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Australian Competition & Consumer Commission v Australian Safeway Stores and Mark Jones - Update

The High Court has refused to grant special leave to appeal to both the Australian Competition & Consumer Commission (ACCC) and also to Australian Safeway Stores (Safeway) and Mark Jones (Jones) in respect of the judgment of the Full Federal Court. Consequently, the decision of the Full Federal Court stands. The ACCC has been successful in establishing four contraventions of the misuse of market power provisions of the Trade Practices Act and one instance of price fixing.

Background

This is an update of an earlier AGS Casenote ([attached](#)) that overviewed the proceeding in detail and the decision of the Full Federal Court.

We briefly summarise the background.

On 9 occasions Safeway refused to accept supplies of bread products of a major plant baker (eg. Tip Top Bakeries) at one of its supermarkets while a plant baker supplied *secondary* branded bread sold at a discounted price by an independent retailer located in the vicinity of the Safeway supermarket. Jones was Safeway's bread category manager responsible for arranging the supply of bread.

The deletion of bread was alleged to be intended to deter the baker from supplying cheap bread and to damage the independent retailers. The conduct was alleged to be a misuse of market power in contravention of s 46 of the Trade Practices Act (TPA).

The ACCC also alleged that Safeway and Tip Top had made a price fixing agreement as to the type of bread products to be sold at Tip Top's Preston Market Stall and the price of products, in contravention of s 45 of the TPA.

Safeway denied the allegations. Safeway's primary defence was that it only deleted bread products having first made a request for a case deal of the plant baker for the supply of *proprietary* brand bread and the request had been refused. Safeway had to delete the bread as it was seen by consumers to be uncompetitive on price.

Trial Judge

At first instance, following a lengthy trial, Justice Goldberg dismissed all of claims of the ACCC: ACCC v Safeway (No 2) [2001] FCA 1861; (2001) 119 FCR 1. His Honour held that Safeway had not breached s 46, on the grounds that there had not been a taking advantage of market power. Safeway would have acted in the same manner without market power.

Secondly, a case deal was sought in five incidents, which was considered to be inconsistent with Safeway having an anti-competitive purpose.

In relation to the Preston Market price fixing allegations, on the evidence Goldberg J was not satisfied that the participants to discussions had a meeting of minds in order to give rise to a proscribed arrangement.

Since Safeway was not found to have contravened the Act, the Judge did not consider it necessary to deal with the issue of Jones's liability as an accessory.

Full Federal Court on appeal

The Full Federal Court, by majority, held that Safeway had contravened s 46 in relation to four incidents where there had been a deletion of bread products: *ACCC v Safeway* [2003] FCAFC 149; (2003) 198 ALR 657.

Also, the Full Court was unanimously of the view that a price fixing arrangement had been made in relation to the Preston Market incident.

The Full Court made declaratory orders against Safeway in relation to the four incidents found to contravene s 46 and ordered Safeway to pay 80 per cent of the ACCC's costs of the appeal: *ACCC v Safeway (No 2)* [2003] FCA 811.

High Court special leave applications

The ACCC, Safeway and Jones each filed separate applications seeking special leave to appeal to the High Court. The applications were heard on 10 September 2004. The High Court refused to grant special leave in respect of all applications. The Court stated that the issues of fact and law raised did not warrant the grant of special leave. Further, as the conduct in issue occurred some years ago, it was not considered in the interests of justice to further extend the litigation.

Outcome

The refusal of special leave means that the declaratory orders of the Full Federal Court stand.

This represents the first case in which the ACCC has succeed in obtaining as a final outcome in a contested proceeding declaratory orders of contravention of s 46. (Earlier cases where the ACCC has succeeded in obtaining declarations of contravention of s 46 have been set aside on appeal. See for example the decisions in *Boral*, *Rural Press* and *Universal Music*).

Important points to emerge from the Full Federal Court judgment are:

- Focus on the conduct of the respondent and inferences arising in ascertaining whether there has been a contravention.
- Pleading a policy based on a course of conduct can give rise to scope for argument.
- The purpose asserted by the respondent is not necessarily determinative of whether a proscribed purpose exists.
- A defence based on the fact that a request had been made for a similar deal to that provided to a competitor is not necessarily inconsistent with a purpose of damaging the competitor or deterring competitive conduct.

Pursuant to the orders of the Full Federal Court, the proceeding is remitted to Justice Goldberg to hear and determine the following matters:

- the pecuniary penalties to be imposed.
- injunctive relief.
- the liability of Jones.
- costs of the trial.

The judgment of the Full Federal Court is reported at [2003] FCAFC 149 (see <http://www.austlii.edu.au/au/cases/cth/FCAFC/2003/149.html>) and (2003) 198 ALR 657.

Graham Thorley and Gavin Carroll with AGS Melbourne acted on behalf of the Australian Competition & Consumer Commission in conduct of the proceeding.

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