



## **Express law** *fast track information for clients*

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### **Misuse of market power and price fixing**

The recent judgment of Goldberg J brings to an end one of the largest trade practices cases in Australia, with a history extending over 10 years.

The ACCC has been successful in obtaining pecuniary penalty orders against a large corporation following a contested trial and appeal. In all prior cases the penalties imposed have either been jointly agreed sums<sup>1</sup> or the orders have been set aside on appeal.<sup>2</sup>

The penalties imposed are substantial and in line with other recent Federal Court decisions in which significant penalties were imposed for anti-competitive conduct.<sup>3</sup>

The case highlights the need for people in managerial positions or those in positions involving communications with competitors or suppliers to be aware of the provisions of the Trade Practices Act.

This issue of *Express law* consolidates previous notes AGS has published on this case and reports on the finalisation of the proceedings.

***Australian Competition and Consumer Commission v Australian Safeway Stores Pty Ltd and Mark Jones***

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[Full Federal Court, 30 June 2003, \(2003\) 129 FCR 339; \[2003\] FCAFC 149](#)

[Federal Court, 31 January 2006, \[2006\] FCA 21](#)

The Australian Competition and Consumer Commission (ACCC) has been successful in obtaining orders:

- finding breaches of the misuse of market power and price-fixing provisions of the Trade Practices Act ('TPA'), and (in a precedent)
- imposing pecuniary penalties for misuse of market power provisions following a trial and an appeal.

The judgments of the Federal Court are important for their consideration of:

- the application of the misuse of market power provisions in the context of a buyer of products from wholesale suppliers
- what constitutes a taking advantage of market power
- the evidence and circumstances sufficient to prove a price-fixing arrangement
- the appropriate pecuniary penalties for contraventions of ss 45 and 46 of the TPA.

## ***Background to the litigation***

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The ACCC sued the following parties:

- Australian Safeway Stores Pty Ltd ('Safeway'), a subsidiary of Woolworths Ltd, with 130 supermarkets throughout Victoria in 1994 and 1995
- George Weston Foods Pty Ltd ('Tip Top'), a large plant baker of bread products
- Bernie Brookes ('Brookes'), Safeway's Victorian Merchandise Manager, with responsibility for formulating policies and strategies for sale for products
- Mark Jones ('Jones'), the Bread Category Manager with Safeway who implemented policies devised by others, including those formulated by Brookes.

Tip Top had at an early stage in the litigation admitted contravening the TPA. Tip Top was ordered to pay pecuniary penalties totalling \$1.2m in respect of a number of contraventions, including its part in agreeing with Safeway to fix the retail price of bread for sale at its Preston Market stall: *ACCC v Australian Safeway Stores* (1997) 75 FCR 238.

In the course of the preparation of the proceeding for hearing, Goldberg J considered the issue of at what point in the course of the investigation was litigation in contemplation for the purposes of legal professional privilege and conduct amounting to a waiver of privilege: *ACCC v Australian Safeway Stores* (1998) 81 FCR 526.

Safeway, Brookes and Jones defended the allegations made by the ACCC. The trial was a substantial one, lasting 92 days, heard over nine months, with 70 people being called to give evidence, including economic and marketing experts.

During the trial, the ACCC consented to an order dismissing the proceeding against Mr Brookes.

Goldberg J found in favour of Safeway and Jones and dismissed the application of the ACCC: *ACCC v Australian Safeway Stores (No 2)* (2001) 119 FCR 1; [2001] FCA 1861.

His Honour handed down a further decision in respect of costs, that considered the admissibility of 'without prejudice' communications and dismissed an application by Safeway for indemnity costs: *ACCC v Australian Safeway Stores (No 3)* (2002) ATPR 41-901.

The ACCC appealed to the Full Federal Court (Heerey, Sackville and Emmett JJ). The Full Court substantially upheld the appeal.

The summary set out below is a brief overview of complex facts, legal claims and defences and detailed decisions of the trial judge and the Full Federal Court.

## ***Facts***

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The litigation concerned events that took place in 1994 and 1995 in Victoria. Bread was produced by three major plant bakers, Tip Top, Buttercup and Sunicrust ('the plant bakers'). They supplied 80 per cent of all plant baked bread for retail sale. Safeway was the largest purchaser in Victoria. Bread was also manufactured by independent bakers and hot bread shops for retail sale. Bread was found to be a significant product for a supermarket, being not only a staple food, but also indicative of a retailer's general price competitiveness.

There were different categories of bread made by the plant bakers. Proprietary bread, sold under a brand name and heavily promoted, and secondary bread, sold with little or no advertising.

The ACCC alleged that Safeway had a policy that if secondary branded bread of a plant baker was sold at discounted price at an independent retailer (other than Coles or Franklins) in the vicinity of a Safeway store, at a price less than Safeway, then Safeway would remove *all* that plant baker's bread from sale while that product was on special at the retailer's store ('the bread policy'). The bread policy was implemented in nine incidents ('the nine incidents') for the purpose of deterring a plant baker from supplying cheap secondary bread to independent retailers.

A further incident ('the Preston Market incident') concerned an allegation that Safeway, through Jones, had made an arrangement with Tip Top as to the prices to be charged and the type of bread to be sold by Tip Top at its Preston Market stall.

## ***Contraventions***

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### ***Nine incidents***

In the nine incidents, the Commission alleged that Safeway had (or alternatively, attempted to):

- made an arrangement with the plant bakers that the bakers cease supplying cheap secondary bread to independent retailers with the purpose of lessening competition: contravention of s 45
- taken advantage of its market power in the wholesale market for the acquisition of bread with the purpose of imposing a term of trade on plant bakers that they would not supply cheap secondary bread to independent retailers, and to deny the retailers access to cheap secondary bread, thereby preventing them undercutting Safeway: contravention of s 46
- engaged in exclusive dealing: contravention of s 47
- induced the plant bakers to engage in retail price maintenance ('RPM'): contravention of s 48.

### ***Preston Market incident***

It was alleged that the Respondents had made, and given effect to, an arrangement regarding the prices Tip Top would charge for its secondary bread at the Preston Market stall, that substantially lessened competition: contravention of s 45(2). Section 45A deems price-fixing arrangements to substantially lessen competition. It was also alleged that the arrangement included an exclusionary provision, that proprietary bread not be sold at the stall: contravention of s 45(2).

The conduct was further alleged to constitute exclusive dealing, in contravention of s 47.

## ***Safeway's defences***

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Safeway and Jones defended the allegations made by ACCC.

The principal defences were:

- that the bread policy alleged by ACCC was incorrect and that Safeway's true bread policy, as formulated by Mr Brookes, was intended to place Safeway in a competitive position, and involved making a request for a case deal (i.e. provision of bread at a discount) prior to a deletion of bread occurring, in order to be price competitive with independent retailers ('the Brookes bread policy')
- Safeway contested the ACCC's market definition and denied it had market power

- that no anti-competitive arrangements were made.

This note concentrates on the decisions of the Court in respect of price fixing (s 45) and misuse of market power (s 46).

### ***Decision of the trial judge***

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#### ***Nine incidents***

Goldberg J dismissed the claims of the ACCC that the conduct in respect of the nine incidents constituted price fixing, misuse of market power, exclusive dealing and RPM.

#### ***Price-fixing arrangement (Section 45)***

Goldberg J stated that in order for there to be a price-fixing arrangement there had to be a meeting of minds of the parties. Jones's requests for a case deal were a unilateral act, which if declined resulted in the deletion of a plant baker's products. The evidence did not support the conclusion that there had been a meeting of minds between Safeway and any of the plant bakers.

#### ***Misuse of Market Power (Section 46)***

##### **Market definition**

Goldberg J upheld the ACCC's contention that the relevant market in which Safeway had a substantial degree of market power was the wholesale market for the acquisition of bread in Victoria. Safeway had submitted that the relevant market was the total bread market at both wholesale and retail levels, which included hot bread shops and independent bakers.

##### **Market power**

The High Court has held in *Queensland Wire*<sup>4</sup> and *Melway*<sup>5</sup> that 'market power' exists where a firm can behave persistently in a manner different from how it would be forced to act in a competitive market (i.e. unconstrained by the conduct of competitors).

Goldberg J held that Safeway possessed market power as an acquirer of bread at the wholesale level from plant bakers in Victoria, by reason of the following considerations:

- Safeway had the ability to influence the terms of trade on which plant bakers dealt with it to an extent it could not do so in a competitive market. The evidence was that Safeway always bought at the best price.
- Safeway was the largest purchaser of bread products from the plant bakers.
- Safeway was not constrained by barriers to entry.
- The plant bakers had excess production capacity.
- If Safeway significantly reduced its purchases of bread from plant bakers, the plant bakers had no alternative large-scale purchasers of bread.
- Hot bread shops were in the retail market and did not constrain Safeway's power in the wholesale market.
- Independent bakers were not a viable alternative source of supply for independent retailers seeking cheap bread.

## **Take advantage of market power**

The expression 'take advantage of' means to 'use' the market power involved: *Queensland Wire*. There is a use of market power by a firm where it does something that is materially facilitated by the existence of the power: *Melway*. Goldberg J held that Safeway did not take advantage of its market power in any of the nine incidents by deleting bread, as it *would* have acted in the same manner in a competitive market without market power.

### **Purpose**

Goldberg J found that the policy that Safeway had was in terms claimed by Safeway (the Brookes bread policy) and not that alleged by the ACCC. The purpose of the Brookes bread policy was to enable Safeway to be competitive and was not intended to prevent or deter plant bakers from engaging in competitive conduct with independent retailers. There had been a request for a case deal before a deletion occurred in five incidents. In two incidents, His Honour could not make a finding. The making of a request for a case deal was considered to be inconsistent with the purpose to punish plant bakers. Accordingly, no proscribed purpose existed in seven of the incidents.

In the remaining two incidents, Goldberg J found that no requests for a case deal had been made prior to a deletion taking place and that Safeway's purpose was to punish the plant baker. However, no contravention occurred in these two incidents, by reason of His Honour's ruling that Safeway had not taken advantage of its market power.

### *Exclusive Dealing (Section 47)*

Goldberg J held that sub-sections 47(4) and (5) do not apply to conditions on the acquisition of goods that relate to the price of goods.

### *Retail price maintenance (Section 48)*

On the evidence, Brookes and Jones did not intend to have the plant bakers engage in RPM and Safeway did not specify a price or range of prices for there to be RPM.

### **Preston Market incident**

Although there had been discussions between officers of Safeway and Tip Top relating to Preston Market and prices of bread, Goldberg J was not satisfied that an arrangement had been entered into between persons with authority to act on behalf of Safeway. Accordingly, Goldberg J dismissed the case in respect of the Preston Market incident.

The ACCC appealed against the dismissal of the claims made in respect of misuse of market power and the Preston Market incident.

## ***Full Federal Court decision on appeal***

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### ***Misuse of market power in the nine incidents – Section 46***

The Full Court was divided as to whether there had been a contravention of s 46.

### *Heerey and Sackville JJ*

#### **Market definition**

Heerey and Sackville JJ upheld Goldberg J's rulings in respect of market definition. Competition in the retail market for bread did not constrain Safeway's ability to impose terms

of trade on suppliers in the wholesale market. The wholesale and retail markets for bread products were separate markets.

### **Market power**

This is the first case to consider s 46 in the context of a *buyer*. The Full Court held that s 46 can apply to a purchaser, and is concerned with the extent a purchaser's conduct is constrained by competitors, suppliers and customers. Market power on the part of a buyer may be evidenced by the buyer's ability to extract terms relating to price or terms of trade that are more favourable to itself than it could extract in a competitive market.

Safeway was found to have market power by reason of the following factors:

- the excess capacity of the plant bakers, combined with Safeway's substantial market share and its importance to the three plant bakers
- Safeway's conduct in deleting a plant baker's entire range of bread
- barriers to entry were high, requiring entry on a state-wide basis
- Safeway was successful in having Tip Top cease supplying cheap bread
- Safeway procured an increase in its rival's costs of supply of bread
- Buttercup and Sunicrust suffered loss of sales from having products deleted.

### **Take advantage of market power**

Their Honours found that Goldberg J was in error in his interpretation and application of the legal principles concerning the term 'take advantage' of market power.

*The rationale for the conduct is critical. ... A firm without market power would not have pursued a policy of deletion because to do so would have produced harm for itself without any countervailing benefit.*

Heerey and Sackville JJ held that in the four incidents where no requests for a case deal were made, Safeway had taken advantage of its market power in the wholesale market. There was no business rationale for the conduct. It was only explicable as the use of market power to deter the plant baker from supplying independent retailers with cheap secondary bread.

Their Honours also stated that the deletions may have constituted a taking advantage of market power for a proscribed purpose, despite requests for case deals. They did not agree with the trial judge's view that requests were inconsistent with a proscribed purpose. However, having regard to the way the case was pleaded and conducted at trial, the Court would not consider the matter on this basis.

### **Purpose**

Purpose is to be analysed by reference to Safeway's conduct and inferences from that conduct, not by ascertaining Mr Brooke's policy. The deletions in the four incidents could not have occurred by accident. The deletions in those incidents were for the purpose of deterring both the plant bakers and independent retailers from engaging in competitive conduct.

### *Emmett J*

Emmett J agreed with the decision of Heerey and Sackville JJ, except on the issue of market power. His Honour held that he was not persuaded that Safeway had a substantial degree of power as an acquirer of bread market in the wholesale market. The factors that the trial judge relied on did not establish that Safeway had market power in the wholesale market. For

instance, Safeway was not able to obtain terms of trade *better* than other market participants and barriers to entry were low, being at the local supermarket level.

### ***Preston Market incident, price-fixing arrangement – Section 45***

The Full Court unanimously held that on the facts as found by Goldberg J, it was satisfied that Jones, who held the requisite authority to bind Safeway, was involved in giving instructions regarding meetings with officers of Tip Top and approved the outcomes. There was a meeting of minds between the participants involved in this incident. The trial judge was in error by applying the *Briginshaw* standard too rigorously. The ACCC made out its case that Safeway engaged in price fixing by making an arrangement having the purpose or effect of substantially lessening competition.

### ***Orders of the Full Federal Court***

In a further judgment,<sup>6</sup> the Full Court made declaratory orders that Safeway had taken advantage of its market power in contravention of s 46 in respect of the four incidents and made a price-fixing arrangement with Tip Top in breach of s 45 in respect of the Preston Market incident. The proceeding was remitted to the trial judge for determination of the issues of injunctions, penalties, costs and the liability of Mr Jones.

### ***High Court special leave applications***

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Applications for special leave to appeal were filed by both ACCC and Safeway and Mr Jones. The High Court refused to grant special leave, as the proceeding was not considered to be a suitable matter for consideration of any questions of principles that may arise, and it would not be in the interests of justice to further delay the determination of the proceeding. Consequently, the orders of the Full Federal Court represent the final position in regard to issues of liability for contraventions of the TPA.

### ***Remittal to the trial judge***

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The ACCC did not seek injunctive relief or cost orders in respect of either Safeway or Mr Jones.

### ***Safeway***

ACCC and Safeway were in dispute as to the appropriate pecuniary penalty to be imposed in respect of the four incidents. The ACCC sought penalties totalling \$15.5m (\$3.5m for each of the four incidents and \$1.5m for the Preston Market incident).

Safeway submitted that the penalties proposed were excessive and that it should not be penalised more than the total imposed on Tip Top. Goldberg J rejected this submission, as the sections alleged to be contravened were different. No allegations of a breach of s 46 were made against Tip Top. Safeway's conduct was found to be more serious, because it involved a misuse of market power, and because Safeway had brought about the contraventions.

Goldberg J imposed pecuniary penalties totalling \$8m in respect of the four incidents for contraventions of s 46 and \$900,000 for the Preston Market price-fixing arrangement. Relevant factors were that the conduct was serious, deliberate, of a recurring nature, it affected the competitive process, and the need for general deterrence.

**Mr Jones**

Mr Jones's liability in respect of the four incidents for contravention of s 46 was not pursued by ACCC.

Mr Jones accepted accessorial liability for involvement in the Preston Market incident and agreed to a declaratory order being made. The parties jointly submitted that the appropriate penalty was \$30,000. Goldberg J considered that such a sum was not within the permissible range, being too light a penalty in the circumstances. A higher penalty was appropriate having regard to considerations of general deterrence, that persons in managerial positions comply with the TPA, that Mr Jones was in a position of authority and responsibility and that his conduct was deliberate and serious. A penalty of \$50,000 was imposed on Mr Jones.

**Text of the decisions is available at:**

[Full Federal Court, 30 June 2003, \[2003\] FCAFC 149](#)

[Federal Court, 31 January 2006, \[2006\] FCA 21](#)

AGS acted on behalf of the Australian Competition and Consumer Commission in conduct of the proceedings.

*For further information please contact:*

Graham Thorley  
Senior Executive Lawyer  
T 03 9242 1244 F 03 9242 1278  
graham.thorley@ags.gov.au

**Notes**

- <sup>1</sup> *TPC v Carlton United Breweries Ltd* (1990) 24 FCR 532; *TPC v CSR* (1991) ATPR 41-076; *ACCC v Fila Sport Oceania P/L* (2004) ATPR 41-983 (\$3m for ss 46 and 47 breaches); *ACCC v Eurong Beach Resort* [2005] FCA 1900 (\$900,000).
- <sup>2</sup> *ACCC v Rural Press* (2002) 118 FCR 236; *Universal Music v ACCC* (2003) 131 FCR 529.
- <sup>3</sup> *ACCC v Leahy Petroleum (No 2)* (2005) 215 ALR 281 and *(No 3)* (2005) 215 ALR 301.
- <sup>4</sup> *Queensland Wire Industries v BHP Ltd* (1989) 167 CLR 177.
- <sup>5</sup> *Melway Publishing v Robert Hicks* (2001) 205 CLR 1.
- <sup>6</sup> *(No 2)* [2003] FCAFC 811 (1 August 2003).

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