
Clarifying New Zealand Competition Law: Establishing “Arrangements” between Competitors, the “Controlling” of Price, and Anti-Competitive “Purpose” after *Lodge*

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*This article examines the decision of the Supreme Court in *Lodge v Commerce Commission*.*

It concludes that the decision adds helpful clarification to two important aspects of New Zealand competition law, while failing to grasp the opportunity to provide needed clarification to two other issues.

*The decision in *Lodge* clarifies the meaning of what amounts to an “arrangement” for the purpose of the Commerce Act. It appropriately confirms that there will not be an arrangement unless there is a commitment between the parties, thereby ensuring that “conscious parallelism” between competitors will not be considered to breach the rules on cartel conduct. *Lodge* also helpfully confirms the circumstances in which an agreement or arrangement between competitors will amount to a breach of the price fixing laws when the agreement or arrangement only extends to a component of the overall price of a good or service.*

While these clarifications are very useful, the Supreme Court declined the opportunity to confirm the correct approach to two other matters of New Zealand competition law.

*The first concerns the question of whether it is appropriate in some cases to apply a form of “counterfactual” analysis to assess whether prices have been controlled. This article contends that this is in fact appropriate notwithstanding the different view on the question by the High Court and Court of Appeal in *Lodge*.*

The second is the question of how to determine whether a provision in an arrangement between competitors has a “purpose” of fixing or controlling price. This article suggests that the New Zealand courts should confirm an approach under which purpose is assessed objectively based on the terms of the arrangement in question, and other background circumstances and documents indicating the purposes of the provision in question. The unexpressed intentions of a party should not be taken into account.
