IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

I TE KŌTI MATUA O AOTEAROA
TĀMAKI MAKAURAU ROHE

CIV-2015-404-3045
[2020] NZHC 2329

BETWEEN	COMMERCE COMMISSION Plaintiff
AND	LODGE REAL ESTATE LIMITED First defendant
	LUGTON'S LIMITED Second defendant
	MONARCH REAL ESTATE LIMITED Third defendant
	Continued overleaf

Hearing:	4 September 2020
Appearances:	JCL Dixon QC, LCA Farmer and VMA Fowler for the plaintiff L J Taylor QC and M A Cavanaugh for the first and seventh defendants D H McLellan QC and M S Anderson for the third and sixth defendants
Date of judgment:	8 September 2020

JUDGMENT OF JAGOSE J

This judgment was delivered by me on 8 September 2020 at 3.30pm.
Pursuant to Rule 11.5 of the High Court Rules.

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Registrar/Deputy Registrar

Counsel/Solicitors:
JCL Dixon QC, Auckland
L J Taylor QC, Wellington
D H McLellan QC, Auckland
Wotton + Kearney, Auckland
Meredith Connell, Auckland

ONLINE REALTY LIMITED
Fourth defendant

SUCCESS REALTY LIMITED
Fifth defendant

BRIAN KING
Sixth defendant

JEREMY O'ROURKE
Seventh defendant

[1] This judgment determines what pecuniary penalties should be paid to the Crown by each Lodge Real Estate Limited ("Lodge") and Monarch Real Estate Limited ("Monarch") – and their respective executives, Jeremy O'Rourke and Brian King – for their contraventions of Part 2 of the Commerce Act 1986 (the "Act"), in entering and giving effect to a 30 September 2013 consensus between Hamilton real estate agencies to control the price of real estate agency services in Hamilton.[1]

Background

[2] My 2 November 2017 judgment explained:[2]

> Lodge, Lugton's, Monarch, Online and Success each provide real estate agency services in Hamilton. They compete by securing properties for sale through their respective agency.
>
> Lodge is Hamilton's only member of the New Zealand Realtors Network ("NZRN"), which is a network of geographically-separate real estate agencies. Lugton's is not affiliated with any other real estate agency. Monarch, Online and Success are respectively franchisees in the national Harcourts, Ray White and Bayleys groups of real estate agencies. … Assessments of market share (calculated by average monthly sales volumes) vary, but it is generally accepted Lodge (with approximately 35% market share), Monarch (28%), and Lugton's (25%) are the larger agencies in Hamilton, with the other agencies' shares in single figures.

[3] I concluded the five Hamilton real estate agencies' consensus – not to absorb the cost of Trade Me's proposed per listing fees and to withdraw all listings from Trade Me, any subsequent Trade Me listings to be vendor funded[3] – while entering and giving effect to an arrangement or understanding between competitors,[4] reserved sufficient discretion for the full range of price setting options on any individual transaction not to have the purpose or effect of "fixing, controlling, or maintaining of the price" as prohibited by the Act's ss 27 and 30:[5]

> [I]t is at that individual level of analysis 'price' is to be understood – the "prices at which goods are in fact sold or offered for sale on terms where acceptance will result in a contract": it is not an expansive concept. The

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1 *Commerce Commission v Lodge Real Estate Ltd* [2018] NZCA 523, [2019] 2 NZLR 168 ("CA judgment") at [89].
2 *Commerce Commission v Lodge Real Estate Ltd* [2017] NZHC 1497 ("HC judgment") at [28]–[29].
3 At [193].
4 At [200] and [208].
5 At [227], citing *Commerce Commission v Siemens AG* (2010) 13 TCLR 40 (HC) at [246]–[248].

> arrangement or understanding does not interfere with the competitive setting of price.

[4] The Supreme Court held the arrangement or understanding was as to "the default offer price for Trade Me advertising … depriv[ing vendors] of the opportunity to be offered a price that had been set by an agency under workably competitive market forces".[6] It "interfere[d] with the competitive setting of price for the services offered":[7]

> The fact that the cost of Trade Me standard listing was going to be substantially greater after Trade Me's new policy came into effect meant that offering a free Trade Me listing would have had greater significance. It was a field of potential competition between agencies in the quest for new listings. The arrangement between agencies effectively prevented that potential competition from developing.

Thus the Hamilton agencies' consensus contravened s 27, by reason of s 30's operation. The other agencies earlier admitted their own liabilities; this Court then determined the penalties payable by them: $900,000 for Success; $1 million for Lugton's; and $1,050,000 for Online.[8]

[5] Had I to consider the individuals' status at trial, "[m]y inclination would have been to regard them as principals".[9] That was upheld by the Court of Appeal,[10] which remitted the case back to me for assessment of penalties.[11]

[6] The Commission now proposes I should impose a penalty on Lodge of $2.375 million; on Monarch, of $2.1 million; on Mr O'Rourke, of $65,000; and on Mr King, of $40,000. The defendants propose substantially lesser penalties: no more than $400,000 on Lodge, and $350,000 on Monarch; and, if separate penalties should be imposed on the individuals, no more than $25,000 on Mr O'Rourke, and $20,000 on Mr King.

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6 *Lodge Real Estate Ltd v Commerce Commission* [2020] NZSC 25 ("SC judgment") at [165] and [169]. Similarly, CA judgment, above n 1, at [89].

7 SC judgment, above n 6, at [170]–[171]. Similarly, CA judgment, above n 1, at [91] and [93].

8 *Commerce Commission v Lodge Real Estate Ltd* [2016] NZHC 1494 ("Success judgment") at [34]; *Commerce Commission v Lodge Real Estate Ltd* [2016] NZHC 3115 ("Lugtons judgment") at [25]; *Commerce Commission v Lodge Real Estate Ltd* [2017] NZHC 1875 ("Online judgment") at [25].

9 HC judgment, above n 2, at [235].

10 CA judgment, above n 1, at [110].

11 At [118].

Approach to pecuniary penalties

[7] At the time of the defendants' contravention, the Act's s 80 relevantly provided:

> **80 Pecuniary penalties**
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> (1) If the court is satisfied on the application of the Commission that a person—
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> (a) has contravened any of the provisions of Part 2 …
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> …
>
> the court may order the person to pay to the Crown such pecuniary penalty as the court determines to be appropriate ….
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> (2) The court must order an individual who has engaged in any conduct referred to in subsection (1) to pay a pecuniary penalty, unless the court considers that there is good reason for not making that order.
>
> (2A) In determining an appropriate penalty under this section, the court must have regard to all relevant matters, in particular,—
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> (a) any exemplary damages awarded under section 82A; and
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> (b) in the case of a body corporate, the nature and extent of any commercial gain.
>
> (2B) The amount of any pecuniary penalty must not, in respect of each act or omission, exceed,—
>
> (a) in the case of an individual, $500,000; or
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> (b) in the case of a body corporate, the greater of—
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> (i) $10,000,000; or
>
> (ii) either—
>
> (A) if it can be readily ascertained and if the court is satisfied that the contravention occurred in the course of producing a commercial gain, 3 times the value of any commercial gain resulting from the contravention; or
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> (B) if the commercial gain cannot be readily ascertained, 10% of the turnover of the body corporate and all of its interconnected bodies corporate (if any).

[8] It is accepted the applicable corporate maximum penalty here is $10 million.

[9] Having regard to "all relevant matters" under s 80(2A) "will bring to account all those factors previously set out in s 80(2)",[12] being (as continue to have application on contraventions of ss 47 or 47B, addressing business acquisitions substantially lessening competition in a market)[13]:

> (a) the nature and extent of the act or omission:
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> (b) the nature and extent of any loss or damage suffered by any person as a result of the act or omission:
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> (c) the circumstances in which the act or omission took place:
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> (d) whether or not the person has previously been found by the court in proceedings under this Part to have engaged in any similar conduct.

[10] Relevant considerations thus include:[14]

> (a) the duration of the contravening conduct;
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> (b) the seniority of the employees or officers involved in the contravention;
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> (c) the extent of any benefit derived from the contravening conduct;
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> (d) the degree of market power held by the defendant;
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> (e) the role of the defendant in the impugned conduct;
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> (f) the size and resources of the defendant;
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> (g) the degree of cooperation by the defendant with the Commission;
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> (h) the fact that liability is admitted; and
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> (i) the extent to which a defendant has developed and implemented a compliance programme.

[11] Sentencing usually engages two steps, so that – with 'non-mechanical' reference to analogous cases,[15] and aggravating and mitigating features of the

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12 *Telecom Corporation of New Zealand Ltd v Commerce Commission* [2012] NZCA 344 at [13], citing *Commerce Commission v Qantas Airways Ltd* HC Auckland CIV-2008-404-8366, 11 May 2011 at [26], and *Commerce Commission v Alstom Holdings SA* [2009] NZCCLR 22 (HC) at [19].

13 Commerce Act 1986, s 83.

14 *Telecom Corporation of New Zealand Ltd v Commerce Commission*, above n 12, at [13], citing *Commerce Commission v Qantas Airways Ltd*, above n 12, at [26] (citing *Commerce Commission v Geologistics International (Bermuda) Ltd* HC Auckland CIV-2010-404-5490, 22 December 2010 at [20]), and *Commerce Commission v New Zealand Diagnostic Group Ltd* HC Auckland CIV-2008-404-4321, 19 July 2010 at [17].

15 *Telecom Corporation of New Zealand Ltd v Commerce Commission*, above n 12, at [62], citing *Australian Competition and Consumer Commission v Telstra Corp Ltd* [2010] FCA 790 at [210].

offending – I should first decide a starting point for the contravention, to adjust that up or down to take into account individual circumstances, for determination of the applicable pecuniary penalty.[16]

[12] As an exercise in sentencing for regulatory offending, "[t]he primary consideration is deterrence and penalties must be set at a level that achieves both specific and general deterrence[;] … the size and resources of a firm, and its position of influence in the industry, are relevant to deterrence".[17]

[13] Reservations against drawing too close analogy with criminal sentencing principle – particularly given the Act's regulatory rather than penal nature, and the need to have regard for the contravention in its market context – are notorious.[18] Nonetheless, some have resonance: the gravity of the contravention and the culpability of the contravenor; the serious of the contravention in the spectrum of proscribed conduct; and "the general desirability of consistency" of outcome with similar contravenors committing similar contraventions in similar circumstances.[19]

Discussion

[14] I address first the reason for the substantial gap between the penalties proposed each by the Commission and for the defendants. For the Commission, John Dixon QC draws on starting points adopted predominantly in other real estate Trade Me price-fixing sentences. I return to that at [18] below.

[15] For the defendants, Les Taylor QC and Daniel McLellan QC draw on s 80(2B)(b)(ii)(A)'s alternative maximum penalty "if the court is satisfied that the contravention occurred in the course of producing a commercial gain, 3 times the value of any commercial gain resulting from the contravention". Acknowledging the alternative maximum only is available if the multiplier results in a sum greater than

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16 *Moses v R* [2020] NZCA 296 at [46]; *R v Taueki* [2005] NZCA 174, [2005] 3 NZLR 372 at [8].

17 *Telecom Corporation of New Zealand Ltd v Commerce Commission*, above n 12, at [28] and [55], the latter citing *Carter Holt Harvey Building Products Group Ltd v Commerce Commission* (2001) 10 TCLR 247 (CA) at [94]; *Commerce Commission v Qantas Airways Ltd*, above n 12, at [24]; and *Commerce Commission v New Zealand Diagnostic Group Ltd*, above n 14, at [17].

18 *Commerce Commission v Telecom Corporation of New Zealand Ltd* (2011) 13 TCLR 270 (HC) at [6].

19 Sentencing Act 2002, s 8.

$10 million (thus, if readily ascertainable commercial gain is more than $3.33 million), nonetheless the multiplier is argued to provide "a compelling guide" to achieving effective deterrence while avoiding over-deterrence.[20] Lodge points to its commercial gain in avoidance of Trade Me fees in the range of $125,000–$146,000 during the period for which the contravention was operative, meaning "the maximum starting point" of $375,000–$438,000; Monarch to commercial gain of $114,000–$131,000, and a maximum starting point of $342,000–$393,000.

[16] Such extrapolation is not legitimate. First, I do not accept the commercial gain exclusively is the avoided Trade Me fee. As avoiding development of "a field of potential competition between agencies in the quest for new listings",[21] other things being equal, the commercial gain may be the corporate defendants' retention of their highly-profitable market shares, not only for the period of the contravention but with the on-going structural change achieved in the market by Trade Me's subsequent abandonment of its new pricing. Second, that commercial gain is not 'readily ascertainable' on the evidence before me, but the evidence I do have suggests such may well be significantly higher even than the thrice-multiplied avoided Trade Me fees. And last, the multiplier is to establish an alternative maximum *penalty*, not a maximum starting point. The Act anticipates a $10 million or greater maximum penalty for Part 2 contraventions, within which range any necessarily lower starting point must separately be determined.

[17] That any Part 2 contravention falls to be penalised in the range requires some reflection on the full spectrum of contravening conduct: at the time of these contraventions, any collusive substantial lessening of competition, which price-fixing between competitors is deemed to do; or unilateral taking advantage of market power or resale price maintenance. All are serious incursions into the Act's objective "to promote competition in markets for the long-term benefit of consumers within New Zealand".[22] Just how serious falls to be comprehended from the circumstances of the particular incursion.

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20 Citing *Commerce Commission v Telecom Corp of New Zealand Ltd*, above n 18, at [4], citing *Commerce Commission v New Zealand Bus Ltd (No 2)* (2006) 3 NZCCLR 854 at [25].

21 SC judgment, above n 6, at [171].

22 Commerce Act 1986, s 1A.

—starting points

[18] Other Hamilton agency contraventions were held to have deprived vendors of access to Trade Me listings, "or, at the least, of the ability to negotiate for that service".[23] Such attracted a starting point in a range of $1.7–$2.1 million for Lugton's;[24] $1.5–$1.8 million for Online;[25] and $1.4–$1.7 million for Success.[26] Reference also was made to similar contraventions among Manawatu agencies, the starting point range being $1.5–$1.8 million for participants,[27] and $1.8–$2.25m million for the ringleader.[28] The lower ranges reflected materially smaller market shares, including by reference to unrelated but comparable price-fixing arrangements between livestock companies and saleyards in response to external price shocks,[29] and the highest to the initiator of those Manawatu contraventions.

[19] Mr Taylor emphasised the incursion found in the present case was far less than vendors' comprehensive 'deprivation' of access to Trade Me listings admitted in the other Hamilton cases, here only depriving them of a price set in workably competitive conditions. While there may be some superficial attractiveness about such a distinction, it disregards the Act's object, which is not of itself to ensure consumer benefit, but only through promotion of competition in markets, to which price control such as was exerted here is anathematic. Regardless of the degree of impact on vendors, the arrangement "interfere[d] with the competitive setting of price for the services offered by the Hamilton agencies".[30] That is why breaches of s 30 are deemed to contravene s 27 in principle, to be a substantial lessening of competition in a market.

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23 Success judgment, above n 8, at [14]; cited in the Lugton's judgment, above n 8, at [18]. Similarly in the Online judgment at [17].

24 Lugton's judgment, above n 8, at [22] and [25].

25 Online judgment, above n 8, at [23].

26 Success judgment, above n 8, at [29].

27 *Commerce Commission v Unique Realty Ltd* [2016] NZHC 1064 ("Unique judgment") at [41]; *Commerce Commission v Property Brokers Ltd* [2016] NZHC 2851 ("Manawatu (1994) judgment") at [14].

28 *Commerce Commission v Property Brokers Ltd* [2017] NZHC 681 ("Property Brokers judgment") at [12].

29 *Commerce Commission v PGG Wrightson Ltd* [2015] NZHC 3360 at [56]; *Commerce Commission v Rural Livestock Ltd* [2015] NZHC 3361 at [52]. External price shocks also were the genesis of price-fixing in air cargo and freight forwarding markets, but the scale of those operations makes their starting points of little utility here.

30 SC judgment, above n 6, at [170].

[20] The Hamilton arrangement was entered into and given effect for the whole of its duration by the Hamilton agencies, through their directors and major shareholders,[31] each agency avoiding development of "a field of potential competition" between them.[32] Thus the first meaningful consideration is Lodge's and Monarch's respective market shares by reference to revenues or surpluses. There is not too much in that to distinguish either between themselves or from Lugton's at the time. Those three agencies clearly carried the bulk of the Hamilton market, and any differentiation between them would not have regard for such periodic variations as may adjust their relativities. Any temporal pre-eminence is marginal; none of the three is shown to have individual influence above the other two. That is a more significant consideration than the cruder ruler of market shares alone, although the latter also goes to a contravenor's size and resources.

[21] The Commission seeks to characterise Monarch and, more particularly, Lodge as ringleaders, by attribution to them respectively of Mr King's and Mr O'Rourke's activities. That is not supported by the evidence.

[22] Trade Me's initial approach was exclusively with the major national real estate agency groups and networks, through which individual agencies progressively became aware.[33] The groups and networks' starting points fell in a $3–$4 million range, in significant part because of their initiator status across the country.[34]

[23] Mr O'Rourke first initiated contact with Lugton's and then the Hamilton agencies' meeting, which Mr King offered to host in Monarch's boardroom.[35] While Lugton's was independent, the other agencies learned of the issues initially from their respective groups and networks. But the unlawful consensus was found objectively to arise from the attendees' communication to each other at the meeting of their intended

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31 HC judgment, above n 2, at [97].
32 SC judgment, above n 6, at [171].
33 HC judgment, above n 2, at [46].
34 *Commerce Commission v Bayley Corporation Ltd* [2016] NZHC 1493 at [30], citing *Commerce Commission v PGG Wrightson Ltd*, above n 29; adopted in *Commerce Commission v Barfoot & Thompson Ltd* [2016] NZHC 3111 at [26], in relation also to Harcourts, L J Hooker, and Ray White.
35 HC judgment, above n 2, at [65] and [83]–[91].

and common course.[36] It did not arise prior from, and was not at the time led by, any of the meeting's attendees or their respective groups or networks.

[24] Any meeting at the time between the Hamilton real estate agencies was likely to engender a similar response, given the commonality of the challenge presented by Trade Me's new pricing. And there is considerable evidence the meeting was not expressly intended to achieve any unlawful consensus, but rather to discuss responses to that changed pricing. A diversionary exception is Lodge's network's prior note of Mr O'Rourke's advice he had obtained each Hamilton agency's agreement in principle to "[o]nly vendor funding for Trade Me listings", which specificity I found "hard to gainsay",[37] but is an insufficient foundation from which to doubt the contrary evidence of all the meeting's attendees.

[25] There is some basis cautiously to distinguish between Lodge, Monarch, and Lugton's in terms of their relative sizes and resources.[38] Distinction can be discerned from the contended sizes of the Hamilton and Manawatu markets in uplifting from the latter participants' range to determine Lugton's starting point.[39] The Hamilton agreement's unique withdrawal of listings from Trade Me does not offer a further basis to discriminate from the Manawatu result in terms of any s 30 analysis, as is illustrated by the consistency of the Online judgment with those of the Manawatu participants.[40]

[26] So far as starting points for Lodge and Monarch are concerned, I set them within the range adopted for Lugton's of $1.7–$2.1 million.

[27] Given Mr King and Mr O'Rourke also are contravenors, I must order they "pay a pecuniary penalty, unless [I consider] there is good reason for not making that order".[41] Their closest comparator is the individual Manawatu initiator:[42]

> [He] was the instigator of the agreement. He organised, hosted and chaired the meeting at which the Manawatu price-fixing agreement was reached. He

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36 At [192], upheld on appeal (CA judgment, above n 1, at [68]–[70]; SC judgment, above n 6, at [107]–[109]).
37 At [57].
38 *Telecom Corporation of New Zealand Ltd v Commerce Commission*, above n 12, at [56].
39 Lugton's judgment, above n 8, at [22] and [25].
40 Online judgment, above n 8, at [23].
41 Commerce Act 1986, s 80(2).
42 Property Brokers judgment, above n 28, at [17].

> directed the follow-up correspondence confirming the terms of the agreement reached and ensured that other parties implemented it as soon as their contracts with Trade Me expired. He also attempted to expand the terms of the initial agreement. His conduct was a deliberate attempt to save costs for his company and he indirectly stood to benefit from this because his family trust owned all of the shares in the company.

His role meant the starting point for Property Brokers, otherwise relatively indistinguishable from Unique and Manawatu (1994), was in the higher range. The Judge considered a comparable $100,000 starting point for the individual was too high, and established his starting point at $70,000, bearing in mind his interests "will bear the burden of meeting the substantial monetary penalty imposed on Property Brokers".[43]

[28] Mr King's and Mr O'Rourke's activities are not at all comparable. There is no obvious basis to distinguish them from, or to justify them carrying a materially heavier personal burden than, their fellow directors and shareholders Davinder Singh and David Couch also in attendance at the meeting (but not alleged individually to contravene).[44] As said at [24] above, a meeting of Hamilton real estate agencies to discuss responses to the Trade Me price change was near inevitable. All entered and gave effect to the consequent arrangement. Mr King and Mr O'Rourke did not "enforce" it.[45] Most significantly, their activities also are not materially distinct from other Hamilton agencies' directors and shareholders in attendance at the meeting (also not alleged individually to contravene).[46] That last disparity, in particular, provides good reason not to require Mr King or Mr O'Rourke pay a pecuniary penalty. I will not require they do so.

—adjusting for individual circumstances

[29] No aggravating or mitigating individual factors exist. I am not prepared without substantially more evidence to conclude the companies disregarded or were reckless as to their responsibilities under the Act, including as to any compliance training. In particular, although Lodge and Monarch each initially engaged with the Commission on a voluntary basis, any benefit as may be thought to have accrued from

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43 At [20]–[21].
44 HC judgment, above n 2, at [97].
45 At [197]–[199].
46 At [180]–[182].

that initial engagement comprehensively is offset by the contest for and at trial and on first and second appeals. Without any adjustment to make, the penalties should distinguish between Lodge's and Monarch's respective sizes and resources, while allowing lower room for Lugton's, within the starting point range I have identified.

Result

[30] I **order**:

(a) Lodge to pay to the Crown $2.1 million; and

(b) Monarch to pay to the Crown $1.9 million;

as pecuniary penalties under s 80 of the Commerce Act 1986.

—Jagose J