

The Legal Irrelevance of Counterfactual Analysis When Assessing Whether a Provision in a CAU “Controls” A Price

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In *ACCC v CC (NSW)* Lindgren J said: “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.”

In *ACCC v Pauls* O’Loughlin J seems to have taken that to mean that an agreement does not control a price if the price charged or offered pursuant to the agreement is a market price. But that is not what Lindgren J meant. O’Loughlin J’s interpretation introduces a spurious counterfactual analysis that is inconsistent with the wording and purpose of the provisions defining price fixing.

Two competitors, A & B agree with each other to charge the market price as determined each day by an independent expert. This clearly is price fixing as defined by s 44ZZRD(2): A & B have agreed to control a price because, applying Lindgren J’s interpretation correctly, they have restrained their freedom to charge any other price including a price lower than the market price. This refutation of O’Loughlin J’s approach is simple and obvious. It also reflects the explication of price fixing in *Trenton Potteries*, *Socony Oil* and other leading US decisions that have strongly influenced the TPA provisions on price fixing.

On this analysis, a counterfactual analysis of the price that a competitor would have offered or paid but for the alleged price fixing agreement is legally irrelevant. If such an approach were to be adopted it would create loopholes and necessitate complex counterfactual assessment. The purpose of s 44ZZRD(2) (and s 45A(1)) is to avoid the creation of loopholes and the need for difficult and protracted counterfactual analysis.

The correct application of s 44ZZRD(2) (and s 45A(1)) re controlling a price is relatively straightforward: have the competitors agreed to impose a restriction on their freedom to determine the price to be charged or offered by either or both of them? A contractual obligation to pay price \$X is the most obvious form of such a restriction on freedom.