


**CASEFLASH**

## ACCC -v- George Weston Foods Limited

### – Court warns of dangers of not having a compliance culture.

*...‘This decision is a timely reminder of the importance of implementing comprehensive trade practices compliance programs and the importance of constantly monitoring their effectiveness, including at the highest levels of the organisation.’ ACCC Chairman Graeme Samuel.*

On 25 August 2004, Justice Gyles of the Federal Court found that George Weston Foods Limited (*‘George Weston’*) contravened section 45A of the *Trades Practices Act* (*‘the Act’*), through the actions of Paul Loneregan, a then director and chief executive of the Flour Milling Division, when he tried to fix the price of flour in the Australian market with a competitor.

#### The Facts

In late 1999, Mr Loneregan telephoned Mr Peter Simpson, General Manager of Manildra Flour Mills Pty Ltd (*‘Manildra’*), whose duties included determining flour pricing. At the time, Manildra was a competitor of George Weston in the wholesale wheaten flour market in several states.

Mr Loneregan said that George Weston intended to increase the price of flour and asked what Manildra intended to do about prices. It was inferred at the hearing that Mr Loneregan probably suggested that Manildra should co-operate. Mr Simpson responded that he would need to speak to the Chairman of Manildra (who later instructed him not to return the call).

A few weeks later, Mr Loneregan telephoned the Marketing Manager for Manildra and again stated that George Weston was putting up the flour price and that it was seeking Manildra’s co-operation. The response again was that the matter would need to be passed on to the Chairman - who again instructed that the call should not be returned.

#### The Law

Section 45 of the Act prohibits (amongst other things) contracts, arrangements and understandings that have an anti-competitive purpose. Section 45A (1) of the Act deems price-fixing arrangements between competitors to be anti-competitive conduct for the purposes of section 45. Pursuant to these sections of the Act, agreements between competitors relating to prices are prohibited.

As George Weston admitted the conduct, the main issue at the hearing was the appropriate penalty. Section 76 of the Act provides that the Court shall consider the following factors when determining a penalty:

1. The nature and extent of the of the act or omission;
2. Any loss or damage suffered as a result of the act or omission;
3. The circumstances in which the act or omission took place; and
4. Whether the person has previously engaged in similar conduct.

In the case of a body corporate, the maximum penalty for each act or omission is \$10 million.

#### The Hearing

In 2002, the ACCC commenced proceedings against George Weston and Mr Loneregan. The proceedings followed an ACCC investigation- prompted by a report from an anonymous whistleblower. The ACCC eventually discontinued the proceedings against Mr Loneregan.

The ACCC alleged that:

1. Mr Loneregan tried to reach an agreement with a competitor about George Weston’s decision to raise the price of its wholesale flour; and
2. Had agreement been reached, it would have amounted to a price fixing arrangement under the Act and that, accordingly, both George Weston and Mr Loneregan had attempted to breach the Act.

Mr Loneregan gave evidence that, although he was aware of the relevant provisions of the Act, his intention was to reach an agreement with Manildra to raise and maintain flour prices.

## The Decision

Justice Gyles ordered that George Weston:

1. Pay a pecuniary penalty of \$1.5 million to the Commonwealth; and
2. Be restrained for a period of 4 years from making or attempting to make any price-fixing arrangements with competitors regarding the price of flour.

Justice Gyles reasoned in his decision that:

1. It was a deliberate attempt at the highest level of a very substantial corporation to breach the most fundamental prohibition in Part IV of the Act. George Weston had a very poor record in this regard and had previously engaged in price-fixing or attempted price fixing conduct in 1976, 1995 and 1997. The conduct in 1976 incurred a penalty of \$50,000; the conduct in 1995 incurred a penalty of \$750,000; and the conduct in 1997 incurred a fine of \$900,000;
2. Although the attempt at price-fixing was unsuccessful and no actual loss or damage was occasioned by it, had the price increase occurred there would have been widespread detrimental effects flowing through to consumers- as the industry is very large and strategic and is central to the production of many staple foods;
3. The conduct was typical of cartel behaviour;
4. Although George Weston admitted the contravention, it was entitled to very little lenience as the admission came only after receiving Mr Loneregan's affidavit which contained admissions about the conduct. Prior to that, George Weston had defended the case;
5. Although George Weston led evidence about the development of its trade practices compliance program and Justice Gyles acknowledged that the program was *'a serious and well designed endeavour to ensure compliance with the Act'*, he noted that the program has *'little to do with the conduct exemplified by this case,*

*namely, the deliberate action of an executive director of the company'*;

6. It was to be inferred that there was something in Mr Loneregan's arrangements with the company which must have motivated him to act as he did. Alternatively, it may be that this type of activity was commonplace in a tightly organised oligopoly. Justice Gyles was not satisfied that this was simply an isolated act of madness by Mr Loneregan;
7. Although Mr Loneregan's employment was terminated, the reasons for the termination were not disclosed to other employees and he was subsequently retained as a consultant by George Weston. The company did not take the opportunity to demonstrate to other employees how seriously it viewed a breach of the Act by a senior employee. Justice Gyles noted that an appropriate response by the company would potentially have been more effective than any compliance program.

## The Effect of this Decision

The penalty imposed upon George Weston clearly demonstrates the seriousness with which the courts view attempts by competitors to fix prices.

In addition to reinforcing the importance of implementing a trade practices compliance program, Justice Gyles' decision should serve as a warning to all organisations to address any problems in their corporate culture which may allow or encourage contraventions of the Act to occur. Also, in the event of a contravention of the Act, organisations should demonstrate to all employees their commitment to trade practices compliance through an appropriate response to the contravention.

In commenting upon the decision in this matter, ACCC Chairman Graeme Samuel said that *'it is a timely reminder of the importance of implementing comprehensive trade practices compliance programs and the importance of constantly monitoring their effectiveness, including at the highest levels of the organisation.'*

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