Legal notes

This section comments on legal issues arising from recent trade practices cases.

ACCC v Pioneer International Limited and Pioneer Building Products (Qld) Pty Ltd

Federal Court
Lockhart J
20 December 1996

On 20 December 1996, Lockhart J of the Federal Court ordered Pioneer International Limited (Pioneer) and a subsidiary company, Pioneer Building Products (Qld) Pty Ltd (Besser), to pay $4.8 million in pecuniary penalties for a contravention of s. 50 of the Trade Practices Act. The decision was the result of proceedings brought by the Commission which, for the first time, obtained pecuniary penalties as part of the relief sought.

Section 50(1) states:

> A corporation must not directly or indirectly;
>
> (a) acquire shares in the capital of a body corporate; or
>
> (b) acquire any assets of a person;
>
> if the acquisition would have the effect, or be likely to have the effect, of substantially lessening competition in a market.

Background

The Pioneer case arose from the acquisition by Pioneer and Besser of the assets of A Class Blocks Pty Ltd (A Class) and Q Blox Concrete Masonry Pty Ltd (Q Blox). A Class and Q Blox were sister companies with common management which manufactured and traded from common premises in Hemmant, a suburb of Brisbane. A Class and Q Blox were operated by a Mr Noel Cooke and a Mr Brian Toppenberg. The companies were a competitive supplier of concrete masonry blocks in the south-east Queensland area.

Pioneer controlled a number of companies within the Pioneer Group that produced and supplied concrete masonry products, including Besser. Pioneer, Boral Resources (Qld) Pty Limited (Boral) and A Class were the main producers of concrete masonry blocks in south-east Queensland, although two smaller producers did exist.

Concrete masonry blocks are used extensively in Queensland and in the south-east Queensland area by the building industry, particularly for use in walling for housing units, industrial buildings such as warehouses and factories and also commercial construction including multi-level buildings. Between 1990 and 1995, at least $15 million to $20 million worth of blocks were sold in the south-east Queensland area each year.

The prices of blocks were largely based on the extent to which discounts were given by the producer of the blocks to purchasers. Immediately prior to A Class producing blocks in the south-east Queensland area the discounts offered on blocks usually did not exceed 15 per cent. From mid-1991, A Class began producing and supplying substantial numbers of blocks in the south-east Queensland market. From about this time on until 1994, prices for blocks in the market were highly competitive, with discounts on blocks regularly reaching 45–55 per cent off the trade price.

A Class offered substantially greater discounts than both Boral and Besser, and this, combined with the extra capacity that A Class brought into the market, led to Besser suffering significant losses in the market. From the time that A Class entered the market, Pioneer regarded A Class as a vigorous competitor and the substantial cause of the losses Pioneer was incurring in the market.

In late 1992, Pioneer and Besser considered that a way of improving their results in the south-east Queensland market would be to acquire the A Class business, thereby eliminating A Class as a competitor and allowing Besser to increase its prices and profit sustainably. By December 1992, Pioneer obtained legal advice from its solicitors that an acquisition of the A Class business would not contravene s. 50 of the Act as it then was. The legal advice also advised that impending changes to s. 50 of the Act, which would take effect on 21 January 1993, would make it much harder for Besser or Pioneer to acquire A Class after that date. At that time s. 50 of the Trade Practices Act was being amended by the Parliament. The section only prohibited mergers or acquisitions that resulted in market dominance, but was being amended to prohibit mergers or acquisitions that substantially lessened competition in a market.

Following that advice, in late December 1992, a director of Besser who was also a senior manager of Pioneer, (the director), acting on behalf of both Besser and Pioneer, offered A Class $4 million for the A Class business. The principal of A Class (Mr Cooke) rejected Pioneer's offer and said that he wanted $7.2 million.

When this offer was made, the only relevant valuation available to Pioneer and Besser was an assessment made by a Besser employee based upon an inspection of the A Class premises and equipment which was conducted in August 1992. This assessment valued the land, stock and equipment at $2.75 million. In addition to this valuation, the director received two memoranda from a senior Besser manager which expressed a view as to the reduction in discounts of the price of masonry blocks which could be achieved after the elimination of A Class from the market, and the prices that were thereby justifiable for the A Class assets.

After December 1992 discounting increased in the market, and Pioneer and Besser suffered further losses throughout 1993. By December 1993, Pioneer received further legal advice from a solicitor that it may be able to acquire the A Class business without contravening s. 50 of the Act. This advice was based on the view that concrete masonry blocks were not a self-contained market, but part of a much wider market definition of building materials. On the basis of this advice, in around early December 1993, Pioneer approached Mr Cooke and offered to buy the A Class business for $6 million. Mr Cooke agreed to this figure.

On 14 December 1993 the director prepared a memorandum for Pioneer senior management which recommended that Pioneer acquire the A Class business for the sum of $6 million. Pioneer senior management refused to approve the acquisition unless they first received an opinion from a QC specialising in trade practices law that the acquisition of the A Class business would not contravene s. 50 of the Act. The QC gave an opinion that there was a 'significant risk' that such an acquisition would contravene s. 50.

Following receipt of that opinion, the director told Mr Cooke that Pioneer had received a negative opinion from its QC, and that the acquisition would not proceed. Pioneer and Mr Cooke rejected the possibility of then applying to the Trade Practices Commission (as it then was) to seek approval for the proposed acquisition of A Class.

In March 1994, Besser asked the QC to reconsider his opinion of December 1993, and in particular to consider whether a wider market definition than that considered earlier was relevant. The QC confirmed his earlier opinion, and offered an alternative method of acquisition, which Pioneer rejected.

In June 1994, Pioneer and Mr Cooke considered a proposal that Mr Cooke close his business and sell his assets to Pioneer. Pioneer obtained legal advice from its QC on that proposal. The effect of that advice was that the QC said '... for s. 50 not to apply, it will be critical that A Class have decided to close down on a specified date and to dispose of its assets and for that decision to have preceded any acquisition by Besser'.

Subsequently, in June 1994, the director and Mr Cooke orally agreed that Besser and Pioneer would purchase the assets of the A Class business for $6.5 million. No valuations of the assets of A Class business were available to Besser and Pioneer prior to making this agreement other than the $2.75 million assessment referred to above.

In July 1994, Pioneer decided to reduce the maximum discount offered on blocks in the market to 40 per cent.

A Class was not willing to agree to close down its business until it was assured of receiving the purchase price of $6.5 million. Pioneer agreed to pay the entire purchase price upon execution of the contract and upon A Class's public announcement of its intention to close its business. This contract was executed by Besser and A Class on 22 August 1994.

Had A Class not closed down its business, and sold its assets, it would have been likely to have continued to be a vigorous competitor in the market, and Pioneer would have been unlikely to have been able to implement the reduction in discounts referred to from July 1994. In September 1994, Pioneer reduced the maximum discount on blocks in the market to 30 per cent.

The acquisition was completed on 21 October 1994, when Pioneer and Besser obtained possession of the assets. By November 1994, Pioneer had reduced the maximum discount offered on blocks in the market to 20 per cent.

The reductions in the discounts from around July 1994 were made by Besser substantially as a result of the agreement to acquire the A Class assets. As a result of the reduction in the discounts offered on the price of blocks, in the 12 months from June 1994 to June 1995, Pioneer and Besser improved their profit in the market by $2.1 million.

The proceeding

Pioneer and Besser did not file defences to the statement of claim. By not filing defences they admitted for the purposes of these proceedings only the allegations made in the statement of claim. The matter came before the Court for the imposition of pecuniary penalties and the parties provided joint submissions to the Court as to suggested penalties for the Court's consideration and approval. The Court declared the acquisition in contravention of s. 50 in that it had the effect or was likely to have the effect, of substantially lessening competition in the south-east Queensland market for the production and supply of concrete masonry blocks. In particular the acquisition of the assets by the first and second respondents had the effect, or was likely to have the effect, that:

- the third largest producer and supplier of concrete masonry blocks in the market stopped competing in that market;
- the second respondent increased its market share in the market;
- the second respondent, and one other competitor, together supply all or almost all of the concrete masonry blocks required in the market;
- the second respondent significantly and sustainably increased its prices for concrete masonry blocks in the market;
- parties other than the second respondent were deprived of the opportunity of acquiring the assets for use in competing in the market; and
- the barriers to entering the market were significantly raised thereby deterring or preventing potential competitors entering the market.

The Court noted that Pioneer and Besser by not filing defences had avoided lengthy and expensive litigation.

The Court ordered that Pioneer pay to the Commonwealth a pecuniary penalty in the sum of $3.9 million and Besser pay to the Commonwealth a pecuniary penalty in the sum of $900 000.

The Court also ordered by consent that Pioneer and Besser pay the applicant's costs of and incidental to these proceedings, agreed in the sum of $200 000.

The Court noted Pioneer and Besser undertakings to the Court that, until 20 December 2001, they would not acquire, or attempt to acquire, either directly or indirectly:

- any shares in the capital;
- any interest, legal or equitable, in any shares in the capital; or
- any assets,

of a body corporate, or the assets of a person, (the total value of which in each case exceeds $5 million), that is a competitor or potential competitor of Pioneer or Besser in any market for the production and supply of concrete masonry blocks in Australia, without first providing 30 days prior written notice to the Commission of their intention to do so.

Conclusion

These proceedings were the first resulting in pecuniary penalties under s. 50 of the Trade Practices Act. As the facts placed before the Federal Court, and the penalties recommended to the Court, were the subject of agreement between the parties, no written Court decision was required or produced.

Alan Ducret, Regional Director, Brisbane office, ACCC

ACCC v Hungry Jack's Pty Ltd and TPC v Optus Communications Pty Ltd & Optus Mobile Pty Ltd

Hungry Jack's	*Optus*
Federal Court	*Federal Court*
Carr J	*Tamberlin J*
5 November 1996	*6 March 1996*

These cases make significant comments about corrective advertising. The first looks at the nature and extent of corrective advertising needed in relation to a sunglasses promotion with implications for public safety. The second considers several factors, including the lapse of time, which bear on the question of whether a Court should make any order for corrective advertising.

Hungry Jack's

In this matter, a very large number of inexpensive sunglasses were sold to consumers as part of the 'Shades' promotion in conjunction with a '$6.95 dinner' offer. Tests of the sunglasses showed that they did not meet the Australian Standard for luminous transmittance. Therefore, they required labelling as 'specific purpose sunglasses ... not suitable for driving'. However, relabelling did not occur before a significant number of consumers purchased the sunglasses without the warning.

Due to public safety concerns, the Court heard and decided this case within three weeks of the filing of the application by the Commission.

In deciding what corrective advertising was needed to reach the 'unwarned' consumers, the Court looked at several matters including:

- the effect of media coverage and certain other steps already taken by Hungry Jack's;
- whether newspaper or television advertising was more likely to reach the Hungry Jack's clientele; and
- the impact of the cost of the advertising on Hungry Jack's.

The Court took into account the incidental television and radio coverage of the sunglasses safety issue. It also examined the effect of corrective advertising already undertaken. The Court found that these newspaper ads were 'very small' and that print ads were 'relatively ineffective' in reaching the company's customers.

Similarly, the Court discounted the effect of a relatively unnoticeable 'banner' message about the safety issue appearing in later television advertising. Nor was point of sale advertising about the limitations of the sunglasses really adequate. Taking all of these matters together, there remained the likelihood that a significant number of customers not warned in the first instance would still not know about the problem.

The Court referred to the 'very high' percentage of the Hungry Jack's advertising budget which is devoted to television. This led to the observation that the company 'uses commercial television in very strong preference to newspapers'. The Court therefore agreed that television advertising should be the primary means used to reach the remaining uninformed customers.

The Court ordered a series of eight brief television advertisements over a fortnight to address the safety issue. The Commission had sought twice as much advertising on the basis that the original promotion made very heavy use of television. The Court did not accept that in this instance the corrective advertising must match the intensity of the original promotion.

On the issue of the cost of the corrective advertising ordered, the Court noted that this cost could be considered 'insignificant' in comparison to the company's 'annual television advertising budget'. The Court also ordered a single, large newspaper advertisement and the display of point of sale posters.

Optus case

The corrective advertising aspect of this case needs to be seen in the broader context of the case as a whole.

The case concerns the promotion of the Optus mobile telephone 'Freestyle Plan' and the related offer of 'free weekend local calls' to the value of $52. The Court found that the promotion would leave members of the target audience with 'the clear and dominant impression' that the offer of 'free weekend local calls' included calls to other mobile phones. However, the finer details of the Freestyle Plan actually excluded such calls. In the Court's view, the overall promotion and marketing of the plan was misleading in that it did not sufficiently reveal or emphasise this exclusion to potential customers.

In reaching its judgment, the Court carefully considered the meaning which the target audience would be likely to give to the phrase 'local calls'. The Court found that this meaning was a geographic one (i.e. calls within a certain proximity of the user including calls to other mobiles) rather than one relating to the timed or untimed nature of the calls (which distinction could exclude mobile to mobile calls).

The Court granted a declaration and injunctive relief in relation to the misleading conduct engaged in by Optus. Relevant to this decision was a review of the lengthy history of the matter (extending over almost the whole previous year), the various positions taken by Optus and the then TPC at different stages, and the usefulness of such orders in relation to future market conduct. The Court concluded that a clear public interest existed in the corrective impact of the orders on future marketing of mobile phones.

However, the Court refused to order any corrective advertising in this case. Its basis for this decision was that:

- Optus had taken a variety of remedial measures (although the Court noted that these 'have not been wholly successful');
- the declaration and injunctive relief sufficiently protected the public interest;
- corrective advertising has a remedial rather than punitive purpose; and (most importantly it appears)
- the lapse of time since the last misleading conduct (at least six months) combined with the consideration that the purpose of the advertising had been to get consumers to make inquiries with Optus, and this purpose and 'the operative effect of the misrepresentations' were now spent.

In view of the above, the Court concluded that 'corrective advertising would be futile and would not advance the protection of consumers ... (and) ... would put Optus to unnecessary and substantial expense'.

Comment

The Hungry Jack's decision provides very useful guidance on the nature and magnitude of corrective advertising which is justified. Where a company makes particular uses of a given medium in its advertising efforts, that company should be prepared to provide similar information services through the same medium to propagate the correction.

This decision also demonstrates the advantage of quick court hearings in ensuring that corrective advertising is topical and effective. To an extent, though, the decision is an unusual one given its public safety dimension and the corresponding strength of arguments in favour of expedition of proceedings.

By contrast, the Optus decision illustrates what can occur to corrective advertising when the court perceives that 'the world has moved on' since the offending conduct. Should the court consider there is no remaining consumer or public benefit to be gained, it will be very disinclined to make the orders sought.

Timothy Moe, Assistant Director Compliance Education Unit, ACCC

Private action

Gabor Martin Nagy & anor v Masters Dairy Ltd

Federal Court of Australia, Western Australia District Registry
(General Division) No WAG 27 of 1995
13 December 1996
Nicholson J

The applicants, Gabor Martin Nagy and anor, brought an action for breach of contract and of s. 52 of the Trade Practices Act in respect of an alleged loss of opportunity to continue to trade as 'Maddington Milk Supply' and operate a milk round in the Maddington area of Western Australia.

Background

The applicants had traded as 'Maddington Milk Supply' from 1966. They purchased the majority of their milk and milk products from the respondent, Masters Dairy Ltd. The conduct of the business was regulated by the Dairy Industry Authority Act (WA). In 1993 the State Minister for Primary Industries announced that the Western Australian Government intended to deregulate the milk distribution system. The milk vendors and distributors in metropolitan and country areas would not require licences to deliver milk.

As a result of the deregulation in the market, the respondent intended to enter into contracts with distributors that would enable the respondent to compete in the marketplace. The applicants received an example of a distribution agreement from the respondent which they perceived as being too favourable to the respondent. The parties met and corresponded several times during 1994 in order to address the applicants' concerns.

During this time the applicants made it clear that they were not sure whether they were going to enter into any agreement with the respondent, stating on two occasions during telephone conversations with the respondent that there was a 90 per cent chance that they would not. The applicants considered that they had plenty of time to make a final decision about whether to enter the distribution agreement, an expectation recognised by the respondent.

On 13 February 1995, having decided to enter into the distribution agreement with the respondent, the applicants met with the respondent. The applicants were informed at that meeting that the respondent had decided to award the contract to another distributor. The following day the respondent entered into a distribution agreement in respect of the Maddington area with the rival distributor.

Trade practices claim

The applicants alleged that the respondent's failure to inform them that it was negotiating with a rival distributor before the advertised deadline was a deliberate failure to disclose the true state of affairs, and/or constituted misleading conduct in breach of s. 52 of the Trade Practices Act. The misleading character of the omission was alleged to derive from the inconsistency of silence with the reasonable expectation which the applicants had of negotiating a distribution agreement with the respondent in good faith.

A representation?

The applicants' case was that, induced by and in reliance on the conduct and representations of the respondent, they did not accept the offer until 13 January 1995 and deferred acceptance of the opportunity to sign the distribution agreement.

Nicholson J found that it was not possible to infer from the respondent's conduct that there was a representation that:

- the applicants would be able to enter into the distribution agreement;
- the respondent would negotiate only with the applicants in relation to such an agreement; and
- the respondent would give reasonable notice to the applicants of its intention to vary the terms of negotiation with the applicants or its intention to negotiate or enter into a contract with another party.

Nicholson J noted, however, that it was not necessary that the applicants make out a representation in order to establish misleading or deceptive conduct: *Demagogue Pty Ltd v Ramensky* (1992) 39 FCR 31.

A reasonable expectation?

Justice Nicholson noted that the failure to communicate may constitute misleading or deceptive conduct because the person who ultimately may act to his or her detriment is entitled to infer from the silence that no danger or detriment existed: *Winterton Constructions Pty Ltd v Hambros Australia Ltd* (1992) 39 FCR 97.

The judge found that the applicants could not have had any reasonable expectation that there would be disclosure of the identity of the persons with whom the respondent proposed to negotiate or contract concerning the Maddington zone. However, the position in relation to notice of intention to contract with another party (the identity of whom was not disclosed) required further consideration.

In all the circumstances, Nicholson J was of the opinion that 'the applicants could reasonably have expected to be advised the time had been reached where they would lose their opportunity to contract unless they agree to enter into a distribution agreement'.

The circumstances included:

- the long business relationship between the parties;
- the respondent's conduct throughout the negotiating process;
- the absence of any deadline being made known to the applicants previously; and
- the respondent's continued recognition that the zone could be taken up if the applicants wished.

The particular matter in relation to which the silence operated was that the time had come for the applicants to make a final decision, failing which the zone would be allocated to another. In all the circumstances the respondent's silence on that fact supported an inference in the mind of the applicants that the time for final decision had not arrived and that, consistently with their conduct over preceding months, they could continue to consider the matter.

Deliberateness?

The respondent contended that silence cannot constitute or be part of misleading or deceptive conduct unless it is deliberate. Nicholson J considered the various authorities that supported that proposition. He was of the opinion that intention is not a disqualifying factor: the question is whether the silence is misleading or deceptive. Nicholson J relied on what Black CJ said in *Demagogue Pty Ltd v Ramensky* (1992) 39 FCR 31:

> Silence is to be assessed as a circumstance like any other. To say this is certainly not to impose any general duty of disclosure; the question simply is whether, having regard to all the relevant circumstances, there has been conduct that is misleading or deceptive or likely to mislead or deceive. ... Although 'mere silence' is a convenient way of describing some fact situations, there is in truth no such thing as 'mere silence' because the significance of silence always falls to be considered in the context in which it occurs.

The Court noted that if it was necessary for the applicants to discharge an onus of proving on the balance of probabilities the non-disclosure to them was deliberate then it considered that the applicants had done so.

Whether misleading or deceptive conduct

The respondent contended that this was a case where the information not disclosed was the type of information which the behavioural norms of bargaining in a commercial context do not either require to be disclosed or make misleading or deceptive when not disclosed: *Lam v Ausintel Investments Australia* (1989) 97 FLR 458. This was accepted by the Court to the extent that the identity of the other party need not have been disclosed. In all the circumstances, however, the non-disclosure of the fact that the deadline for signing the distribution agreement had been reached did constitute misleading and deceptive conduct.

Reliance

The evidence showed that had the applicants been aware of the impending loss of opportunity they would have contacted the respondent with a view to entering into a distribution agreement. The applicants' failure to enter into an agreement with the respondent arose out of the respondent's silence that the applicants' non-committal to any agreement would be taken as a final negative response. Such reliance was held to be reasonable.

Causation

To recover damages the applicants had to prove the loss or damage claimed was caused by conduct in breach of the Trade Practices Act: s. 82 and *Wardley Australia Ltd v Western Australia* (1992) 175 CLR 514. Causation is a matter of fact to be determined by reference to commonsense and experience: *March v Stramare* (1991) 171 CLR 506.

Loss of an opportunity to obtain a commercial advantage or benefit is 'loss or damage' within s. 82: *Sellars v Adelaide Petroleum* (1994) 179 CLR 332. The relevant loss of opportunity in this case was that the applicants could have negotiated with the respondent a distribution agreement. The applicants had a substantial prospect of acquiring the benefit of the distribution agreement, the loss of which was caused by the misleading conduct of the respondent.

The quantum of damages to be awarded in this case could not be determined by the judge because of the divergent assumptions about the value of the distribution agreement adopted by the respective experts. Further submissions as to quantum of damages were necessary.

Nick McGrath, Lawyer, Legal Unit, ACCC