

17 June 1997

Commissioner Sitesh Bhojani
Australian Competition & Consumer Commission
Benjamin Offices
Chan Street
BELCONNEN ACT 2617

Dear Commissioner,

RE: PRICE FIXING COMPLAINT - BRISBANE CBD STORE

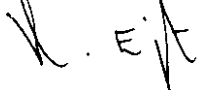
We now enclose two executed copies of the Short Minutes of Order together with the Section 87(b) Undertaking.

We also refer to our recent telephone conversations and wish to confirm the following -

- The Consent Order and the Undertaking will be supported by the Application and Statement of Claim as provided to us in your letters of 13 June and 29 April respectively.
- All documentation has been submitted on the basis that no admissions of liability have been made by Fosseys.
- The Consent Order is conditional on the Commission also agreeing to oppose any penalties, and we point out that Fosseys will remain free to withdraw its consent if the Judge hearing the Application should insist on fixing penalties.
- The writer will appear on the hearing of the Application and it would be appreciated if you could give us as much notice as possible as to the date of this hearing.
- A minor change has been made to the introduction of Clause 14(c) of the Undertaking to bring it into line with the injunctive portion of the Consent Order.
- That you will provide us with a copy of the proposed press release as soon as possible. In any event, we confirm that the press release will not be released by the Commission until the Court Orders have been made.

We look forward to hearing from you further in relation to the finalisation of this matter.

Yours faithfully



KEVIN ELKINGTON
COMPANY SOLICITOR

(Direct Line (03) 5246 2429)

IN THE FEDERAL COURT OF AUSTRALIA)
QUEENSLAND DISTRICT REGISTRY)
GENERAL DIVISION)

No. of 1997

BETWEEN: AUSTRALIAN COMPETITION AND
CONSUMER COMMISSION
Applicant

AND:

FOSSEYS (AUSTRALIA) PTY LIMITED
(ACN 000 142 665)
Respondent

SHORT MINUTES OF ORDER

JUDGE:

DATE OF ORDER:

WHERE MADE:

THE COURT ORDERS THAT:

1. The applicant be granted leave to file in Court a statement of claim in the form initialled by the solicitors for the respondent and forwarded to the applicant's solicitor and upon which the short minutes of order are based.

Filed on behalf of the Applicant by: Australian Government Solicitor

Address:

Level 5, Block D, Benjamin Offices
Chan Street, BELCONNEN ACT 2617

Postal Address:

P.O. Box 43, BELCONNEN ACT 2616

Address for Service:

C/ Office of The Australian Government Solicitor,
Level 15
340 Adelaide Street
BRISBANE QLD 4000

Contact Officer:

Robert Antich - Tel. (06) 264 2953
- Fax. (06) 264 2933

THE COURT NOTES THAT:

2. In order to resolve the issues between the applicant and the respondent without lengthy and expensive litigation, the respondent has not filed a defence to the statement of claim filed by the applicant.
3. The respondent has provided an undertaking to the applicant pursuant to section 87B of the Trade Practices Act 1974 in the terms of Annexure "A" to this application.

THE COURT ORDERS BY CONSENT THAT:

4. The respondent, whether by its directors, servants, agents, or otherwise howsoever, be restrained for a period of three years, from:
 - (a) making or arriving at; or
 - (b) giving effect to:

any contract, arrangement or understanding which contains a provision that has the purpose, or has or is likely to have the effect, of fixing controlling or maintaining, or providing for the fixing, controlling or maintaining of, the prices of drinks (including canned drinks, pre-mixed drinks, milkshakes, fruit juices and other drinks) supplied or acquired or to be supplied or acquired by the parties to the contract, arrangement or understanding, in competition with each other, within Australia.

5. The respondent pay the applicant's costs of and incidental to these proceedings, agreed in the sum of SEVEN THOUSAND DOLLARS (\$7,000.00), within 30 days of the date of this order.


DEPUTY DISTRICT REGISTRAR

DATE ENTERED:

The applicant and the respondent hereby consent to the Court making the orders set out above in the short minutes of order.

.....
Australian Government Solicitor
and solicitor for the applicant

Date: 1997.


.....
Solicitor for the respondent

KEVIN ELKINGTON
(Company Solicitor)

Date: 17th June 1997.

TRADE PRACTICES ACT 1974

**UNDERTAKING TO THE AUSTRALIAN COMPETITION & CONSUMER
COMMISSION GIVEN FOR THE PURPOSES OF SECTION 87B**

by

**FOSSEYS (AUSTRALIA) PTY LTD
ACN 000 142 665**

Background

1. Fosseys (Australia) Pty Ltd ACN 000 142 665 (Fosseys) is a company incorporated in the State of Victoria which engages in the retail sale of a range of household and grocery products throughout Australia.
2. In a letter dated 10 January 1994, Mr Tom Mahoney, the manager of the Fosseys store located on the Queen Street mall in Brisbane, wrote to Mr John van Zonneveld, a director of John and Marina Enterprises Pty Ltd ACN 050 325 847 (John and Marina Enterprises), which held a licence to operate a takeaway food and beverage outlet (Euro Eats) from premises within the Fosseys store. This letter purported to fix the price at which 375 gram cans of soft drink could be sold from the Euro Eats outlet at \$1.25 per can, the same price at which they were retailed by Fosseys.
3. It was a condition of the licence held by John and Marina Enterprises that the licensed area could be used for the preparation and sale of Doner Kebabs, salads, drinks (including coffee), Lebanese pastry and traditional Dutch snacks including poffertjes, Oliebollen, croquettes and bitter ballen.
4. John van Zonneveld is a small business person who speaks English as a second language.
5. In spite of the right under the licence to sell non-alcoholic beverages from the outlet, the complainant was informed by Mr Mahoney and Mr Theo Siemensma, Real Estate Manager for Fosseys, that he was not entitled to sell soft drink in cans. It was only on the terms set out in paragraph 2, above, that he was allowed to sell 375 gram cans of soft drink.



6. In early March 1996, Target Australia Pty Ltd ACN 004 250 944 (Target) took over management of Fosseys stores throughout Australia.
7. In June 1996, a meeting took place between Commission staff and the company solicitor for Target. At that meeting, Target confirmed the facts set out in clauses 2, 3, 4 and 5 above. The Commission indicated that it was of the view that the alleged conduct was in contravention of Section 45 of the *Trade Practices Act 1974* (the Act).
8. Due to the Commission's concerns regarding the conduct of large corporations in their dealings with small business enterprises, the Commission views compliance with the Act by corporations in these circumstances as a priority.
9. Fosseys appreciates the importance of developing and maintaining good working relationships with suppliers, including the small businesses with which it deals.
10. Fosseys acknowledges that despite its best endeavours to prevent disputes arising in business dealings with suppliers, including small businesses, such disputes may still arise whether due to simple misunderstanding, communication breakdown or as the result of a legitimate grievance. Where such disputes arise, it is possible that the disparity in size (or bargaining power) between a small business and Fosseys may have the potential to exacerbate the dispute. Fosseys is concerned to ensure that such potential is minimised and disputes that do arise are resolved quickly and effectively. Wherever possible, Fosseys will place emphasis on preserving the relationship between the parties.
11. In response to the Commission's concerns, Fosseys has offered to give the undertaking set out in the terms below pursuant to Section 87B of the Act. The Commission has agreed to accept the undertaking under Section 87B of the Act.

Undertaking

Aim

13. To create a culture of compliance within Fosseys and to assist the development or refinement of processes through which disputes between Fosseys and suppliers, including small businesses, may be resolved in a timely, simple and fair manner.

Obligations

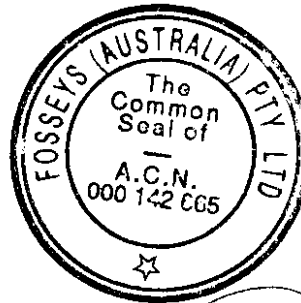
14. Fosseys undertakes for the purposes of Section 87B of the Act:

- (a) That its company solicitor and one or more senior executive members will meet with the Commission in accordance with the terms of this undertaking, for the purpose of discussing the nature of disputes, between Fosseys and suppliers, including small businesses with which it deals.
- (b) That a preliminary meeting will be held with the Commission at an agreed time and place prior to 18 July 1997, to discuss:
 - (i) the nature and extent of Fosseys' current internal procedures regarding trade practices compliance;
 - (ii) disputes with suppliers, including small businesses; and
 - (iii) the development of an effective internal dispute resolution scheme.
- (c) To work with the Commission in subsequent meetings and communications, up to a maximum period of 3 years from the date of this Undertaking, to develop enhancements to the Fosseys' dispute resolution scheme which will result in the following:
 - (i) procedures being developed within Fosseys to ensure that the dispute resolution scheme becomes understood within the business, including incorporating a segment on the dispute resolution scheme in the trade practices compliance program referred to in clause 14(b);
 - (ii) to develop and implement an alternative dispute resolution mechanism which will come into operation in the event that Fosseys' internal dispute resolution scheme fails to resolve a dispute between Fosseys and one of its suppliers or a small business with which it deals; and
 - (iii) the introduction of a new clause in Fosseys' current supply contracts which will formally make provision for an alternative dispute mechanism in the event of a dispute between Fosseys and its suppliers, including small businesses.
- (d) That where the parties consider it necessary, further meetings will be held to ensure that the objectives set out in this undertaking are achieved in an expedient and effective manner.

Acknowledgement

- 15. Fosseys acknowledges that the Commission will make this undertaking available for public inspection.
- 16. Fosseys further acknowledges that the Commission will from time to time publicly refer to this undertaking.
- 17. Fosseys further acknowledges that this undertaking in no way derogates from the rights and remedies available to any other person arising from the alleged conduct.

IN WITNESS of these undertakings and its agreement the common seal of **FOSSEYS (AUSTRALIA) PTY LTD ACN 000 142 665** is affixed by authority of the Board of Directors in the presence of:



K. Eft

.....
Secretary

[Handwritten Signature]

.....
Director

ACCEPTED BY THE AUSTRALIAN COMPETITION AND CONSUMER COMMISSION PURSUANT TO SECTION 87B OF THE TRADE PRACTICES ACT 1974

Allen Casher

.....
Chairperson

This *19th* day of *June* 1997