

Competition Law News

ACCC v ANZ – Court dismisses price fixing allegations

Australian Competition and Consumer Commission v Australia and New Zealand Banking Group Limited [2013] FCA 1206 (**ACCC v ANZ**).

WHAT YOU NEED TO KNOW

- The Federal Court has dismissed proceedings brought by the Australian Competition and Consumer Commission (**ACCC**) against Australia and New Zealand Banking Group Limited (**ANZ**) alleging breaches of the price fixing provisions of the then *Trade Practices Act 1974* (Cth) (now the *Competition and Consumer Act 2010* (Cth) (**CCA**)).
- While the case was determined on its own particular facts the findings are consistent with the proposition that a principal does not compete with its agent for the purposes of the prohibition of price fixing arrangements between competitors. Had the Federal Court upheld the ACCC's case theory many common commercial practices engaged in by principal-suppliers in managing distribution channels would have been called into question.
- The Court was critical of the ACCC's reliance on short extracts from documentary evidence and (as ANZ did not lead evidence) the case reinforces that the onus is on the ACCC to prove its allegations.
- This note briefly considers Justice Dowsett's judgment, and highlights some important strategic matters to consider when defending proceedings brought by the ACCC.

Introduction

On 18 November 2013, the Federal Court dismissed proceedings brought by the ACCC against ANZ. The case was instituted in the Federal Court in Brisbane in 2007 and heard in March and April 2012. Broadly, the ACCC alleged that ANZ had engaged in conduct that had the purpose or effect, or was likely to have the purpose or effect, of fixing a price or rebate. The allegations arose under the following circumstances:

- ANZ sells loan products through a range of channels. During the relevant period for these proceedings, ANZ sold loan products through the ANZ Mortgage Group, which in turn used various distribution channels including ANZ branches,

Mortgage Solution franchisees, brokers and specialised agencies.

- In 2001, ANZ appointed Australian Financial Group Limited (**AFG**) as an independent contractor to market and arrange certain ANZ loan products for customers.
- AFG subsequently appointed, as accredited officers under its contract with ANZ, certain mortgage brokers (operating under the Mortgage Refunds Pty Ltd (**Mortgage Refunds**) banner).
- Mortgage Refunds advertised and promoted a "mortgage refund" offer involving the rebate to customers of part or all of the commissions paid by ANZ to the brokers.

- In March 2004, ANZ wrote to AFG to prevent Mortgage Refunds advertising and promoting the "mortgage refund" on ANZ loans by cancelling the mortgage brokers' accreditation. Following negotiation between the parties, ANZ agreed to re-activate the accreditation provided Mortgage Refunds agreed that:

The maximum refund that can be provided to the customer in relation to an ANZ Loan Product is to be no greater than the amount of the Loan Approval Fee as determined by the ANZ Bank. The amount of this fee may be altered at any time and at the Bank's sole discretion.

Accordingly, ANZ could effectively match the "mortgage refund" if it chose to waive the Loan Approval Fee.

The Court considered that the primary factual issue concerned the alleged supply of "loan arrangement services",¹ and specifically, whether ANZ branches and mortgage franchisees competed with Mortgage Refunds (or its brokers) for the supply of such services.²

The ACCC did not allege that the specialised agents competed with branches and franchisees or with the brokers in supplying those services.³

The Court ultimately held that ANZ did not participate in any market in which the brokers provided loan arrangement services to potential borrowers. The Court therefore concluded that ANZ and Mortgage Refunds (or its brokers) were not competitors in that market. As the price-fixing prohibition only applies to contracts, arrangements or understandings between competitors, ANZ's conduct was found not to amount to a price fixing agreement.⁴

Competition in the market for the supply of loan arrangement services

The key component to the ACCC's case was establishing that the ANZ branches or franchisees competed with the Mortgage Refunds brokers in the market for the provision of "loan arrangement services".

In effect, the ACCC's case was that ANZ's distribution channels (ie, its branches, franchisees and brokers) should be treated as economic entities, separate from ANZ Mortgage Group (and presumably ANZ itself), and

¹ ACCC v ANZ at 616.

² ACCC v ANZ at 617.

³ ACCC v ANZ at 618.

⁴ ACCC v ANZ at 638.

participated in the loan arrangement services market.⁵ Accordingly, on the ACCC's analysis, the entities would be in competition with the Mortgage Refund brokers.

However, the Court was not satisfied that either the ANZ branches or the franchisees supplied loan arrangement services to potential borrowers. Instead, they supplied sales services to ANZ Mortgage Group and/or ANZ.⁶ Further, even if the staff supplied some sort of service to potential borrowers, the Court considered that they did so incidentally and on behalf of ANZ.⁷ The Court found that brokers performed a different function, holding themselves out as offering advice and information concerning a wide range of products, as well as assistance in preparing and submitting loan applications. The Court concluded that the ANZ branches and franchisees did not participate in any market in which the brokers provided loan arrangement services to potential borrowers.⁸

The Court also stated that while section 45A⁹ recognises that relevant competition may occur between one party to the relevant arrangement and a body corporate related to another party, it does not follow that section 45A applies where:

- there is a relevant arrangement as between A and B;
- two "profit centres" within B are to be treated as separate "economic entities" for the purpose of determining whether A and B were in competition;
- such competition is said to have been between A and one of B's separate economic units; but
- the agreement was between A and another of B's separate economic units.¹⁰

The ACCC's evidentiary burden and conduct of litigation

ANZ did not lead evidence in defence of the ACCC's claims against it, and the outcome of this case highlights some important strategic matters to consider when defending proceedings brought by the ACCC.

Firstly, the case reinforces that the obligation is on the ACCC to prove its allegations. Whilst Justice Dowsett

⁵ ACCC v ANZ at 649.

⁶ ACCC v ANZ at 631 and 634.

⁷ ACCC v ANZ at 632 and 633.

⁸ ACCC v ANZ at 632 and 638.

⁹ The relevant price fixing prohibition contained in the old *Trade Practices Act 1974* (Cth).

¹⁰ ACCC v ANZ at 651.

held that "the absence of any evidence to contrary effect from ANZ may permit me to be more courageous in drawing inferences than I might otherwise have been", he was satisfied that the lack of evidence did not "loom large in this case" and that in fact, "much of the evidence called by the ACCC supported ANZ's case".¹¹

Accordingly, the case serves as an important reminder that careful consideration should be given to whether evidence should be lead, particularly where the strength of the ACCC's evidence is in doubt.

Secondly, Justice Dowsett was critical of the ACCC's use of, and reliance on extracts from ANZ documents stating that "to the extent that ACCC relied on the ANZ documents, it frequently fails to have regard to the context in which particular statements were made"¹² and "the ACCC's attempts to rely on ANZ documents frequently involves reliance on short extracts from quite complex documents where context is important, frequently undermining ACCC's reliance on such extracts".¹³

Implications for businesses with multiple distribution channels

This judgment provides helpful guidance for businesses operating through multiple distribution channels, including both internal and external sales channels. It is important to look at the nature of the goods or services being supplied in each case, and to give weight to business reality, in determining where competition occurs. As Justice Dowsett's decision made clear, there was no relevant competitive overlap between the loan products being supplied by ANZ, and the "loan arrangement services" being supplied by Mortgage Refunds and other brokers.

The case has interesting parallels with another Federal Court proceeding: *ACCC v Flight Centre Limited* QUD 177 of 2012. The *Flight Centre* case was also heard in the Federal Court in Brisbane, just a few months after the ANZ proceedings. The ACCC again alleged that there was competition between different distribution channels – in that case, between travel agents on the one hand, and airlines that sold airfares directly to customers via their websites on the other. The outcome of the *Flight Centre* proceedings could have potentially wide-ranging implications for agency arrangements in a number of different industries, and the ACCC will no doubt be hoping for a more successful result than in the ANZ case.

¹¹ *ACCC v ANZ* at 563.

¹² *ACCC v ANZ* at 562.

¹³ *ACCC v ANZ* at 563.

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