

TRADE PRACTICES LAW JOURNAL

Volume 17, Number 2

June 2009

EDITORIAL

Again, a new feature	81
-----------------------------------	-----------

ARTICLES

Quo vadis? Towards an effective predatory pricing provision – Garth Campbell

The level of criticism directed at s 46 of the <i>Trade Practices Act 1974</i> (Cth) for its inability to capture predatory pricing indicates that smaller businesses are extremely concerned about this practice. Such criticism reached its peak following the High Court's decision in <i>Boral Besser Masonry Ltd v ACCC</i> (2003) 215 CLR 374, which rejected a claim of predatory pricing. Since then, the Birdsville Amendment and other recent amendments to s 46 have attempted to more effectively capture predatory pricing by defining it more accurately. However, it remains to be seen whether these amendments will be successful. This article assesses the application and effectiveness of the Birdsville Amendment by applying it to the facts of the Boral decision, in effect, re-deciding the case on the current law, and attempts to define the characteristics of a truly effective predatory pricing provision.	82
--	----

Is anyone out there listening? – Christine Parker and Vibeke Lehmann Nielsen

This article reports findings from a survey of 999 larger Australian businesses about whom they listen to in forming their awareness of their compliance responsibilities under the <i>Trade Practices Act 1974</i> (Cth) (TPA), and what impact this has on their attitudes towards trade practices compliance and the Australian Competition and Consumer Commission. The survey results show that Australian businesses mostly pay attention to media stories and their own lawyers in forming their awareness of the TPA. Contrary to expectations, it was found that those who listen more to media stories are more likely to have a higher moral commitment to comply with the TPA, and those that listen more to their own lawyers have a greater sense of the negative risks of failing to comply with its requirements.	106
--	-----

ADMINISTRATION AND NATIONAL COMPETITION POLICY

Criminalisation of cartels: A critique of the Trade Practices Amendment (Cartel Conduct and Other Measures) Bill 2008 (Cth) – Frank Zumbo	123
--	------------

DEFECTIVE GOODS

Cuts cost manufacturer whilst defects speak for themselves – LJC Detmold	130
---	------------

TELECOMMUNICATIONS

Telecommunications access: Testing the regulatory limits of Part XIC – Brent Salter	133
---	------------

Achieving network neutrality: Maintaining competition between content and application providers – Karen Lee	135
--	------------

CASE NOTE

Section 155 notices get more difficult to avoid – Michael Hilliar	140
--	------------

COMMISSION CAMEOS – <i>Hank Spier</i>	145
---	-----

SNAPSHOTS

Federal Court about to revisit discriminatory conduct by franchisor between franchisees – Douglas Shirrefs	149
---	------------

Horticulture code of conduct requires traders to be up front – Douglas Shirrefs	150
--	------------

When it's good to be a failure ... a consideration of the accc's recent acceptance of a failing firm counterfactual – Jackie Mortensen	151
---	------------

Pleading section 45 TPA claims: The problems continue – Damien O'Brien	152
---	------------

REPORT FROM NEW ZEALAND

New Zealand regulation of natural monopolies and exports to China: Some changes to the Commerce and Fair Trading Acts – Lindsay Trotman and Debra Wilson	154
---	------------

Submission requirements

All contributions to the journal are welcome and should be emailed to the Production Editor, *Trade Practices Law Journal*, at LTA.tplj@thomsonreuters.com for forwarding to the Editor.

Licences

- It is a condition of publication in the journal that contributors complete a licence agreement. Licence agreements can be downloaded at http://www.thomsonreuters.com.au/support/as_contributors.asp and emailed with the submission or mailed separately to the Production Editor, *Trade Practices Law Journal*, Thomson Reuters (Professional) Australia Limited, PO Box 3502, Rozelle, NSW 2039.

Letters to the Editor

- By submitting a letter to the Editor of this journal for publication, you agree that Thomson Reuters, trading as Lawbook Co, may edit and has the right to, and may license third parties to, reproduce in electronic form and communicate the letter.

Manuscript

- Manuscript must be original, unpublished work that has not been submitted or accepted for publication elsewhere, including for online publication.
- Personal details (name, qualifications, position) for publication and a delivery address, email address and phone number must be included with the manuscript on a separate page.
- Manuscript must be submitted electronically via email in Microsoft Word format.
- Manuscript should not exceed 7,000 words for articles or 3,000 words for section commentary or book reviews.
- An abstract of 100-150 words must be included at the head of articles.
- Authors are responsible for the accuracy of case names, citations and other references. Proof pages will be emailed to contributors but excessive changes cannot be accommodated.
- **Graphics** (diagrams and graphs) to be grayscale; in .jpeg format; no more than 12 cm in width; within a box; of high resolution (at least 300 dpi); font is to be Times New Roman, no more than 10pt. The heading for a graphic should be placed outside the box.

Peer review

- This journal complies with the Higher Education Research Data Collection (HERDC) Specifications for peer review. Each article is, prior to acceptance, reviewed in its entirety by a suitably qualified expert who is independent of the author.

Style

1. **Levels of headings** must be clearly indicated (no more than four levels).
2. **Unpointed style** is to be used – there are no full stops after any abbreviation or contraction.
3. **Cases:**
 - Where a case is cited in the text, the citation follows immediately after the case name, not as a footnote.
 - Authorised reports must be cited where published, and one other reference can be used in addition.
 - For “at” references use media-neutral paragraph numbers within square brackets whenever available.
 - For international cases best references only should be used.
4. **Legislation** is cited as follows:
 - *Trade Practices Act 1974* (Cth), s 51AC (including in full within footnotes).
5. **Books** are cited as follows:
 - Ross D, *Ross on Crime* (3rd ed, Lawbook Co, Sydney, 2006) pp 100-101.
 - In footnotes do not use *ibid* or *op cit*. Repeat author surname and add footnote reference to first mention.
 - ¹ Hayton D, “Unique Rules for the Unique Institution, The Trust” in Degeling S and Edelman J (eds), *Equity in Commercial Law* (Lawbook Co, Sydney, 2005) p 284.
 - ² Hayton, n 1, p 286.
6. **Journals** are cited as follows:
 - Kirby M, “The Urgent Need for Forensic Excellence” (2008) 32 Crim LJ 205.
 - In footnotes do not use *ibid* or *op cit*. Repeat author surname and add footnote reference to first mention.
 - ³ Trindade R and Smith R, “Modernising Australian Merger Analysis” (2007) 35 ABLR 358.
 - ⁴ Trindade and Smith, n 3 at 358-359.
 - Wherever possible use official journal title abbreviations.
7. **Internet references** are cited as follows:
 - Ricketson S, *The Law of Intellectual Property: Copyright, Designs and Confidential Information* (Lawbook Co, subscription service) at [16.340], <http://www.thomsonreuters.com.au/default.asp> viewed 25 June 2007. Underline the URL and include the date the document was viewed.

SUBSCRIPTION INFORMATION

The *Trade Practices Law Journal* comprises four parts a year.

Customer service and sales inquiries:
Tel: 1300 304 195 Fax: 1300 304 196
Web: www.thomsonreuters.com.au
Email: LTA.Service@thomsonreuters.com

Editorial inquiries:
Tel: (02) 8587 7000

HEAD OFFICE
100 Harris Street PYRMONT NSW 2009
Tel: (02) 8587 7000 Fax: (02) 8587 7100



THOMSON REUTERS

© 2009 Thomson Reuters (Professional) Australia Limited
ABN 64 058 914 668

Lawbook Co.

Published in Sydney

ISSN 1039-3277

Typeset by Thomson Reuters (Professional) Australia Limited, Pyrmont, NSW

Printed by Ligare Pty Ltd, Riverwood, NSW