

# FEDERAL COURT FINDS CRACKS IN ACCC'S EGG CARTEL CASE

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Legal Briefings - By **Matthew Bull** and **Emily McConnell**

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In a rare case brought under the cartel laws, the ACCC has failed to establish that the Australian Egg Corporation Limited and two egg producers attempted to induce 19 egg producers to make an arrangement to reduce the production of eggs in Australia.

While the Court considered that the ACCC claims had 'some force', the Court found that there was insufficient evidence of an intention to bring about an arrangement or understanding to reduce egg production. In reaching this conclusion, the Court took into account a range of factors, including the lack of persuasive evidence that options canvassed for reducing eggs were put forward as a proposal for collective action, the importance of the role and character of the Egg Corporation as an industry association and the fact that pointing fingers at particular producers during the meeting was inconsistent with an intention to induce parties to agree upon a form of mutual and reciprocal action.

While the Court ultimately found that there was insufficient evidence of an attempt, the case does highlight the issues that members of industry associations can face when meeting to discuss and share information during challenging industry conditions.

## NO ATTEMPT TO INDUCE A CARTEL ARRANGEMENT

### Background

The Egg Corporation is an industry body. Its principal function is the collection, analysis and communication of information relating to the egg industry, including crisis and issue management. The Egg Corporation Board usually meets once a month. It publishes a quarterly magazine, *Eggstra Eggstra*, and a fortnightly email, *EggCorp EggsPress*.

In response to an industry-wide over-supply of eggs which had caused a sharp decline in egg prices, the Egg Corporation organised a 'summit' on 8 February 2012 for the 25 largest egg producers. At the meeting, power point presentations were delivered on the oversupply situation and various 'solutions' were identified, including disposing of eggs, donating eggs to charity and culling birds.

The ACCC brought proceedings claiming that Egg Corporation, the Managing Director of Egg Corporation and 2 egg producers (Farm Pride and Ironside) had attempted to induce 19 egg producers at the meeting to make an arrangement or understanding to limit the supply of eggs. In particular, the ACCC claimed that the meeting was a 'call to action' to limit egg production which amounted to prohibited cartel conduct.

Shortly before trial, one of the Directors of Farm Pride (Mr Lendich), agreed with the ACCC that he had engaged in the alleged attempt.

## **THE COURT'S DECISION**

The Court accepted that the meeting involved a direct call to action (and not just information sharing). In particular, the Court agreed with a number of elements of the ACCC's case which suggested a direct call to action, including:

- an atmosphere of crisis - the Court had no difficulty finding that the meeting took place in an atmosphere of crisis (as was evident in the use of the word 'summit'), which suggested that more than just information sharing would occur,
- Egg Corporation's custom and practice went beyond mere information sharing - the Court accepted that Egg Corporation did from time to time encourage egg producers to reduce supply,
- the calling of a special meeting was unusual - the Court accepted that the calling of a special meeting of the top 25 egg producers in the country (~68% of egg production), suggested that it was more than just the normal type of meeting for sharing information,
- an independent auditor to monitor compliance - the Court accepted that an independent auditor could be used to overcome the misgivings of the egg producers about direct action arising from their distrust of each other (but could also allow Egg Corporation to know whether each producer was, by voluntary and individual action, reducing its egg numbers), and
- no 'innocent' explanation for the meeting - the Court accepted that the agenda indicated that the meeting was not merely for information sharing purposes as it contemplated discussion of means to 'resolve the current crisis' and to seek a 'path forward' in a 'coordinated and consolidated fashion'.

However, while the ACCC case had 'some force', the Court found that there was insufficient evidence of an intention to induce a collective arrangement to reduce the production of eggs. In reaching this conclusion, the Court took into account a range of factors, including:

- The respondent's actions at the meeting did not facilitate a consensus amongst the egg producers. The Court considered it significant that a key focus of the meeting was on producers who had increased their production rapidly in excess of the general increase in demand for eggs. This 'finger pointing' was inconsistent with an intention to induce all of the attendees to agree upon a form of mutual and reciprocal action.
- The role and interests of the industry association. The respondents emphasised that Egg Corporation had 'nothing to gain' from any collective action. The Court accepted that the role and character of Egg Corporation is important and that, 'trade associations and their officers may legitimately encourage their members to examine their profitability and to make production and pricing decisions in order to maintain profitability'.
- Similarly, lack of knowledge regarding competition laws will not protect an association. In the present case, the Court, '[did] not regard the circumstance that the respondents' conduct was not covert as being particularly significant',<sup>1</sup> because the Court found the respondents were oblivious to the fact that their conduct may be regarded as unlawful.
- The nature of the egg industry. The Court accepted that the industry was generally 'of a competitive kind', such that it was likely that individual producers would only take action where it was in their individual commercial interest to do so.<sup>2</sup> The evidence showed that the Egg Corporation was making an appeal to both the industry as a whole, as well as the interests of each individual egg producer. The Court accepted the respondent's submission that all Egg Corporation wanted was for 'everybody to think harder' about their own circumstances and what they can do to solve the problem.
- The ACCC's case was circumstantial, based entirely on the documents of the Egg Corporation. There was a significant volume of written materials produced by the Egg Corporation in relation to industry supply, including in the past (in *Eggstra Eggstra* and *EggCorp EggsPress*) as well as in connection to the meeting. However, while the evidence indicated the Egg Corporation sought to bring about a response to the crisis, the documents did not clearly show Egg Corporation's intention in relation to collective action.
- There was no precise form of the alleged intended arrangement or understanding. At the meeting, the Egg Corporation presented a variety of options for addressing the oversupply but the Court found there was 'insufficient evidence to warrant the conclusion that these options were propounded as a form of collective action'. While the Court did not consider the lack of a 'precise form of the alleged intended arrangement or understanding' fatal to the ACCC's case, it noted that this did make it 'more difficult' to be satisfied that the respondents did seek to induce an agreement or understanding which contravened the law.

# KEY IMPLICATIONS

## Competition law applies broadly

The Court confirmed that industry bodies like the Egg Corporation can be subject to competition law, although that they may be not-for-profit organisations, may perform a number of activities which have a public nature and may have 'a number of close ties' to the Australian Government.

The key issue is whether the body 'carries on a business'. The Court re-affirmed that this concept is broad, finding that it would be 'inappropriate' to construe the concept narrowly. The Court considered that the Egg Corporation did carry on a business in the required sense, namely the business of promoting the Australian egg industry. The Egg Corporation engaged in activities of a commercial nature such as research and development, marketing and promotional activities directed at increasing the sales of eggs, the provision of quality assurance and accreditation, and the collection, analysis and dissemination of information concerning the production and consumption of eggs. As such, it was carrying on a business and was subject to competition law.

## Trade associations must walk a fine line when sharing information

The decision confirms that parties can share information, provided that it does not give rise to an agreement between them to act in a certain way. The key test is whether there is a consensus as to what is to be done (not just a mere hope or expectation).

Importantly, the Court confirmed that trade associations can share information and can even legitimately encourage association members to examine their own profitability and make production and pricing decisions in order to maintain their own profitability. However, industry bodies should be careful not to go beyond disseminating information for each member to separately consider for itself and should not stray into the world of facilitating an industry-wide consensus about specific action.

While it is important to be clear about the role of industry associations and make statements about the purpose of any meetings at the start, this in itself will not necessarily protect participants. Given the potential concerns that can arise from meetings of competitors, trade associations should think very carefully about their conduct. In particular, it would be advisable to obtain advice before suggesting any action aimed at generating an industry-wide response.

**This article was written by Matthew Bull, Partner, Brisbane and Emily McConnell, Senior Associate, Melbourne.**

## ENDNOTES

1. At [359].

2. At [391].

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