

TRADE PRACTICES COMMISSION V. NICHOLAS ENTERPRISES PTY LTD (NO 2) (1979) 40 FLR 83

Federal Court of Australia

FACTS

The defendants ran five hotels in the metropolitan area of Adelaide. The defendants all sold packaged beer to the public.

The Trade Practices Commission commenced proceedings against the defendants claiming pecuniary penalties and injunctions. The claim alleged breaches of section 45 of the Trade Practices Act as the defendants had made an arrangement or arrived at an understanding which had the purpose or effect of substantially lessening competition and that they gave effect to that understanding. The essence of the arrangement as alleged was that the defendants would only allow two bonus bottles to customers who purchase twelve bottles instead of the then customary three bonus bottles.

ISSUES

Had the defendants made an arrangement or reached an understanding that they would reduce their bonus supply of beer?

Did the alleged arrangement lead to, or substantially reduce competition?

FINDING

An arrangement or understanding within the meaning of section 45 of the Act requires each party to have communicated with the other, for each party to have raised an expectation in the mind of the other and for each party to have accepted an obligation from the other.

There must be a meeting of minds. The raising of the expectation in one party must be communicated to the other party.

QUOTE

Fisher J said:

“A significant feature is the emphasis placed upon the necessity for each of the parties to have communicated with the other, for each to have raised an expectation in the mind of the other and for each to have accepted an obligation qua the other. These are, in my opinion the essential elements of the requisite meeting of minds.

“It seems to me also that an understanding must involve the meeting of two or more minds. Where the minds of the parties are at one that a proposed transaction between them proceeds on the basis of the maintenance of a particular state of affairs or the adaptation of a particular course of conduct, it would seem that there would be an understanding within the meaning of the Act”.

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Jim Doyle
1800 888 783

jdoyle@doylesconstructionlawyers.com
www.doylesconstructionlawyers.com

IMPACT

An arrangement to reduce competition in a market does not need to be a legally binding agreement or contract to make the parties liable under the Act.

Arrangements between competitors for the same market or customer may be in breach of the Act.

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