

Article Information

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ACCC v Pfizer - Special Leave Application

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The ACCC first brought its case against Pfizer in February 2014, alleging that Pfizer had misused its market power as the patent holder of the cholesterol-lowering drug atorvastatin, which it marketed under the brand name “Lipitor”. It was alleged that Pfizer had taken advantage of its substantial market power by preventing or deterring manufacturers of generic atorvastatin from engaging in competitive conduct after the expiry of the drug’s patent.

It also alleged that Pfizer had engaged in exclusive dealing with the purpose of substantially lessening competition in the market for atorvastatin through discounts and rebates offered on Pfizer’s own generic brand of atorvastatin.

The ACCC lost at first instance and on appeal to the Full Court of the Federal Court of Australia.

The action was brought using the former section 46 of the Competition and Consumer Act 2010 which prohibited a business with substantial market power from taking advantage of its market power for a specified anti-competitive purpose. This section has since been amended by introducing an effects test, under which a breach will occur if the conduct has the purpose, effect or likely effect of substantially lessening competition.

The High Court refused special leave with costs. It found the proposed appeal necessarily involved challenges to findings of fact or mixed law and fact made by the courts below.

The problem for the ACCC was that there had been findings in the lower courts that the purpose of the actions that the ACCC sought to impugn was the legitimate purpose of providing rigorous competition rather than the illegitimate purpose of substantially lessening competition.

Whilst the ACCC was not successful in this case, under the new effects test it is expected that it will be easier for it to successfully bring actions of this kind against companies who are engaging in conduct that constitutes a misuse of market power.

[i] *ACCC v Pfizer Australia Pty Ltd* [2018] HCA Trans 218