BUDDLEFINDLAY

Price fixing trouble at the lodge

Tony Dellow, Susie Kilty, Jessica White, Anna Parker

28 November 2018

A Court of Appeal decision handed down on Friday (*Commerce Commission v Lodge Real Estate & Ors* [2018] NZCA 523) emphasises just how easy it is to unwittingly enter into an unlawful cartel arrangement and breach the Commerce Act 1986 – with substantial consequences.

What you need to know

- Businesses and individuals must be vigilant when meeting or communicating with competitors in any forum – whether it is a chance meeting, an end-of-year party, or a formal get-together such as an industry association meeting or conference
- To be safe, do not discuss any aspect of pricing, customers, strategies or plans, with your competitors – in any context. If you think there is a genuine need for such a discussion, seek competition law advice beforehand
- It is **unsafe** to assume that you are not breaching the Commerce Act just because:
  - you are merely communicating to a competitor a decision that has already been made internally
  - you don't think that you or the competitor are necessarily obliged to do anything differently as a result of the meeting or discussion, and you can both still make your own decisions
  - if you are discussing a matter that relates to the pricing of the product/service that you and the competitor both supply, it doesn't relate directly to the price, or it only relates to a small part of it.

Manage your risk

It is apparent from this most recent court decision (and others) that many defendants who have penalties imposed on them were unaware that their conduct might breach the Commerce Act.

In light of the upcoming likely introduction of jail time for individuals who engage in cartel conduct, it is important to manage and minimise your risk: ensure that you and your staff are properly trained, and that your business has proper policies and procedures in place.

The real estate cases

The Commerce Commission has brought proceedings against a range of real estate agencies and individuals for price fixing, and issued warnings to many others. In summary, the background facts (broadly common to each case) were:

- In mid-2013, TradeMe decided on a new fee structure for standard residential property listings. This had the effect of substantially increasing the cost of advertising on TradeMe for real estate agencies – one Hamilton agency faced an annual cost increase from around $8,000-$9,000 to $200,000-$220,000
- In response, real estate agency representatives around the country met locally to share with one another what they intended to do, including whether they should bear the cost themselves, or have the individual agent or the vendor bear the cost
- Having shared that information with one another, they then behaved in a similar fashion, by passing the cost on to individual vendors or agents and reducing their listings on TradeMe.

The Commission was largely successful in these proceedings.

The Hamilton case and the Court of Appeal decision

The outlier in the Commission's successful run was a High Court judgment from November 2017, which found that a group of Hamilton real estate agencies and individuals had not engaged in price fixing.

The High Court found that they had entered into an arrangement or understanding between themselves – but it did not have the effect of fixing, controlling or maintaining prices, because each agency was still free to charge any price it liked to any vendor in relation to any transaction.

The Commission appealed to the Court of Appeal and won. The Court of Appeal found that the agencies and individuals had engaged in price fixing with respect to the services they provided. In summary:

- The Court of Appeal agreed with the High Court that the parties had entered into an arrangement or understanding. The parties appreciated the risk that, unless everyone shifted to vendor funding, those who implemented vendor funding could lose listings to other agencies. The meeting eliminated that risk by reaching a consensus as to how the Hamilton agencies would respond to the change in TradeMe's fee structure
- The arrangement or understanding did have the purpose or effect of fixing, controlling or maintaining prices, because:
  - in order for that to be the case, there does not have to be an absolute position as to price. The Court of Appeal said: "The consensus [in price fixing agreements] will almost always be loose and not legally enforceable, and slippage will be commonplace. An arrangement or understanding to seek or offer a particular price is enough. This is because a starting position as to price will have the purpose and effect of fixing, controlling or maintaining the actual price" (paragraph 87). The fact that the end price is set by each party at their discretion does not mean that there is not an agreement that will affect price
  - the understanding reached was that, for each agency, the starting point was that the cost increase would be met by vendor funding. This was sufficient to interfere with the competitive setting of prices
  - it was not necessary to show that the price fixing related to a mathematically significant part of the ultimate price of services provided by the real estate agencies. Price fixing can relate to a component of a price, or a discount or an allowance. The move to vendor funding could be seen as a removal of the discount or allowance, or alternatively, as an addition to the price. Either way, it constituted price fixing.

It is now for the High Court to determine the appropriate penalties to be imposed on the Hamilton agencies and individuals. This will add to the already impressive tally of penalties imposed on defendants in the real estate cases, of around $16.425m.

If you have any questions about the issues raised in this update, or you would like assistance with training or reviewing policies or procedures, please contact a member of our competition law team.

Read the full Court of Appeal and High Court judgments here.

Auckland

PwC Tower
188 Quay Street
Auckland 1010

PO Box 1433
Auckland 1140
New Zealand

P: +64 9 358 2555
F: +64 9 358 2055

Wellington

Aon Centre
1 Willis Street
Wellington 6011

PO Box 2694
Wellington 6140
New Zealand

P: +64 4 499 4242
F: +64 4 499 4141

Christchurch

83 Victoria Street
Christchurch 8013

PO Box 322
Christchurch 8140
New Zealand

P: +64 3 379 1747
F: +64 3 379 5659