

NOTICE OF FILING

This document was lodged electronically in the FEDERAL COURT OF AUSTRALIA (FCA) on 27/04/2017 5:35:11 PM AEST and has been accepted for filing under the Court's Rules. Details of filing follow and important additional information about these are set out below.

Details of Filing

Document Lodged: Concise Statement
File Number: VID430/2017
File Title: AUSTRALIAN COMPETITION AND CONSUMER COMMISSION v
MURRAY GOULBURN CO-OPERATIVE LIMITED & ORS
Registry: VICTORIA REGISTRY - FEDERAL COURT OF AUSTRALIA



Warwick Soden

Dated: 28/04/2017 10:03:12 AM AEST

Registrar

Important Information

As required by the Court's Rules, this Notice has been inserted as the first page of the document which has been accepted for electronic filing. It is now taken to be part of that document for the purposes of the proceeding in the Court and contains important information for all parties to that proceeding. It must be included in the document served on each of those parties.

The date and time of lodgment also shown above are the date and time that the document was received by the Court. Under the Court's Rules the date of filing of the document is the day it was lodged (if that is a business day for the Registry which accepts it and the document was received by 4.30 pm local time at that Registry) or otherwise the next working day for that Registry.

NCF1

Concise Statement



FEDERAL COURT OF AUSTRALIA
DISTRICT REGISTRY: VICTORIA
DIVISION: GENERAL

No VID

of 2017

NPA: Commercial and Corporations, Regulator and Consumer Protection

Australian Competition and Consumer Commission

Applicant

Murray Goulburn Co-Operative Co Limited (ABN 23 004 277 089) and others listed in Schedule 1

Respondents

A. Important facts giving rise to the claim

1. This is a claim against the first respondent (**MG**), Australia's largest dairy producer, for engaging in unconscionable and misleading or deceptive conduct and making false representations towards farmers concerning the price it would pay them for milk for the 2015/16 financial year (**FY16**) in breach of the *Australian Consumer Law (ACL)*, and against its former Managing Director (the second respondent (**Helou**)) and former Chief Financial Officer (the third respondent (**Hingle**)) for involvement in that conduct.
2. The farmgate milk price (**FMP**) is a weighted average price for milk over a financial year, set solely by MG, that MG pays to dairy farmers in its Southern Milk region (relevantly the dairy regions of Victoria, South Australia and southern New South Wales) from whom it acquires milk (**Farmers**). In parts of the Southern Milk region, MG is the only acquirer of milk from Farmers.
3. Before the start of a financial year MG announced the FMP that would apply at the beginning of that year (**Opening Price**) and its forecast of the average FMP for the full year taking into account variations to the Opening Price (**Final FMP**). Typically, the Opening Price was set conservatively, and at 90 to 96% of the forecast Final FMP, so that there would be 'step-ups' from the Opening Price as the financial year progressed. Farmers expected the Opening Price to be a floor price for milk for the year, and that the Final FMP would be higher than the Opening Price as a result of step-ups.
4. Many Farmers operate small to medium dairy farming businesses. The payments of the FMP were their sole or primary source of income. Many Farmers relied on the Opening Price, and used information given by MG about the Opening Price and forecast Final FMP, when setting their budgets for the financial year and when making their significant business decisions throughout the year, such as whether to increase or decrease herd size, the quality and volume of feed to acquire

Filed on behalf of: The Applicant, Australian Competition and Consumer Commission
Prepared by: Katrina Close, AGS lawyer within the meaning of s 55I of the Judiciary Act 1903
Law firm: Australian Government Solicitor
Tel: (03) 9242 1230
Email: katrina.close@ags.gov.au
Address for service: Level 34, 600 Bourke Street, Melbourne, VIC, 3000
21606535

and when to maximise milk production. Farmers were not in a position to forecast the Final FMP themselves, as the forecast depended on matters that included MG's costs, MG's current and planned product mix, and demand and likely prices in a range of foreign countries.

5. As MG, Helou and Hingle knew, the Farmers relied on the forecasts and were exposed to risk of financial harm if MG provided forecasts or information relating to the FMP that did not have a genuine and reasonable basis, or set the Opening Price at a level that failed to minimise the risk of the Final FMP falling below the Opening Price. Indeed, MG stated that it was committed to making timely and balanced disclosure of all material matters and effective communication with its key stakeholders so as to give them ready access to clear and relevant information to assist them in making informed decisions.
6. As at May 2015, MG was proceeding with an initial public offering (IPO) of units in the MG Unit Trust. MG completed its budget and the forecast Final FMP for FY16 before issuing its prospectus for the IPO. On 1 May 2015 MG issued the prospectus and told Farmers that its forecast Final FMP for FY16 was \$6.05 per kilogram of milk solids (kg/ms). This was earlier than its usual timing for announcing its forecast Final FMP.
7. For FY16 approximately 30% of MG's forecast sales (by volume) comprised dairy commodities, such as bulk milk powder, butter and cheddar cheese. Between 1 May and 24 June 2015 auction prices for dairy commodities declined and sources of expert opinion relied upon by MG lowered their forecast commodity prices for FY16.
8. Notwithstanding those adverse developments, MG chose not to revise its forecast Final FMP before the start of FY16, which in turn caused it to set the Opening Price too high. On 24 June 2015 MG told Farmers that it had fixed the Opening Price for FY16 at \$5.60 kg/ms. It also represented to Farmers that it had fixed the Opening Price at a level that minimised the risk of the Final FMP falling below the Opening Price and would facilitate step-ups from the Opening Price, and that it had a genuine and reasonable basis for this representation. That was not in fact the case, as MG, Helou and Hingle knew.
9. On the same day, MG also represented to Farmers that it forecast a Final FMP for FY16 of \$6.05 kg/ms. In doing so, MG further represented that although the forecast Final FMP was subject to changes in external factors such as global dairy commodity prices, it reflected MG's up to date opinion about those matters, and that there were no material risk factors to achieving a Final FMP of \$6.05 kg/ms known to MG other than the disclosed risk factors. In addition, MG represented that it had a genuine and reasonable basis for making these representations. That was not in fact the case, as MG, Helou and Hingle knew.
10. MG did not withdraw, qualify or correct its representations to Farmers about the Opening Price between 24 June 2015 and 27 April 2016. To the contrary, it reinforced them by further statements confirming the previous forecasts, and by making monthly payments to Farmers in accordance with the Opening Price, despite the adverse information known to MG. Nor did MG withdraw, qualify or correct its representations to Farmers about the forecast Final FMP between 24 June 2015 and 29

February 2016, but made further reinforcing statements. The representations accordingly continued during those respective periods.

11. MG typically prepared internal Revised Income Forecasts (**RIFs**) each month, which forecast its Final FMP and profit for the financial year based on actual sales for the year to date and forecast sales for the balance of the financial year. Helou and Hingle were involved in approving RIFs, then presenting them to the board of directors of MG (**Board**) at monthly meetings (other than in July 2015, January and March 2016, when RIFs were not presented to the Board). The presentation of RIFs to the Board provided MG with an opportunity, each month, to determine whether to amend its forecast Final FMP and ensure that Farmers had an opportunity to adjust their budgets and business decisions in light of any changes to MG's trading conditions and outlook. At all times until late April 2016, the RIFs did not support MG's ongoing representations about its forecast Final FMP.
12. MG's RIFs typically identified a range of potential Final FMPs, either in the form of a "low case", a "mid case" and a "high case" (where the mid case represented the most likely Final FMP), or a forecast Final FMP with potential "upside" and "downside".
13. On 27 or 28 August 2015 a RIF was presented to the Board that had a low case of \$5.52 kg/ms, a mid case of \$5.74 kg/ms and a high case of \$6.05 kg/ms. This RIF was based on inappropriate and/or unreasonable assumptions concerning forecast commodity prices and the successful achievement of initiatives and sales targets developed after the budget for FY16 had been finalised, as well as having a mid-case well below the forecast Final FMP that MG had announced to Farmers. Both Helou and Hingle knew this. In approving and presenting this RIF to the Board, they knowingly overstated the range of potential Final FMP that Farmers would receive, leading to the provision of incorrect forecasts by MG to Farmers.
14. Further, despite the mid-case in the August RIF being only \$5.74, MG did not lower its forecast FMP for FY16. On the contrary, on 31 August 2015, MG represented to Farmers that it maintained its forecast Final FMP for FY16 of \$6.05 kg/ms. In doing so, MG further represented that it considered a Final FMP of \$6.05 kg/ms to be the most likely outcome for FY16, that although the forecast was subject to certain assumptions including a material strengthening of commodity prices during the balance of FY16, it expected commodity prices to strengthen during the balance of FY16, and there were no material risk factors to achieving a Final FMP of \$6.05 kg/ms known to MG other than the disclosed risk factors. MG further represented that if the assumptions underpinning the forecast Final FMP of \$6.05 kg/ms did not materialise, it expected a Final FMP in the range of \$5.60 to \$5.90 kg/ms. In addition, it represented that it had a genuine and reasonable basis for making these representations. That was not the case, as MG, Helou and Hingle knew.
15. MG repeated and reinforced these representations to groups of Farmers at presentations in September 2015, at MG's Annual General Meeting on 26 October 2015 and at a presentation to Farmers in December 2015. It did not withdraw, qualify or correct its representations before 29 February 2016, and the representations accordingly continued through this period.

16. Between September 2015 and February 2016 (inclusive), as detailed in Schedule 2, Helou and Hingle approved and presented to the Board RIFs that did not support a Final FMP of \$6.05 as the most likely outcome for FY16.
17. Each of these RIFs was based on inappropriate and/or unreasonable assumptions concerning forecast commodity prices and/or the successful achievement of initiatives and sales targets. Helou and Hingle knew this and, in approving and presenting these RIFs, knowingly overstated the range of potential FMP that Farmers would receive.
18. Further, despite each of these RIFs being presented to the Board approximately monthly between September 2015 and February 2016, and having a mid case or forecast well below \$6.05 kg/ms, MG did not tell Farmers it had lowered its forecast of the Final FMP they would receive for FY16 until 29 February 2016.
19. On 29 February 2016 MG presented its half yearly results. In doing so, MG represented to Farmers that it expected that the Final FMP would be \$5.60 kg/ms, that although that forecast was subject to there being no further material deterioration in commodity prices or unfavourable changes to the current AUD:USD exchange rate, MG considered a Final FMP of \$5.60 kg/ms to be the most likely outcome for FY16, and that the underperformance of the Ingredients and Nutritionals segment of MG's business derived from the weakness in commodity prices was expected to be partially offset by the expected strong performance of domestic and international dairy foods product sales. MG also represented to Farmers that there were no material risk factors to achieving a Final FMP of \$5.60 kg/ms known to MG other than those disclosed factors. It further represented that it had a genuine and reasonable basis for these representations. This was not in fact the case, as MG, Helou and Hingle knew.
20. MG repeated and reinforced these representations to groups of Farmers at presentations in March and early April 2016. It did not withdraw, qualify or correct its representations until 27 April 2016, and the representations accordingly continued during this period.
21. On 27 April 2016 MG told Farmers it had revised its forecast Final FMP down to \$4.75 - \$5.00 kg/ms. It announced that, as a result, it was introducing a "Milk Supply Support Package" (**MSSP**) by which it would lend money to Farmers during FY16 that would make the FMP equivalent to \$5.47 kg/ms. It also announced that the MSSP and its cash funding cost were to be recovered by MG from Farmers' milk payments over the following three financial years. Many Farmers had no practical choice but to accept the MSSP (which effectively included a 'claw back' of payments they had already received) and incur substantial indebtedness to MG for milk they had supplied in FY16. This was a material consequence Farmers suffered as a result of MG's conduct towards them in relation to the Opening Price and forecast Final FMP. In October 2016 MG suspended recovery of payments under the MSSP until 30 June 2017, and extended the period for recoupment from 3 years to 6 years, while retaining its discretion to accelerate that recoupment.
22. MG's actual Final FMP for milk it acquired from Farmers in FY16 was \$4.80 kg/ms.

B. Summary of the relief sought from the Court

23. The ACCC seeks the relief set out in the accompanying application. As against MG this includes declarations, adverse publicity orders and non-punitive orders, and as against Helou and Hingle it includes declarations, disqualification orders and pecuniary penalties.

C. Primary legal grounds for the relief sought

24. MG, in trade or commerce, engaged in conduct that was, in all the circumstances, unconscionable in contravention of s 21 of the ACL. The relevant circumstances included the imbalance of information between MG and the Farmers, MG's knowing provision and maintenance of overstated forecasts which were repeated and continuing during FY16 until 27 April 2016, its knowledge about the Farmers' expectations, vulnerability and reliance on accurate disclosure of the FMP as their primary source of income, the practical lack of alternatives to supplying MG which Farmers faced, and the detriment suffered by many Farmers as a result of MG's withholding of accurate information about the forecast Final FMP until near the very end of FY16 when it was too late for Farmers to practically readjust significant business decisions. The Final FMP was well below MG's estimate of the Farmers' average production costs.

25. MG, in trade or commerce, in connection with the supply of milk by Farmers, engaged in misleading or deceptive conduct in contravention of s 18(1) of the ACL, and made false or misleading representations with respect to the price of that milk in contravention of s 29(1)(i) of the ACL. To the extent MG's representations were as to future matters, it did not have reasonable grounds for making them.

26. Each of Helou and Hingle was knowingly concerned in, or party to, each of MG's contraventions within the meaning of s 224(1)(e) of the ACL.

D. Harm suffered

27. As a result of the unconscionable and misleading or deceptive conduct of MG, and the false representations it made, Farmers had inaccurate information when making their significant business decisions in FY16 as to the most likely price they would receive from MG for milk supplied that year, and the financial risks to which they were exposed by MG. The 'claw-backs' are a significant financial burden for Farmers.

Date: 27 April 2017



.....
Katrina Close
AGS lawyer
for and on behalf of the Australian Government Solicitor
Lawyer for the Applicant

This Concise Statement was prepared by Peter Collinson QC, Oren Bigos and Andrew Barraclough.

Certificate of lawyer

I Katrina Close certify to the Court that, in relation to the concise statement filed on behalf of the Applicant, the factual and legal material available to me at present provides a proper basis for each allegation in the pleading.

Date: 27 April 2017



.....
Signed by Katrina Close
AGS lawyer
for and on behalf of the Australian Government Solicitor
Lawyer for the Applicant

Schedule 1

FEDERAL COURT OF AUSTRALIA

DISTRICT REGISTRY: VICTORIA

DIVISION: GENERAL

NPA: Commercial and Corporations, Regulator and Consumer Protection

NO VID

OF 2017

Respondents

Second Respondent

Gary Helou

Third Respondent

Bradley Hingle

Date: 27 April 2017

Schedule 2

Details referred to in paragraph 16.

Between September 2015 and February 2016 (inclusive) Helou and Hingle approved and presented to the Board RIFs that had:

- a. in September 2015, a low case of \$5.51 kg/ms, a mid case of \$5.67 kg/ms and a high case of \$6.05 kg/ms;
- b. in October 2015, a low case of \$5.61 kg/ms, a mid case of \$5.73 kg/ms and a high case of \$6.05 kg/ms;
- c. in November 2015, a low case of \$5.49 kg/ms, a mid case of \$5.69 kg/ms and a high case of \$6.03 kg/ms;
- d. in December 2015, a Final FMP of \$5.68 kg/ms with an “upside” of \$6.04 kg/ms and a “downside” of \$5.60 kg/ms; and
- e. in February 2016, a RIF that forecast a Final FMP of \$5.62 kg/ms.

RIFs were not presented to the Board in January or March 2016.