

TRADE PRACTICES LAW JOURNAL

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ARTICLES

Butcher v Lachlan Elder Realty: A contemporary version of caveat emptor? – Douglas Shirrefs

In *Butcher v Lachlan Elder Realty Pty Ltd* (2004) 218 CLR 592; 212 ALR 357, the High Court distinguished the long line of authority that formal disclaimers, in the context of real estate promotions, will seldom be effective to absolve real estate agents from liability for misleading claims. Gleeson CJ, Hayne and Heydon JJ held that the disclaimer clauses on a brochure advertising a residential property were effective to protect the real estate agent advertising the property against a claim of misleading and deceptive conduct under s 52 of the *Trade Practices Act 1974* (Cth). However, in coming to this view, the reasoning of the majority was less than compelling. It seemed to become distracted by the commercial nature of the transaction, giving inordinate weight to the commercial acumen of the purchasers and, in doing so, departing from the conventional analysis; a rigorous assessment of the overall impression conveyed by the whole of the conduct. What is more unsettling than the legal arguments in the various judgments is the underlying policy tension. Should real estate agents be responsible for vetting and verifying every little piece of information they are given by vendors? Why should buyers not have to bear their share of the risk in substantial commercial transactions? Ultimately, the conclusion of the majority resembles little more than “buyer beware”. If you are up to spending more than a million dollars on a harbourside property and you have hired expert help, you should do your homework: a contemporary version of caveat emptor. 138

Exclusive dealing: How exclusive are minimum quantity condition dealings? – Adrian Coorey and Pornsakol Panikabutara

This article provides a critical evaluation of minimum quantity conditions and their restrictions under s 47(2)(d) of the *Trade Practices Act 1974* (Cth) (the Act). The first section provides a working definition of a minimum quantity condition and how it differs from other forms of exclusive dealings. The second section examines s 47(2)(d) of the Act and, in particular, the judicial interpretation of the words “condition” and “competition”. The article then looks at the decision of *O’Brien Glass Industries Ltd v Cool & Sons Pty Ltd* (1983) 77 FLR 44; 48 ALR 625 and how it interpreted a minimum quantity condition. This examination is followed by an analysis of seven hypothetical situations which show why it is extremely difficult, if not impossible, for a minimum quantity condition to fall under s 47(2)(d) of the Act. 145

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