Cartel cases in New Zealand – insights and issues

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> *It is better to debate a question without settling it than to settle a question without debating it.*
> (Joseph Joubert)

1. I wonder what Joesph Joubert, the 18th century French 'man of letters' would think if he surveyed the history of New Zealand's cartel cases, littered as it is with the ghosts of settled cases. While we have seen a good number of cases since the advent of the leniency programme in 2004 – and at least one proceeding masquerading as a cartel proceeding – relatively few cases have progressed to a hearing and a substantive judgment.

2. When I joined the Commission in 2012, the Commission was coming to the end of a string of high profile and high stakes international cartel cases. The interlocutory skirmishes they spawned resulted in important developments and clarifications of New Zealand's competition law. The High Court's decision in *Air Cargo*[1], the Court of Appeal's decisions in *Visy*[2] and *Kuhne & Nagel*[3] and the Supreme Court's decision in *Poynter*[4] all defined, in various ways, the territorial and jurisdictional boundaries of the Act and did so in a way that those boundaries are relatively settled today.

3. Having resolved those important questions, these large cases inevitably settled. Perhaps those cases had done their work, but their settlement excluded the possibility that the law would develop further through the substantive trial of those cases. Similarly, and still to my great regret, the Interchange fees litigation of the late 2000s settled on the eve of trial depriving us of the court's views on the limits of the term 'controlling or maintaining price'.

4. During my time working at the Commission from 2012 to 2016, the Commission commenced six cartel proceedings.[5] Five of them settled, and the last one settled in part and was contested in part (*Commerce Commission v Lodge Real Estate*[6]).

5. Despite the relatively early stage at which five of these cases settled – and notwithstanding what Monsiuer Joubert may think – I think there is still much we can learn from these cases. I will start this paper by describing the cases in broad terms before proposing some lessons we may learn. I will finish by offering some brief observations on the Hamilton judgment, mindful of the fact that this matter is the subject of an appeal to the Court of Appeal scheduled to be heard in September.

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1 *Commerce Commission v Air New Zealand & Others*, HC Auckland, CIV-2008-404-008352, 20 August 2012.
2 *Commerce Commission v Visy Board* [2012] NZCA 383.
3 *Commerce Commission v Kuhne & Nagel International AG* [2012] NZCA 221.
4 *Poynter v Commerce Commission* [2010] NZSC 38.
5 Technically, there were more than six because the Commission, on occasion, filed separate proceedings against parties who had agreed to settle before the proceedings were filed.
6 *Commerce Commission v Lodge Real Estate Limited* [2017] NZHC 1497 (**Hamilton judgment**).

The Commission's six cases from 2012 to 2016

6. The six proceedings commenced by the Commission covered, in effect, four different fact patterns. There are six rather than four because the real estate investigation gave rise to three different proceedings: a national agreement (the PPL proceeding), a Manawatu agreement (the Manawatu proceeding), and a Hamilton agreement (the Hamilton proceeding).

The livestock fees proceeding

7. The livestock case had its genesis in the Government's introduction of an RFID tracking system for cattle via the National Animal Identification and Tracing Act 2012. The scheme was established to track the movements of all cattle and deer throughout New Zealand. The idea was that it would enable the tracking of infected animals in the case of a foot & mouth outbreak or, as we have now, mycoplasma bovis.

8. Introducing the system required stock & station agents and saleyard owners (often the same people) to incur costs to carry out their obligations under the scheme. I think it is fair to say that the agents and saleyards were aggrieved at the extra costs they would have to carry, and, I think, at a perception that they were being treated differently to other parts of the industry such as meat works.

9. The various judgments record that the saleyards concerns strayed into the area of pricing and led to three arrangements. The first was an agreement to impose a tagging fee of $25, charged to cattle owners who presented untagged cattle at a saleyard for sale; the second was an agreement to increase yard fees to meet the costs of the investment required to comply with the scheme; and the third was an agreement to introduce an RFID administration fee to be charged by stock and station agents for their costs in administering the scheme.

10. The Commission commenced proceedings against three corporate defendants and five individuals and warned another eight bodies corporate including the industry association. The case was ultimately settled by the three parties and five individuals.

The real estate cases

11. When you compare the real estate cases to the livestock case it reminds me of the Mr Men books my Dad read to me when I was growing up. I say this because each Mr Men book (of which I have the set) was superficially different with different characters and a different setting, but the underlying story bared a remarkable resemblance.

12. The real estate cases, in terms of their genesis, are in many respects a carbon copy of the livestock cases with Trade Me standing in for the Government and the real estate agents standing in for stock and station agents.

13. In the same way that the Government introduced the NAIT scheme in a way that imposed cost on the industry, Trade Me changed its fee structure in a way that was expected to lead to very substantial cost increases for real estate agencies. In the same vein as the stock agents, there was a real sense of grievance among real estate agencies and a concern that worse was to come. That sense of outrage sparked the conversations that led to the arrangements that the Commission alleged were reached.

14. The Commission commenced three proceedings.

14.1 The PPL proceedings, which involved an agreement between the head offices of the five largest real estate agencies in the country. The defendants accepted liability and the case was settled by way of admissions and an agreed penalty.

14.2 The Manawatu proceedings alleged an agreement between real estate agencies in Manawatu, with the Commission commencing proceedings against the three largest agencies and one individual and warning the eight other agencies involved. The proceedings were settled with all three agencies and the individual concerned accepting liability and agreeing a penalty.

14.3 The Hamilton proceeding alleged an agreement between real estate agencies in Hamilton. The Commission commenced proceedings against five agencies and two individuals. Three agencies settled and accepted liability and paid an agreed penalty. The remaining two agencies and the two individuals contested liability and were successful in defending the proceeding in the High Court. As I highlighted above, the High Court's decision has been appealed to the Court of Appeal. The Appeal is scheduled to be heard in September 2018.

Bens Oil[7]

15. The Bens Oil case has a different, and in my view, a more sympathetic genesis. It is also different in that it is an attempt case. Specifically, the case involved an attempt to enter a price fixing agreement affecting the market for the collection of waste oil in Nelson.

16. Prior to the conduct, there were two providers of waste collection services that had well defined customer bases. Customers were not charged for the collection of waste oil, because it had value as a developed product.

17. Transpacific employed a new driver, and that driver started to offer to pay potential customers for their waste oil. That news got back to Mr Askew at Enviro Waste. What resulted was a series of increasingly forceful communications from Mr Askew to various Transpacific staff seeking to ensure that each party would stick to its own customers.

18. Ultimately, Enviro Waste and Mr Askew accepted the conduct was an attempt to enter an understanding with Transpacific to compete less aggressively for customers.

19. I say that the genesis was more sympathetic because, as the Court recorded, Mr Askew's personal family circumstances, which were unhappy, seemed to be a key driver of his conduct. His conduct was described by the Court, fairly I think, as an "unsophisticated and impulsive attempt to put an anti-competitive mechanism into place … driven by a desire to release stress from his employment, owing to difficulties faced by him in his family life".

Auckland Timber[8]

20. The final case is the Auckland timber case. This case involved an agreement between Carter Holt Harvey and Placemakers stores to price MSG8 structural timber at cost plus 8% when

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7 *Commerce Commission v Enviro Waste Services* [2015] NZHC 2936.

8 *Commerce Commission v Carter Holt Harvey Limited* [2014] NZHC 531.

they were bidding against each other for commercial contracts. This case is slightly different from the others in that it had a vertical/hub and spoke type element to it.

21. Carter Holt is a vertically integrated wood products supplier. Relevantly, Carter Holt Harvey Wood Products operates at the wholesale level selling timber, and Carters is Carter Holt Harvey's merchant arm operating at the 'retail' level. The Carters stores compete with Fletcher Building's joint venture merchant stores, Placemakers.

22. Wood Products' major customers in the Auckland commercial market were its own Carters stores and the Placemakers stores at Mt Wellington and Cook Street in Auckland City.

23. The Carters and Placemakers stores competed to sell into the commercial construction market. By May 2012, margins were very low in the Auckland commercial market, and Carters and the Placemakers branches were losing jobs to the other. This saw both complaining to Wood Products that they must have been giving preferential treatment to the other because otherwise, how could they be losing these jobs?

24. The Wood Products manager, Mr Dodds, wanted to solve that problem for his customers. He and others at Wood Products developed the idea of introducing recommended retail prices, but that was subsequently abandoned for what were described as 'practical and legal difficulties'. Despite abandoning that RRP idea, Mr Dodds understood that he could make non-binding recommendations to merchants and encourage them in their own behaviour.

25. A series of meetings in August 2012, led to Mr Dodds meeting with representatives of the two Placemakers branches Cook St and they agree a recommended retail price of cost + 8% for Carters and the Placemakers stores. As the judgment records, the reference to RRP was in fact a reference to a minimum resale price.

26. The Placemakers representative expressed concern that Carters might not follow an RRP. Mr Dodds told them variously that he would "try to ensure Carters also priced at that level" and that he would "talk to Carters and use his influencing skills and recommend strongly to them to comply with any RRP".[9]

27. Mr Dodds then met with Carters to tell them about the proposal and strongly encouraged them to adopt it. He said he had spoken with the two Placemakers branches and that he expected them to price that way.

28. The parites started to price MSG8 at cost plus 8% from mid-September 2012 and the arrangement lasted until March 2013 covering around 33 quotes by Carters branches.

29. The Commission commenced proceedings against CHH and Mr Dodds and each accepted liability settling the proceeding.

What, if anything, can we learn from these cases?

30. Even though these cases settled at a relatively early stage, there are still several interesting observations we can take from them.

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9 *Carter Holt*, at [17]-[18].

A. A move toward domestic cartels?

31. The first and most notable observation I would make is that the cases the Commission took over the period changed from what was on the docket previously. In the period from 2004 to 2012, the Commission's case docket was dominated by large scale international cartels. That is not to say that there weren't any domestic cartel cases, there were. But much of the Commission's attention appeared to me to be focussed on these larger scale international cases.

32. The cases I was involved in at the Commission and that I described above were resolutely domestic: the sale of structural timber in Auckland, the provision of waste collection services in Nelson, the provision of saleyard and stock agent services throughout the country, and the sale of real estate. In none of those cases did the Commission need to cash in a return on the investments it made in the territorial and jurisdictional battles of the 2000s.

33. While there is a difference in the type of cases, I'm not sure I'd call it a trend towards domestic cartels yet. It is certainly not the case, in my experience, that the Commission chose to retreat from the investigation and enforcement of international cartels. It is simply that the domestic cases were the ones coming to the fore during this period, and that could change in the future.

B. Impugned arrangements were, by and large, a response to significant market changes

34. The second thing I would highlight about these cases, except for Auckland Timber, is that they all arose from a precipitating event. These were not cases where the central characters sat down in a Hawaiian hotel room and asked themselves "how can we make more money"?

35. When I look at the cases, there was a shock; the shock created a motive for a conversation; and the conversation sparked the arrangement or understanding that the Commission took issue with.

36. In other words, these were not long-running cartel cases that were unearthed by the Commission's leniency programme or surveillance. And I say that not as a criticism, but simply an observation. So, if there are long running BaU cartels in New Zealand, these are not the ones we are uncovering now with the leniency programme. This raises the question of whether, if there are such cartels, criminalisation will tip the balance so the there is a greater incentive for parties to report these.

37. Of course, on the flip side, if cartels are arising as a response to market shocks, then perhaps that tells the Commission where it should be putting its intelligence focus. The Commission has been quite vocal in the last few years about seeking to take a more proactive approach to identifying areas of concern. The Commission has introduced an 'intelligence' function and has been quite open about trying to do more to detect and identify those areas in advance. We've seen the fruits of this in the release each year of the Commission's Consumer Issues paper, and I think it works well in the consumer area.

38. But I've always struggled with how one uses intelligence to detect cartel behaviour. Given the nature of these cartels perhaps this is where the role for the Commission is – identifying when these shocks occur and focussing resource in that area. To be fair to the Commission, they did this in relation to the rebuild efforts in Christchurch given the worldwide evidence that cartel conduct followed natural disasters. Moreover, the Commission has identified the role that trade associations can play in leading to agreements like those that arose in the

livestock and real estate cases. However, I wonder, on reflection whether it is better to focus on the root cause rather than the vehicle that has been used in the past to reach an agreement, i.e., trade associations.

C. If you're in a cartel make sure: (a) there are many parties, and (b) you're small

39. My impression is that the Commission finds it hard to walk past conduct which it believes breaches s 30. That is, if the Commission thinks your client has breached the Act, it is an unusual situation where it would not take high level enforcement action.

40. What the livestock and the Manawatu real estate cases demonstrate, however, is that your client's best chance of escaping liability is if there are lots of people involved in the agreement, and you are relatively small in relation to them.

D. Individuals are very much in the Commission's focus

41. Another thing that these cases all have in common is that the Commission has commenced proceedings against the individuals involved. My expectation is that this is a trend that is here to stay. This is because I believe there will be a desire at the Commission to ensure that individuals are treated equitably between cases.

42. And from the comments I've heard, the realisation that individual liability is very much on the table has sharpened the mind of directors and executives. Again, is this a portent of the impact that criminalisation will have?

E. The cases pretty much always settle

43. As I've mentioned, of these six cases only one has gone to trial. While I haven't run the numbers, I don't think that's an unusual conversion rate in New Zealand. Simply put, not many cases get to a substantive hearing.

44. When I was at the Commission I regarded a settlement, rightly or wrongly, as a win. However, the downside of a settlement is that it doesn't facilitate the development of the substantive law. As I mentioned earlier, the jurisdictional skirmishes we've seen have been valuable in developing the law in that area. But in the s 30 world, there is little New Zealand law. Certainly, thinking back to my experience on the interchange fees case, there was very little New Zealand law to look at when trying to work out whether the setting of interchange fees was a breach of s 30.

45. That is not to say that there has been no development from these settled cases. For example, the framework for setting penalties is well understood now, although disputes over quantum remain.

46. So, why do these cases settle? I have seen some suggestions that the Commission only takes the easy cases. That wasn't my perception when I was at the Commission, although it was certainly the case the Commission members were very focussed on making sure they thought there was a breach and the case was a good one. In this vein, I think that people who haven't worked at the Commission would be surprised by the diversity of views held and expressed within the Commission when deliberating on a case.

47. Another interesting counterpoint to the question of why cases settle is the idea that penalties for breach are too high. That may or may not be true in terms of the blameworthiness of the conduct. However, my perception is that the penalties are at a level

where a defendant can effectively arbitrage the cost of a defence versus the cost of a penalty. If a negative externality of settling a case is the lack of development of the law, are we pricing that negative externality into our penalty framework?

48. Indeed, one of the unintended benefits of criminalisation might be that we see greater development in the substantive law, which I think is important given the recent changes to the law. I think we are already starting to see this as the Commission focuses on individuals. My experience in negotiating settlements at the Commission was that it took more work to do a deal when individuals were involved. The penalty and reputational damage was far more acute for them and they weren't as willing to trade those away for a quick result. So, criminalisation may only reinforce that trend and potentially lead to fewer 'settlements' and greater development of our law.

The Hamilton judgment

> *My whole life is about winning. I don't lose often. I almost never lose.*
> (Donald J Trump)

49. As I've already mentioned, two real estate agencies and two individuals associated with those agencies successfully defended the Commission's allegation that they had been party to a price fixing agreement in Hamilton in breach of s 27 via s 30. As the case is now the subject of an appeal to the Court of Appeal, I will constrain my observations to describing the Court's findings and the issues arising from them that the Court of Appeal may have to grapple with.

50. Most of you will know the facts of the case, but for those of you who don't, I'll provide a summary of the essence of the case. In doing so, I acknowledge that there was a significant amount of evidence before the Court that is recorded in the judgment and that my summary may not do justice to.

51. Trade Me Property was New Zealand's foremost online classified property advertiser. In 2014, it changed the way it set the prices it charged to real estate agents to advertise properties on Trade Me.

52. Previously, Trade Me had operated a subscription model. An agency signed up, and every office's costs was capped at around $700 to $900 per month regardless of the number of listings.

53. In addition to online listings, agents offered a range of other marketing materials to vendors when they were selling their property. This included advertising in the local paper for example. As a general rule, agencies charged marketing costs as disbursements. However, agents, as a general proposition, did not charge for listing a property on Trade Me.

54. In 2014 Trade Me changed its pricing model. It moved from a subscription model to what was described as a per listing model. Instead of an agency being able to list as many properties as they wanted for a set fee, the agency had to pay for each listing. The standard rate was $159 per listing.

55. This change threatened to impose significant costs on agencies assuming they still listed properties on Trade Me. For Lodge, one of the defendant agencies, the amount it paid to Trade Me each year was estimated to be likely to increase from $8,000-$9,000 per year to $200,000-$220,000 per year.

56. Naturally, this proposed change caused a lot of angst amongst the agencies and led to various discussions being held around the country between agents about what to do. These discussions led to the national and Manawatu proceedings I've referred to earlier.

57. The Hamilton case involved allegations by the Commission that the major real estate companies in Hamilton met together on 30 September 2014 and agreed:

    57.1 that they would, no later than 20 January 2014, remove from Trade Me all their listings of residential property for sale; and

    57.2 if, after that date, vendors requested their residential property be listed for sale on Trade Me, the cost of that listing would be funded by the vendor, and/or the particular real estate agent.

58. The Commission alleged that by doing so, the agencies fixed, controlled or maintained the price, or components of the price, vendors paid for services provided by the agencies in competition with each other.

59. Before diving into the decision, there are a couple of interesting things that distinguish this case from the PPL and Manawatu proceedings.

60. The first is that this case did not have the same amount of written evidence as in those two cases. The PPL agreement was in minutes of a meeting, while in Manawatu there were contemporaneous records of what was discussed and agreed at the meetings where the Commission alleged the agreement arose.

61. There was less written evidence of an agreement as recorded by Jagose J in his judgment:[10]

> With one possible exception, there is no contemporaneous record of the 30 September 2013 meeting. What occurred at the meeting is instead largely to be drawn from what its participants said occurred at it. The evidence was of transcripts of Commission investigatory interviews with the meeting's attendees, and their oral evidence in Court.

62. Indeed, as an aside, a fascinating part of this case was a record of a statement by one of the alleged participants in the cartel made three weeks before the meeting in which the Commission alleged the agreement arose, that the Hamilton agencies had reached an agreement to charge for Trade Me. But there was no other evidence supporting that statement.

63. The second distinguishing feature was the allegation that the fee would not just apply to new listings, but also to existing listings. The PPL and Manawatu agreements were focussed only on new listings.

64. Turning now to the way the Court approached the relevant issues.

Was there an arrangement?

65. What the judgment records is that on 30 September 2014 all the Hamilton agencies met and proceeded to vent their frustrations at Trade Me's pricing change. Each indicated that they would not be absorbing the price increase. Interestingly, this is not a case where there was a

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10 Hamilton Judgment, at [92].

disputed meeting, or even, really, much debate about whether the fact of Trade Me's change was discussed at the meeting where the arrangement was said to arise.

66. Rather, the key part of the defence was that there was no qualifying agreement. It was argued that the parties had already made a series of individual decisions that they would pass on their fees and they were just communicating that to the group. In the words of one witness, it was an 'uncover' – a sharing of information about what they were going to do.[11] The defendants argued that there was no discussion of reciprocity or of giving assurances that they would do so.

67. That argument was rejected. While accepting that there was no conditionality on the statements made by each party, his Honour noted that some of the agencies had taken comfort from the universality of feeling and had expressed concern at an earlier stage that agencies could take different approaches. He went on to say:[12]

> None of the agencies acted on their decisions in advance of the 30 September 2013 meeting. At least some of the agencies were aware a decision to vendor fund Trade Me listings risked others' decisions to continue to absorb that cost. The agencies' decisions were thus at least capable of adjustment in light of further information. The further information came from the 30 September 2013 meeting. The independence of the agencies' prior decisions is undermined by the mutuality of their understanding arising from the 30 September 2013 meeting.

68. His Honour went on to find that there was an agreement, couching his decision as follows:[13]

> It is enough to establish consensus here that the defendants communicated to each other their intended and common course. And the consensus gave rise to the defendants' expectations of how they each would act. That is what objectively establishes "communication among the parties of the assumption of a moral obligation".
>
> I find the defendants were part of a consensus giving rise to expectations each would not absorb the cost of Trade Me's proposed per listing fees, and each (other than Success) would withdraw their standard listings from Trade Me by January2014, subsequent Trade Me listings to be vendor funded. For the purposes of s27, the defendants entered into an arrangement, or arrived at an understanding, to those ends.

Did the arrangement fix prices?

A de minimis exception?

69. An issue that has floated around s 30 for a while has been the question of whether there is, or should be, a de minimis exception for price fixing. That is, if the arrangement has only a small impact on price it cannot be said to fix, control, or maintain prices.

70. Applied in this case, the argument goes: because the Trade Me fee is a small part of the overall price of an agent's services (if a house is sold), then it cannot be said that an agreement relating to that fee fixes, controls, or maintains overall prices.

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11 Hamilton Judgment, at [126].

12 Hamilton Judgment, at [190].

13 Hamilton Judgment, at [192]-[193].

71. His Honour dismissed that argument finding there is not a de minimis qualification to s 30. He found:[14]

> The availability of Trade Me standard listings appeared to be 'materially significant' in competition between agencies to secure vendors' business. Control of that aspect of the price –whether as a proportion of marketing costs and/or commission paid by the vendor, or simply in its dollar terms –would engage s 30. And, of course, marketing costs were incurred regardless of sale; commission is not a relevant denominator.

Control or maintain prices?

72. In determining whether the agreement controlled or maintained prices, his Honour adopted the conventional definitions of control or maintain. He held that to 'control' the price is not necessarily to determine it such that a price may be controlled even if not fixed. He also commented that:[15]

> While colluders may otherwise freely determine the price, their collusion in its control will relieve some aspect of the price from competitive pressures: "An arrangement or understanding has the effect of 'controlling price' if it restrains a freedom that would otherwise exist as to a price to be charged".

73. His Honour ultimately found that the agreement did not control prices. This is stated in various ways throughout the judgment, but the essence of the finding is that the agreement not to absorb Trade Me's fees did not remove an agency's ability to charge whatever price they wanted to an individual consumer on an individual transaction. In short, I interpret his Honour as finding that the agencies retained all the pricing tools in their pricing toolbox for any transaction and therefore the agreement did not control prices.

74. His Honour's focus on individual transactions relied on a statement in *Commerce Commission v Siemens AG*[16] that the term 'price' should not be interpreted on an expansive basis. The *Siemens* case was about whether colluding over pre-tender indications would be price fixing and that was the context in which that statement was made. In any event, I am not convinced it provides support for the conclusion his Honour ultimately reached.

75. At [215] his Honour said:

> As I have found, the defendants' concurrence was as to the cost of Trade Me's new 'per listing' fees, if to be absorbed by each agency. **The agencies would not absorb them, as they generally had done in the past for Trade Me's subscription fees, and would move to vendor funding of Trade Me's 'per listing' fees. By 'vendor funding', they meant comparably with other third party advertising, including Trade Me feature listings –in principle, to be paid for by the vendor. But that was not to prevent, in particular necessary or desirable circumstances, the agency and/or the agent bearing some portion or all of that third party expense.** Each of the Commission's agency witnesses who attended the 30 September 2013 meeting confirmed that position.

76. At [231] his Honour commented:

> The defendants' refusal to absorb the cost of Trade Me's new fees says nothing about the price of their services to vendors. Nothing in the arrangement or understanding reached between the defendants constrains any freedom to charge any price to any individual vendor

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14 Hamilton Judgment, at [213].

15 Hamilton Judgment at [210].

16 *Commerce Commission v Siemens AG* (2010) 13 TCLR 40at [246]-[248].

> on any individual transaction, including by absorbing part or all of the cost of the residential property's standard listing on Trade Me.

77. In other words, an agreement to, in principle, pass a price increase on to customers does not amount to controlling price if the parties retain the discretion not to do so on any transaction. Unsurprisingly, I think this is a finding that the Commission will attack vigorously as it appears to set a very high bar for controlling price.

78. Interestingly, his Honour reached this view despite his comments that a price may be controlled even if it is not fixed. I also find it difficult to reconcile the finding with his Honour's decision to exclude economic evidence for the defendants that sought to demonstrate that the same price outcome would have arisen absent the agreement. His Honour excluded this evidence principally on the basis that:[17]

> … in principle, s 30 type conduct does not avail of a competition analysis. Constraints on price-setting are deemed in breach of s27. That the same price may have arisen in the counterfactual (*ie*, absent constraint) does not respond to the presence of constraint in the factual. The proposed evidence was irrelevant, and therefore inadmissible.

79. However, implicit in his Honour's finding that there was no control of price is the unstated premise that consumers will pay the same regardless of the agreement. Indeed, the judgment presents evidence on the number of times the Trade Me fee was discounted or not. For Lodge, for example, of the 21 listings surveyed, Lodge paid the whole of the fee for 12 and part of the fee for 3.[18] These statistics are used in the judgment to demonstrate the extent of the discretion that agencies retained.

80. However, using those same statistics six consumers are paying more than they would have been absent the agreement. Absent the agreement, the starting point was that consumers would not pay for Trade Me; after the agreement, the starting point is that they will. Should s 30 be disapplied because some consumers have the ability or desire to push back? To me, that does not seem correct as a matter of logic or policy. And if one is to look at price on an individual transaction by transaction bases, as suggested by his Honour based on the *Siemens* case, does that not mean that six consumers have been the victim of a price fix?

81. Where does all this leave us? In my view, the High Court's judgment creates some uncertainty as to the correct way to assess whether an agreement controls price. But to bring us back to our starting point, if debate is to be encouraged to develop our substantive law then it is probably a good thing that these issues will be ventilated before the Court of Appeal.

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17 Hamilton Judgment, at [238(a)].

18 Hamilton Judgment, at [228].