



CASE STUDY 17

DECEMBER 2013

Australian Competition and Consumer Commission v. Black & White Cabs Pty Ltd* (Anticompetitive Agreements)

Forum:

Federal Court of Australia

Legislative Provisions referred:

***Trade Practice Act, 1974*¹**

1. Section 47 (1) of the Act, incorporates provision pertaining to 'restriction on exclusive dealing'.
2. Section 47 (6) of the Act, incorporates provision pertaining to 'exception to the restriction on exclusive dealing'.
3. Section 76 of the Act, incorporates provisions pertaining to 'pecuniary penalties'.

Parties to the Case:

Australian Competition and Consumer Commission (ACCC) - Applicant

Black & White Cabs Pty Ltd. (B&W Cabs) – Respondent

Cabcharge Australia Ltd (Cabcharge)- Third Party

Facts of the Case:

The respondent in the instant case, B&W Cabs provides network services such as booking, dispatch etc. to its various operators and also permits operators to use taxi service licences it manages. The respondent entered into an agreement with Cabcharge, agreeing to use its payment systems in its operated taxis. Under the agreement, Cabcharge provided a merchant facility to B&W Cabs so that its operators and drivers could use its payment system in their taxis, and it would pay B&W Cabs 2.5% of the taxi fares processed using the system.² The respondent used

a standard form of contract having a direction for the taxi operators that they must use the electronic payment system approved only by them, exclusively during the term of the taxi operator's engagement with the respondent. And thus, creating an exclusive dealing contract between themselves, taxi operators and Cabcharge. It should be noted that the respondent had approximately 1000 taxis under its realm.

In light of the above circumstances, ACCC sought declarations of contravention, injunctions, and the establishment of a trade practices compliance and education/training program along with pecuniary penalties.

Issues raised and observations thereupon:

B&W Cabs were to establish that its agreement with taxi operators pertaining to the extent of requiring them to use *Cabcharge's payment system (CPS)*, does not contravene Section 47(1) and (6) of the Act.

However, during the deposition sessions³ prior to court's proceeding, B&W Cabs conceded to the fact its conduct had contravened section 47 of the TPA. Further, the ACCC and B&W Cabs agreed on proposed declarations and orders to be made by the Court in light of the contravening conduct.

Issue No. 1: Whether B&W Cabs and Cabcharge Australia Ltd, are related company within Section 47(6) of the Act?

ACCC while contesting its submissions before the Court, submitted that B&W Cabs and Cabcharge Australia Ltd. are unrelated companies and therefore an agreement of exclusive dealing would contravene Section 47, as the exception to exclusive dealing provided under Section 47(6) is

* [2010] FCA 1399, decided on December 14, 2010, available on: <http://www.austlii.edu.au/au/cases/cth/FCA/2010/1399.html>. Last visited on November 12, 2013.

¹ Hereinafter referred as 'the Act'. The said Trade Practice Act, 1974 has been replaced by Competition and Consumer Act, 2010.

² The Order, [2010] FCA 1399.

<http://www.austlii.edu.au/au/cases/cth/FCA/2010/1399.html>. Last visited on November 12, 2013.

³ A Deposition is the out-of-court oral testimony of a witness that is reduced to writing for later use in court or for discovery purposes

only pertaining to related companies and thereby making Cabcharge Australia Ltd., a third party.

Issue No. 2: Whether there has been 'Exclusive Dealing' in the instant case?

The Court observed that it has been a prima facie case of exclusive dealing. The Court observed that the respondent entered into a contract with Cabcharge in relation to the use of its payment systems. By virtue of the terms of the contract, all taxis being operated/ permitted through license by the respondent, had to install Cabcharge payment system. Further Cabcharge in return agreed to pay the respondent 2.5% of the GST inclusive amount of all taxi fare proceeding generated through its payment system. Prior to April 2009 B&W Cabs provided network services and taxi licence services on the basis of a standard form of contract. However in April 2009 the respondents revised the terms of its contract. The new contract contained an exclusive dealing clause. Clause 15.3 of the contract provided that:

- a. *Black & White Cabs has an approved electronic payment system being Cabcharge Payment System or such other system which may be approved by Black & White Cabs from time to time.*
- b. *The Operator must use the approved electronic payment system exclusively during the term of this Agreement.*

Therefore making a pre-condition operators and license holders, will have to use Cabcharge's payment system. This conduct was therefore held to be a case of third line forcing.

Decision by the Court:

As B&W Cabs admitted the charge of exclusive dealing, it agreed to undertake various declarations to ACCC and the Court. The Court after formulating the issues and observing assertions there upon, held that the declarations already sought and Orders given by ACCC to the respondents were appropriate. These included:⁴

1. A declaration by the respondents confessing its engagement in exclusive dealing practices.
2. An order requiring B&W Cabs to implement and maintain for 3 years, at its

own expense, a Trade Practices Compliance and Education/Training Program for its directors, officers and senior managers.

3. An order imposing penalty of \$110,000 for the contravening conduct and a payment of \$10,000 towards the ACCC's costs of the proceedings.

Analysis of the Decision:

The instant case is an example of significant monetary penalty considering the duration of violation being only 3 months and various mitigating factors in favour of the respondent. During the investigation, certain evidences were asserted by the respondent showcasing its pious intentions. However still ACCC asserted for imposing penalty over the respondents as this case would only then be able to stand test of time with emphasising the significance of complying the Trade Practices Act. Furthermore, the case established the importance of notifying violation conduct with the ACCC and leniency maintained thereafter.

Interestingly, the Court, ordered the respondents, to organise at its own expense, a training workshop for its directors, officers and senior managers. This issue has also been raised in India.⁵ To build an effective compliance culture, it is important to direct companies to train employees and incorporate competition law compliance programmes.⁶ Such international best practices need to be emulated by the competition authority in India to build a robust competition culture in India.

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⁵Mehta, Pradeep S., 'Build a compliance culture'. Financial Express, 22nd Nov. 2013, available at:

<http://www.financialexpress.com/news/build-a-compliance-culture/1197970/0> (last accessed on 15th of December, 2013)

⁶Sharma, Saket, Competition Compliance and Role of CCI: Need to Move Beyond Advocacy, CIRC Issue Note, 2013, available at: http://circ.in/pdf/Competition_Compliance_and_Role_of_CCI_Need_to_Move_Beyond_Advocacy.pdf (last accessed on 15th of December, 2013).

⁴Supra note 2.