of it, require some form of competition analysis similar to inquiries under s 27 of the Act. It would be inappropriate to apply a per se provision such as s 30(1) in that context.

Commentator Chris Noonan has criticised this analysis as "formalistic" and inconsistent with the drafting of prohibitions on restrictive trade practices.[63] Unlike s 27, the former s 30 (and current s 30A) prohibition on price fixing does not require proof of market effects.[64]

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55 At [172].

56 *Lodge* (HC), above n 4, at [215] and [227]; and *Lodge* (CA), above n 21, at [78]. Fixing and maintaining price were not argued.

57 *Lodge* (SC), above n 1, at [138].

58 *United States v Socony-Vacuum Oil Co Inc* 310 US 150 (1940).

59 See Thornton, above n 45, at CZ30.08.

60 *Commerce Commission v Caltex New Zealand* Ltd (1999) 9 TCLR 305 (HC) [*Caltex* substantive decision] at 311.

61 *Commerce Commission v Caltex New Zealand Ltd* [1998] 2 NZLR 78 (HC) [*Caltex* strike-out] at 83–84.

62 *Todd Pohukura*, above n 47, at [276].

63 Noonan, above n 45, at 393.

64 A "market effects" test being one that requires a market definition and an analysis of potential competition in the market: Noonan, above n 45, at 393.

But Edward Willis has pointed out that an evidential link between the arrangement and its pricing effects is still needed.[65] This is because the per se nature of s 30, in his view, only relates to deeming a breach to be a substantial lessening of market competition; it does not assume that entering into an arrangement which affects input price will necessarily affect output price.[66] He was critical of the Commission and the Court of Appeal for drawing such a link by inference, without pointing to any evidential foundation.[67]

While the Supreme Court did not consider the Court of Appeal had ascribed a per se nature to s 30 as a whole, it reined in its open-ended approach by confirming that factual proof that the effect or likely effect of the arrangement was to control overall price is necessary.[68] The Court, therefore, implied that a market effects approach, such as that in *Todd Pohokura*, is unnecessary though factual proof is needed to demonstrate intended or actual control of overall price. Consistent with this view, the Court had refused leave to reconsider admitting counterfactual expert economic evidence on the point.[69] It is not necessary for more to be proved, as s 27 reflects a policy decision to categorise certain anti-competitive conduct as inherently harmful, and thus there is social value in its absolute prohibition.[70] The Supreme Court's test for an arrangement, and the recently enacted collaboration defences,[71] reduce the need for a cautious approach.

Furthermore, the Supreme Court in *Lodge* affirmed the two High Court *Caltex* decisions.[72] Three key points can be identified. First, an arrangement has the effect of controlling the price of a good or service where it restrains the free action of the parties in setting the price.[73] The Commission is only required to prove that "the arrangement ha[s] the purpose or effect of restraining a freedom that would otherwise have existed as to the price to be charged".[74] Secondly, the component of price changed is an "integral part" of the overall price where the arrangement has the effect of altering the overall price.[75] Thirdly, it is irrelevant that the parties to the arrangement can distinguish their prices on some other basis.[76]

The appellants in *Lodge* argued that the Trade Me fee was such a small part of the price for real estate services that it was de minimis.[77] In response, the Supreme Court made the point that the concept of "price" for the purposes of s 30 includes a component of the overall price, "unless that

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65 Edward Willis "The *Lodge* Case and the Misapplication of the Per Se Cartel Provisions of the Commerce Act 1986" (2019) 50 VUWLR 551.
66 At 556.
67 At 560–561.
68 *Lodge* (SC), above n 1, at [136].
69 *Lodge Real Estate Ltd v Commerce Commission* [2019] NZSC 28.
70 See also *Commerce Commission v Taylor Preston Ltd* [1998] 3 NZLR 498 (HC).
71 Commerce Act, ss 31–33.
72 *Lodge* (SC), above n 1, at [145].
73 At [143], affirming the Court of Appeal's statement, above n 21, at [91].
74 *Lodge* (SC), above n 1, at [146].
75 At [144].
76 At [144].
77 At [117(b)].

component is insignificant in competition terms".[78] An arrangement is only "insignificant" where the overall price is nevertheless determined by market forces.[79] Importantly, this signals that it is not necessarily the component's absolute value or proportion of the overall price which determines "control" of it; rather, it is the significance of that component in moderating the competitive process of price setting between competitors in the market.

The Court drew parallels between *Lodge* and *Caltex* in finding that the arrangement amounted to ceasing a "free" service, although this did not limit the price the agencies could charge for their real estate services overall.[80] But that did not mean that the agencies had complete freedom as to price.[81] They were constrained by the consensus that vendor funding would be the default option for Trade Me listings, and were expected to comply with this.[82] Further, the $159 increase in price was "significant in competition terms".[83] This was because it would be a significant portion of the price charged to customers if their house did not sell (where no commission would be payable).[84] Additionally, Trade Me was a crucial advertising platform which was popular with customers and was important to competition between agencies for new listings.[85] The widespread adverse reaction of Hamilton agencies to Trade Me's new pricing announcement confirmed its importance.[86] These factors satisfied the factual link between the arrangement and output pricing effect.

The Court found the effect of the arrangement was to control the overall price of services provided by the agencies by setting a default offer price, thus interfering with the competitive process that would otherwise have existed.[87] Residual discretion to deviate from the arrangement did not equate to freedom in the price setting process.[88] Customers received a lesser service than may have been available to them for the same price had the arrangement not been adopted by the Hamilton agencies.[89] The Court also found the evidence showed the purpose of the agencies' meetings was to protect against the risk other agencies would use the new fee structure to their competitive advantage.[90] Breach of s 30 was established.

78 At [156].
79 At [155].
80 At [147].
81 At [148].
82 At [148].
83 At [157].
84 At [157].
85 At [158].
86 At [159].
87 At [160] and [165].
88 At [148].
89 At [169].
90 At [178].

IV WHAT DOES THE DECISION MEAN FOR FUTURE PRICE FIXING PROCEEDINGS?

From 15 August 2017 new cartel provisions were enacted by the Commerce (Cartels and Other Matters) Amendment Act. There is now a direct prohibition on cartel conduct. Section 27 of the Commerce Act remains the same, but ss 30 and 30A, which replace the former s 30, do not deem price fixing to be a breach of s 27 and thus to substantially lessen competition in the market. However, the definition of price fixing remains the same. The amendments will also introduce criminal penalties for cartel conduct from 8 April 2021.[91]

So, what might the Supreme Court's *Lodge* decision mean for the enforcement of prohibitions on cartel conduct? First, the Supreme Court has taken a pragmatic approach to the scope of the prohibition on price fixing. It has enabled s 30 to capture arrangements that allow parties to deviate and arrangements targeted to a component of price rather than the overall price. Secondly, while some commentators have argued this decision will make price fixing more difficult to prosecute, I argue that the Court's approach appropriately avoids capturing conscious parallelism and prosecutors may actually be relieved of some evidential burden.[92]

Pragmatism

The Supreme Court held that an arrangement is capable of controlling price even where there is some ability for the parties to depart from it for individual transactions. Such an ability would not necessarily amount to complete freedom in setting price in every transaction. On the facts of *Lodge*, if an agency chose to continue to absorb the Trade Me listing fee then that would be cheating on the arrangement. To that extent, their freedom to price was constrained.

One might argue that answering whether there is control over price with the commitment inherent in an arrangement is somewhat circular reasoning. Where the prosecution has proved commitment to the arrangement, any freedom to depart from it takes on lesser significance. However, I suggest that the Court's more flexible approach to what amounts to "controlling" price is realistic. It recognises that there can be cartel behaviour even when parties are not always expected to follow the rules.

Further, the Court recognised that price fixing can occur where a component of price, rather than the overall price, is fixed, controlled or maintained, provided that it is not insignificant to the competitive setting of the overall price. In *Lodge*, the arrangement was targeted to an element of

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91 Commerce (Criminalisation of Cartels) Amendment Act 2019, s 4 — inserting new ss 82B to 82E into the Commerce Act.

92 I use the term "prosecutor" to mean the Commerce Commission in its enforcement capacity, whether bringing civil or criminal proceedings.

the input price that altered the overall offer price for residential vendors looking to contract for real estate services in Hamilton. That element was competitively significant for the reasons set out above.

This interpretation of "price" reflects the Court's emphasis that the prohibition on price fixing is aimed at an arrangement's impact on the competitive process of price setting, rather than prices between individual competitors. Alterations to a component of price can equally affect that competitive process. But the Court's approach avoids capturing "insignificant" components of price which do not. Ultimately the Court's approach is suited to capturing more subtle price manipulations by cartels.

Prosecution

Now that commitment is an essential element of an arrangement in New Zealand, commentator John Land has suggested that it could be more difficult to prosecute cartel conduct.[93] In Australia, price fixing prosecutions have fallen over for want of proof of commitment between the parties.[94] The definition of arrangement in *Lodge* is also likely to be adopted in respect of s 27 breaches, meaning commitment will need to be demonstrated for other arrangements that substantially lessen competition in the market. The same can probably be said for proving an "understanding".[95]

One question that remains uncertain is how commitment is to be proved. Drawing inferences from the "time, character, direction and result" of acts done by parties is the basis for the objective approach supported by the Supreme Court.[96] But it is arguable whether commitment can be proved by objective actions alone. Indeed, much of the evidence relied on by the Supreme Court in *Lodge* to establish commitment consisted of the subjective understandings of the various agency representatives who participated in the two meetings.[97]

On the other hand, difficulties proving commitment in the Australian jurisdiction can perhaps be attributed to the fact that proof of moral obligation or commitment is a subjective inquiry.[98] A predominantly objective approach could be preferable because it can align more closely with the traditional approach to contract. Furthermore, it can avoid defendants claiming they did not subjectively commit to the common strategy, when objective evidence suggests otherwise. Equally, an objective approach better prevents the capture of consciously parallel behaviour — which is not the purpose of ss 27 and 30. Ultimately, the Supreme Court's approach has struck an appropriate balance between capturing actual cartel

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93 John Land "Clarifying the law of price fixing: No arrangement without commitment" *LawTalk* (online ed, New Zealand, 12 May 2020) at 60.

94 *Apco Service Stations*, above n 16; and *Leahy Petroleum*, above n 16.

95 But see discussion of the Court's contradictory treatment of an "understanding" above in Part III.

96 *Lodge* (SC), above n 1, at [50]. See *Caltex* substantive decision, above n 60, at 314 accepting the statement of Isaacs J in *R v Associated Northern Collieries* (1911) 14 CLR 387 at 400.

97 At [97]–[101].

98 See *News Ltd v South Sydney District Rugby League Football Club Ltd* [2003] HCA 45, (2003) 215 CLR 563 per Gleeson CJ and McHugh, Gummow and Callinan JJ.

conduct and preventing participants escaping liability. An objective approach could aid prosecution for anti-competitive behaviour, which is all the more important with criminal penalties coming into force.

There is a further boon for prosecutors in the Court's approach to proof of control of the overall or output price. By refusing leave for counterfactual economic evidence and eschewing a market effects analysis, the Court signalled a move away from the majority approach in *Todd Pohokura*.[99] Of course, this was not a point of law specifically addressed in the *Lodge* decision, but the Court's actions indicate that prosecutors need only point to factual evidence that the purpose or effect or likely effect of an arrangement is to fix or control output price. This will be much easier to achieve.

That there is no need to demonstrate an impact on the market reflects the legislature's policy decision to outright prohibit cartel conduct. This approach will fit well with the now de-linked ss 27 and 30 and could indicate a divergence in their interpretation — a potential opening to move away from confused authority on s 27 such as *ANZCO*.

V CONCLUSION

In summary, the Supreme Court's decision in *Lodge* clarifies the interpretation of both ss 27 and 30 of the Commerce Act. Proof of an arrangement now includes the element of commitment, bringing New Zealand jurisprudence into line with Australia. Although it remains to be seen how commitment will be proved in practice, the objective approach supported by the Supreme Court achieves the Act's aims of prohibiting truly anti-competitive behaviour and commitment between the parties will likely be easier to prove. The decision affirms the position that improper control of price is directed towards restraint on the free action of competitors in setting price. An ability to depart from an arrangement does not necessarily mean there is freedom in the price setting process, and a component of the overall price is able to interfere with that process and amount to "control" of price. The Court also seemingly rejected the need for a market effects analysis of the effect of an arrangement. All of these points reflect a pragmatic approach to cartel behaviour and an easing of the evidential burden on the prosecution.

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99 *Todd Pohokura*, above n 47, at [276].