

## Don't let lockdown become jail time: latest word on what is a cartel

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In a year's time, it will be a criminal offence to enter into a cartel arrangement under New Zealand law. The Supreme Court has recently handed down a [judgment](#) which has confirmed it is easier than you might think to unwittingly enter into one.

The judgment is the last chapter in a saga involving the Commerce Commission's case against real estate agencies in relation to TradeMe listing fees – in which the Commission has been overwhelmingly successful, securing almost \$19m in penalties (with more to come).

Here's what you need to know to manage the risks.

### What is a cartel?

A cartel is an arrangement between two or more businesses in which they agree not to compete with each other. These agreements are strictly illegal under the Commerce Act 1986. Cartel arrangements can take many forms, including price fixing, dividing up customers or markets, rigging bids or restricting output of goods and services.

Under New Zealand law, cartel conduct attracts pecuniary penalties of up to \$500,000 for individuals, and for bodies corporate, the greater of \$10m, three times the commercial gain from the conduct, or 10% of turnover – amongst other sanctions.

From 8 April 2021 individuals will also be liable for a term of imprisonment for up to seven years, and criminal fines will apply.

### What you need to know

There is a lot of discussion in the Supreme Court's judgment about legal technicalities of the test, but the bottom line is:

- Businesses and individuals must be vigilant if they meet or communicate with competitors in any forum: whether it's running into someone that works for a competitor on your daily jog around the block, in the supermarket queue, or on an industry association video call to discuss challenges arising from the COVID-19 response
- 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, so you can recognise the permitted from the absolutely not
- Assumption is the parent of all mistakes. Do not assume that you are not breaching the Commerce Act 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
  - 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 end price charged to customers, or it only relates to a small part of it.

In particular, in the context of COVID-19, the Commerce Commission has said that businesses providing essential goods and services are not restricted from legitimate and necessary collaboration – but the Commission can be expected to vigorously enforce the law for any conduct it considers falls outside that sphere (see our earlier update [here](#)).

### Manage your risk

Many defendants who had penalties imposed on them (in this case and others) 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 you and your staff are properly trained, and that your business has proper policies and procedures in place.

## Last chapter in the real estate cases

The Supreme Court's decision is the final decision on the liability of various real estate agencies, and agents, for entering into a cartel arrangement about 'vendor funding' following an increase in TradeMe property listing fees.

In 2015, the Commission filed proceedings for alleged cartel behaviour by 13 national and regional real estate agencies, as well as a company owned by a number of real estate agencies, and three individuals. The Commission also issued warnings to an additional eight agencies.

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 \$250,000
- 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 property 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.

Before this latest decision, eleven companies and one individual had been ordered to pay a total of just under \$19m in penalties.

The outlier in the Commission's successful run had been its case against two Hamilton agencies – Lodge Real Estate Limited and Monarch Real Estate Limited – and their principals. In November 2017, the High Court found that the Hamilton agencies and the principals had not engaged in price fixing: The High Court had 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 Court of Appeal and the Supreme Court have now both subsequently determined that they did engage in cartel conduct.

Notably, the Supreme Court's judgment records the Court's views that:

- The two agencies had entered into an arrangement or understanding in this case.
- The legal test for an arrangement or understanding is "whether there is a consensus or meeting of the minds among competitors involving a commitment from one or more of them to act (or not act) in a certain way. 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" (paragraph 58)
- The appellants argued that, although there was a consensus that they would adopt a vendor funding model for TradeMe listings in future, and that each expected the others to do that, there was no obligation, assurance, or undertaking assumed or given. This meant, on the appellants' view, there could be no 'arrangement' for the purposes of the cartel prohibition. The Court rejected that argument. There was a commitment from each of them to act in a certain way, which created an expectation as to the common course of conduct (ie, adopt a vendor funded model for Trade Me listings and to remove existing listings in January 2014). This was enough for there to be an 'arrangement'. In effect, the independence of the agencies' prior decisions was undermined by the mutuality of their understanding arising from their meeting
- The arrangement had a substantial purpose, and the effect, of controlling the overall price that the Hamilton real estate agencies charged for their services by interfering with the competitive process that otherwise would have applied (paragraph 160). This was the case even though the arrangement related to a mathematically small component of the overall charges
- Although an agency could decide to absorb the TradeMe fee in any individual transaction, the default position under the arrangement was that the Hamilton agencies would only offer TradeMe standard listings on the basis that the listing fee would be payable by the vendor (or agent). The increase in TradeMe's prices meant that this aspect became a potential field of competition between the agencies. The arrangement controlled price by preventing that competition from developing.

It is now for the High Court to determine the penalties to be imposed on the final two agencies and two individuals.

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.

**Tony Dellow is quoted in an RNZ article about this [here](#) and you can listen to his interview on [RNZ Business News here](#).**

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