

# Trade Practices

# Newsletter

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## Misuse of Market Power: High Court takes a narrow view

Earlier newsletters have noted the litigation between the ACCC and Boral regarding alleged predatory pricing in the Melbourne market for concrete masonry products in the mid 1990s. Briefly, Boral, with a market share of around 30%, participated in a price war which had been started by Pioneer. Part of Boral's strategy was to massively increase its production capacity even though prices fell well below the cost of production. Boral's internal records showed clear intentions to remove competitors from the market by aggressive conduct.

The Full Court of the Federal Court found that Boral had substantial market power even though there was vigorous competition and at least one other sizeable competitor and held that the internal records showed a clear anticompetitive purpose. Boral's substantial asset backing was held to give it the capacity to sustain losses for a long time, which would have intimidated others in the market.

By a majority of 6-1, the High Court held that Boral did not breach section 46 of the Trade Practices Act, despite its anti-competitive purpose, because it did not have substantial market power. The reasoning for this was that:

- large financial resources are not in themselves an indicator of market power, but may be significant in a monopolistic market
- reducing price will not generally be anti-competitive, unless it occurs in a monopolistic market where the effect of the conduct is that the monopolist will be left with freedom to increase prices later

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- reducing price to meet competition will rarely be a misuse of market power
  - “predatory pricing” is a concept not mentioned in the Trade Practices Act, and using the expression may confuse analysis of the actual provisions of the Act
  - market power is more likely to be demonstrated by increases in price rather than reductions.

The Court held that the Federal Court erred by finding that Boral had an anti-competitive purpose, and then reasoning back from that to find that it had market power.

The *Boral* decision, consistently with the earlier *Melway* decision adopts a conservative approach to misuse of market power. It suggests that proving misuse of market power arising from predatory pricing behaviour will often be difficult. There are further decisions on section 46 pending in the High Court, and it seems likely that those decisions will consolidate this approach and provide authoritative guidance on more of the difficult issues affecting misuse of market power. We will update you further as the decisions are handed down.

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## Privilege survives the Trade Practice Act

Late in 2002, the High Court delivered a decision relating to section 155 of the Trade Practices Act. Section 155 gives the ACCC very broad powers to require documents. It is common for parties being investigated by the ACCC to be required to produce large volumes of documents, including computer hard drives, to assist the ACCC with its enquiries.

The ACCC argued that the power was so broad that it abrogated the traditional right to maintain confidentiality of documents created for the purpose of obtaining legal advice, and the advice obtained.

The High Court held that as there was no express intention in the TPA to override privilege. Parties required to produce documents by the ACCC can therefore continue to rely on legal professional privilege where it applies.

# Misleading conduct: An example of what not to do

A Tasmanian clothing manufacturer purchased Chinese-made shirts, snipped the collar labels (“Johnnie Bobbin made in China”) from them and replaced them with labels saying “TASMANIAN” with a picture of a Tasmanian Tiger and “This is a quality Tamar Knitting Mills product” and “Made in Tasmania by Tamar Knitting Mills”.

Not surprisingly, the company was penalised for misleading conduct. It was fined \$55,000, and the managing director was fined \$5,000. The penalties would have been worse if it were not for the company having gone into liquidation, and the managing director being impecunious, old, dependant on the pension and liable for company debts under guarantees. The penalty was increased as a result of misleading information supplied in response to ACCC enquiries.

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## Misleading conduct: “Birdseed” and how the fine print might not keep you out of trouble

Dell Computers recently fell foul of the ACCC concerning newspaper advertisements with a prominently displayed price. The “birdseed” (as the fine print is colourfully known in advertising) suggested that delivery was an option, but not compulsory, by using the words “delivery additional”. In fact Dell did not operate delivery outlets and delivery was mandatory, there being no other way to obtain the product. The impression given by the advertisement was misleading and Dell was ordered to run corrective newspaper advertisements and pay the costs of the ACCC.

## ACCC Leniency Policy

The ACCC is keen to encourage companies involved in prohibited conduct to come clean. To help them do so, the ACCC has proposed a policy giving a firmer basis for going easy on companies which disclose prohibited behavior, such as price rigging or market sharing. The first company to disclose particular conduct will be able to obtain immunity from prosecution where the ACCC is previously unaware of the conduct. (As in many situations in business, “conditions apply”.) Similar protections are available for individuals purporting infringing conduct.

*If you have any queries relating to Trade Practices or fair trading issues, contact :*

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