



DEPARTMENT OF BUSINESS LAW

STUDY GUIDE

BUSL852 TRADE PRACTICES LAW

Semester 1 and External, 2009

Credit points: 4 cps

Unit Convenor: Dr. Niloufer Selvadurai

**Lecturers: Dr. Niloufer Selvadurai and
Ms. Leela Cejnar**

Students in this unit should read this study guide carefully at the start of semester. It contains important information about the unit. If anything in it is unclear, please consult one of the teaching staff in the unit.

1. ABOUT THIS UNIT

The unit examines the *Trade Practices Act 1974* (Cth) and related areas of law. Topics dealt with include contracts, arrangements or understandings that restrict dealings or affect competition, contracts, arrangements or understandings in relation to prices, misuse of market power, exclusive dealing, and consumer protection. The role of the Australian Competition and Consumer Commission will be examined in some detail.

2. TEACHING STAFF

- Dr. Niloufer Selvadurai, W3A, 419.
E-mail: niloufer.selvadurai@law.mq.edu.au.
- Ms. Leela Cejnar, W3A.
E-mail: leela.cejnar@law.mq.edu.au.
- Postgraduate Administrator, W3A 341
E-mail: spilking@efs.mq.edu.au

3. CLASSES AND STUDY TIMES

- Weekly - Wednesdays 6-9pm.

4. REQUIRED AND RECOMMENDED TEXTS AND/OR MATERIALS

Prescribed Text:

P Gillies and N Selvadurai, *Marketing Law* (1st ed, 2008, Federation Press)

A copy of the *Trade Practices Act* will need to be acquired. It is available online at www.AustLii.edu.au; www.comlaw.gov.au.

Recommended text:

- Miller, R, *Miller's Annotated Trade Practices Act* (LBC).

Other useful texts:

- P Gillies, *Business Law* (12th ed, Federation Press).

- Steinwall, R, *Annotated Trade Practices Act* (LexisNexis).
- S Corones and P Clarke, *Consumer Protection and Product Liability Law – Commentary and Materials* (2nd ed, 2002, Law Book)
- S Corones, *Competition Law in Australia* (3rd ed, 2004, Law Book)
- J Duns, M Davidson, *Competition Law – Cases and Materials* (2000, LexisNexis)
- F Hanks and P Williams (eds), *Trade Practices Act – A twenty-five year stocktake* (2001, Federation)

Looseleaf service

- Australian Trade Practices Reporter, CCH Australia
- Heydon, *Trade Practices Law* (Thomson Law Book)
- J Goldring et al, *Consumer Protection Law* (online – looseleaf service, Law Book)

Journals

- *Trade Practices Law Journal* (Law Book)
- *Competition and Consumer Law Journal* (LexisNexis)

5. UNIT WEB PAGE

Study Guides and information on this unit can be found at :

<http://www.law.mq.edu.au/html.postgraduate/studyguides.htm>

6. LEARNING OBJECTIVES

The objectives of this unit are to:

1. Provide an understanding of the fundamental legal principles relating to the operation of the *Trade Practices Act 1974* (Cth).
2. Provide an overview of the institutions that administer such laws;
3. Develop knowledge of specific legislation and cases relating to restrictive trade practices and consumer protection law; and
4. Refine skills of legal analysis through the detailed consideration and application of relevant legislation and case law to hypothetical factual situations.

7. GENERIC SKILLS

In addition to the discipline-based learning objectives, all academic programs at Macquarie seek to develop students' generic skills in a range of areas. One of the aims of this unit is that students develop their skills in the following:

1. Communication skills;
2. Critical analysis skills;
3. Problem-solving skills; and
4. Creative thinking skills.

8. TEACHING AND LEARNING STRATEGY

The unit will be taught by form of lectures, followed by group discussion times. Students are expected to have completed the required reading prior to attending class, and be willing to participate in discussions on the topics and issues addressed in the lectures.

9. ASSESSMENT

Assessment will take the form of an essay of between 5,000 to 7,000 words.

Students are invited to propose a research project topic relevant to their work to Dr. Niloufer Selvadurai (Niloufer.selvadurai@law.mq.edu.au) or Ms. Leela Cejnar (Leela.cejnar@law.mq.edu.au) (Leela.cejnar@law.mq.edu.au).

Assignments may be submitted:

- By being left with Sumi Pilkington in **Room 341 W3A**; or
- By being mailed to Dr. Niloufer Selvadurai at Macquarie University to arrive no later than the submission date. E-mail copies cannot be accepted.

In all cases please retain a copy of the submitted assignment.

Due Date: Monday 15 June 2009

10. RELATIONSHIP BETWEEN ASSESSMENT AND LEARNING OBJECTIVES

The assessment will measure the extent to which the student has gained an understanding of the fundamental legal principles relating to the regulation of

corporations, especially financial intermediaries. Additionally, the assessment will assess the student's analytical skills and ability to apply specific statute and case law to factual situations.

11. PLAGIARISM

The University defines plagiarism in its rules: "Plagiarism involves using the work of another person and presenting it as one's own." Plagiarism is a serious breach of the University's rules and carries significant penalties. You must read the University's policies and procedures on plagiarism. These can be found in the *Handbook of Undergraduate Studies* or on the web at: <http://www.student.mq.edu.au/plagiarism>.

The policies and procedures explain what plagiarism is, how to avoid it, the procedures that will be taken in cases of suspected plagiarism, and the penalties if you are found guilty. Penalties may include a deduction of marks, failure in the unit, and/or referral to the University Discipline Committee.

12. UNIVERSITY POLICY ON GRADING

The University requires all Divisions to adhere to a policy relating to the distribution of grades across high distinction, distinction, credit and pass grades. This means that on occasion a student's raw mark for a unit (ie, the total of their marks for each assessment item) may not be the same as that which they receive on their transcript. This is because the total raw mark may be scaled up or down so that the grades of all students in each unit sit within the distribution bands set down by the University. The policy does not require that any number of students are to be failed in any unit.

13. SCHEDULE OF TOPICS

UNIT 1 – INTRODUCING TRADE PRACTICES LAW

Reading:

Gillies & Selvadurai, Chapter 9

1.1 Historical Overview

1.2 Application of Part IV of Act by State and Territorial law to entities not within scope of competition rules

1.3 Key concepts

“Market”

Re Queensland Co-operative Milling Association Ltd (1976) 25 FLR 169

Singapore Airlines Ltd v Taprobane Tours WA Pty Ltd (1991) 104 ALR 633

“Trade or Commerce”

Ku-ring-gai Co-Operative Building Society No 12

“Competition”

Re Queensland Co-Operative Milling Association Ltd (1976) 25 FLR 169

UNIT 2 – MISUSE OF MARKET POWER

Reading

Gillies & Selvadurai, Chapter 11

2.1 Section 46

2.2 “Market”

Section 4E definition

Re Queensland Co-Operative Milling Association Ltd (1976) 25 FLR 169

2.3 “Market Power”

Queensland Wire Industries Pty Ltd v Broken Hill Pty Co Ltd (1989) 167 CLR 177

NT Power generation Pty Ltd v Power and Water Authority (2004) 210 ALR 312

Melway Publishing Pty Ltd v Robert Hicks Pty Ltd (2001) 205 CLR 1

Stirling Harbour Services Pty Ltd v Bunbury Port Authority (2000) ATPR 41-752

2.4 “Substantial Market Power”

Queensland Wire Industries Pty Ltd v Broken Hill Pty Co Ltd (1989) 167 CLR

Universal Music Australia Pty Ltd v ACCC [2003] FCAFC 193

2.5 Predatory Pricing

Boral Besser Masonry Ltd v ACCC (2003) 195 ALR 609

Victorian Egg Marketing Board v Parkwood Eggs Pty Ltd (1978) 33 FLR 294

Trade Practices Commission v CSBP & Farmers Ltd (1980) 53 FLR 135

Eastern Express Pty Ltd v General Newspapers Pty Ltd (1991) 30 FLR 385;
(1992) 35 FCR 43

2.6 Other Illustrative Cases:

Australasian Performing Rights Association Ltd v Ceridale Pty Ltd Pont Data
(1990) 96 ALR 432

Australia Pty Ltd v ASX Operations Pty Ltd (1990) 21 FCR 385

Taprobane Tours WA Pty Ltd v Singapore Airlines Ltd (1990) 96 ALR 405

Natwest Australia Bank Ltd v Boral Gerrard Strapping Systems Pty Ltd (1992)
111 ALR 631

John S Hayes & Associates Pty Ltd v Kimberley-Clark Australia Pty Ltd
(1994) ATPR 41-318

TPC v Carlton & United Breweries (1990) 24 FCR 532

ACCC v Safeway Stores (No 3) (2001) 119 FCR 1

UNIT 3 - CONTRACTS, ARRANGEMENTS OR UNDERSTANDINGS THAT RESTRICT DEALINGS OR AFFECT COMPETITION

Reading:

Gillies & Selvadurai, Chapter 9

Miller, Part IV

3.1 Section 45

Section 45 (1)

Section 45 (2)

3.2 Key Terms

“Exclusionary provisions”

“Effect of substantially lessening competition”

ACCC v Amcor Printing Papers Group Ltd (2000) 169 ALR 344

Rural Press Ltd v ACCC (2002) 18 FCR 236

Universal Music Australia Pty Ltd v ACCC [2003] FCAFC 193

Visy Paper Pty Ltd v ACCC [2003] HCA 59

News Ltd v South Sydney District Rugby League Football Club Ltd [2003] HCA 45

3.3 “Understanding” or “Arrangement”

Australian Competition and Consumer Commission v CC (NSW) Pty Ltd (1999) 92 FCR 375

Top Performance Motors Ltd v Ira Berk (Qd) Pty Ltd (1975) 24 FLR 286

3.4 Purpose

Adamson v NSW Rugby League Ltd (1991) FCR 242

3.5 Breach of s 45

Australian Competition and Consumer Commission v Australian Safeway Stores Pty Ltd (No 2) (2002) ATPR 46-215

Australian Competition and Consumer Commission v Leahy Petroleum Pty Ltd [2007] FCA 794

3.6 “Substantially Lessening Competition”

Trade Practices Commission v Tubemakers of Aust Ltd (1983) 76 FLR 455

Trade Practices Commission v TNT Management Pty Ltd (1985) 58 ALR 423.

Trade Practices Commission v Parkfield Operations Pty Ltd (1985) 7 FCR 534.

3.7 Other Illustrative Cases:

Pont Data Australia Pty Ltd v ASX Operations Pty Ltd (1990) 21 FCR 385

ACCC v Tyco Australia Pty Ltd (2000) ATPR 41-740

TPC v Tubemakers of Australia Ltd (No 2) (1983) 76 FLR 455

TPC v Email Ltd (1980) 43 FLR 383

UNIT 4 – CONTRACTS, ARRANGEMENTS OR UNDERSTANDINGS IN RELATION TO PRICE

4.1 Section 45A

4.2 Concept of Purpose or Effect

ACCC v Pauls Ltd [2002] FCA 1586

4.3 Concept of Has or is Likely to Have

TPC v TNT Management Pty Ltd (1985) 6 FCR 1

4.4 Concept of Fixing, Controlling or Maintaining

Radio 2UE Sydney Pty Ltd v Stereo FM Pty Ltd (1983) 68 FLR 70

4.5 Arrangements Promoting Competition

Radio 2UE Sydney Pty Ltd v Stereo FM Pty Ltd (1983) 68 FLR 70

4.6 Other Illustrative Cases

Re Australian Automobile Chamber of Commerce (1978) 3 TPR 244

Re Real Estate Institute of the ACT (1985) ATPR50-087

Apco Service Stations Pty Ltd v ACCC [2005] FCAFC 161

UNIT 5 – EXCLUSIVE DEALING

Reading

Gillies & Selvadurai

Cheaper 10

5.1 Section 47

5.2 Restraints Concerning Supply

Section 47 (2) and (3)

5.3 Restraints Concerning Acquisition

Section 47 (4) and (5)

5.4 Third Line Forcing

Section 47 (6) and (7)

KAM Nominees Pty Ltd v Aust Guarantee Corp Ltd (1994) 51 FCR 338

Australian Competition and Consumer Commission v Health Partners Inc
(1997) 151 ALR 662

5.5 Restraints Concerning Leases and Licences

Section 47 (8)

5.6 Other Illustrative Cases

Castlemaine Tooheys Ltd v Williams and Hodgson Transport Pty Ltd (1986)
68 ALR 376

*Monroe Toppie & Associates Pty Ltd v The Institute of Chartered Accountants
in Australia* (2002) FCR 110

Trade Practices Commission v Legion Cabs (1978) 35 FLR 372

ACCC v IMB Group Pty Ltd (in liq) [2002] FCA 402

TPC v Tepeda Pty Ltd (1994) ATPR 41-319

UNIT 6 – RESALE PRICE MAINTENANCE

6.1 Section 96 and Section 48

6.2 Tests for Determining

Trade Practices Commission v Stihl Chain Saws Pty Ltd (1978) 3 TPR 306

BP Australia v Trade Practices Commission (1986) 66 ALR 148

6.3 Other Illustrative Cases:

Peter Williamson Pty Ltd v Capitol Motors Ltd (1982) 61 FLR 257

TPC v Malleys Ltd (1979) 25 ALR 250

Trade Practices Commission v Bata Shoe Co of Australia Pty Ltd (1980)
ATPR 40-161

Trade Practices Commission v Bata Shoe Co of Australia Pty Ltd (No 2)
(1980)
ATPR 40-162

ACCC v Jurlique International Pty Ltd (2007) ATPR 42-146

TPC v Mobil Oil Australia Ltd (1984) ATPR 40-482

ACCC v SIP Australia Pty Ltd (2002) ATPR 41-877

ACCC v Hugo Boss Australia Pty Ltd (1996) ATPR 41-536

TPC v Penfolds Wines Pty Ltd (1991) 104 ALR 601

TPC v Orlane Australia Pty Ltd (1984) 1 FCR 157

UNIT 7 – PROHIBITION OF ACQUISITIONS THAT WOULD RESULT IN SUBSTANTIAL LESSENING OF COMPETITION

Reading

Gillies & Selvadurai

Chapter 9

7.1 Terms of s 50

7.2 “Substantially Lessening Competition”

Trade Practices Commission v Aust Iron & Steel Pty Ltd (1990) 22 FCR 305

7.3 Other Illustrative Cases

QIW Retailers Ltd v Davids Holdings Pty Ltd (No 3) (1993) 42 FCR 255

7.4 ACCC Guidelines (Refer to ACCC website - www.accc.gov.au)

Merger Guidelines, November 2008

Merger Review Process Guidelines, 2006

Merger Guidelines, 1999

UNIT 8 – MISLEADING OR DECEPTIVE CONDUCT

8.1 Section 52

8.2 “Misleading or Deceptive Conduct”

Parkdale Custom Built Furniture Pty Ltd v Paxu Pty Ltd (1982) 149 CLR 191

Taco Co of Australia v Taco Bell Pty Ltd (1982) 42 ALR 177

8.3 Reasonable Person Test

Parkdale Custom Built Furniture Pty Ltd v Paxu Pty Ltd (1982) 149 CLR 191

8.4 Relevance of Silence

Commonwealth Bank of Australia v Mehta (1991) 23 NSWLR 84

Fraser v NRMA Holdings Pty Ltd (1994) 52 FCR 1

8.5 Opinions

Heydon v NRMA Ltd [2000] NSWCA 374

8.6 Disclaimers

Butcher v Lachlan Elder Realty Pty Ltd (2004) 218 CLR 592

8.7 Advice

Global Sportsman Pty Ltd v Mirror Newspapers Ltd (1984) 2 FCR 82

8.8 Advertising

Stuart Alexander & Co (Interstate) Pty Ltd v Blenders Pty Ltd (1981) 53 FLR 307

8.9 Other Illustrative Cases

Travel Compensation Fund v Fry (2003) ATPR 46-227

Sweetman V Bradfield Management Services Pty Ltd (1994) ATPR 41-290

Adour Holdings Pty Ltd (in liq) v Commonwealth Bank of Australia (1991) ATPR 41-147

Warnock v ANZ Banking Group (1989) ATPR 40-928

Chiarabaglio v Wespac Banking Corporation (1989) ATPR 40-971

UNIT 9 – FALSE OR MISLEADING REPRESENTATIONS

9.1 Section 53

9.2 Concept of “False”

Murphy v Farmer (1988) 165 CLR 19

9.3 Other Illustrative Cases

ACCC v Cadbury Schweppes Pty Ltd [2004] FCA 516

ACCC v Optell Pty Ltd [1998] FCA 602

ACCC v Wizard Mortgage Corp Ltd [2002] FCA 1317

ACCC v Dell Computers Pty Ltd [2002] FCA 434

Siddons Pty Ltd v Stanley Works Pty Ltd (1990) ATPR 41-044

UNIT 10 – ADMINISTRATION,

Overview of the regulatory regime

Australian Competition and Consumer Commission

Australian Competition Tribunal

Federal Court

UNIT 11 - OFFENCES, ENFORCEMENT AND REMEDIES

10.1 Offences relating to Unfair Practices – Section 75AZB

10.2 Offences relating to Product Safety and Product Information – Section 75AZS

10.3 Other Offences

10.4 Available Remedies

ADDITIONAL RESEARCH AND READING

Macquarie University Library offers a wide range of services and resources to postgraduate students. Go to the Library website. <http://www.lib.mq.edu.au>

Law Library advisor: Ms Ann Maree Brown (02) 9850 7587

For more information and to enroll in Library orientation programs for Law see your

Postgraduate Programs Administrator:

Linda Ellis

Room 325 W3A,
email: linda.ellis@law.mq.edu.au

Services

Services available include information on borrowing periods, services to distance students, links to IT Help (the Library's IT support service), and links to training information and training course notes.

Postgraduate students are eligible for a number of additional services. Information about these is available from the **Postgraduates** link, listed under **Additional Services** on the Library homepage.

Additional services for Macquarie postgraduate students include the Academic Outreach Librarians (AOLs). The Academic Outreach Librarians are the first point of contact for Postgraduate students. There is an Academic Outreach Librarian appointed to each Division of the University.

Additional Reading

Section 45

Vary, M "Price Fixing: Flawed Past, Uncertain Future" (1995) 3 TPLJ 126.

Pengilley, W *Trade Associations, Fairness and Competition*, 1981, Law Book Co Ltd.

Section 46

Edwards, "The Perennial Problem of Predatory Pricing" (2002) 30 ABLR 170

Seah, "Fair Competition and Unfair Predation" (2001) 9 TPLJ 236

Hardy, "Misuse of Market Power- Purpose or Effect?" (1997) 5 TPLJ 114

Pengilley, "Misuse of Market Power – Future Problems" (1994) 2 TPLJ 27

Section 47

Landrigan, "Vertical Price and Non- Price Restraints in Australia and the US" (1997) 25 ABLR 312

Hank and Williams, "The Treatment of Vertical Restraints under the TPA" (1987) 15 ABLR 147

Section 48

Schreiber, Taylor and Donald, *Resale Price Maintenance*, 1998, Law Book Company Ltd



FACULTY OF
BUSINESS AND ECONOMICS

DEPARTMENT OF BUSINESS LAW

ESSAY COVER SHEET

Family Name:		Unit Code:	BUSL852
Given Names:		Date Due:	5pm Monday, 15 June 09
Student ID:		Tutor's Name:	
Essay Title:			

"I certify that I am aware of the University's policy on plagiarism (as stated in www.student.mq.edu.au/plagiarism/) and that this assignment meets those requirements and has not been previously submitted for assessment in any other course of study"

Signed

MARKER'S COMMENTS