

**CONSUMER  
PROTECTION AND  
LIABILITY LAW  
CASE NOTES**



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***Boral Besser Masonry Ltd v Australian Competition and Consumer Commission (2003) 215 CLR 374***

Source: <http://www.austlii.edu.au/au/cases/cth/HCA/2003/5.html>

Court details: High Court of Australia

**Procedural history:** The Australian Competition and Consumer Tribunal (ACCC) brought proceedings against Boral Besser Masonry Ltd ('Boral') in the Federal Court of Australia, alleging that they contravened s 46 of the *Trade Practices Act 1974 (Cth)*<sup>1</sup> (now s 46 of the *Competition and Consumer Act 2010 (Cth)*<sup>2</sup>) by engaging in the practice of 'predatory pricing' and therefore misusing their market power. The trial judge, at first instance, held that Boral had not contravened s 46 of the *Trade Practices Act*. The ACCC appealed the decision to the Full Court of the Federal Court, who unanimously allowed the appeal, finding that Boral was guilty of misuse of market power. Boral appealed the decision of the Full Federal Court to the High Court of Australia, who affirmed the appeal by a 6:1 majority (Kirby J dissenting).

**Facts:**

Boral supplied concrete masonry products. Specifically, they supplied blocks, bricks and pavers manufactured from raw materials readily available in Melbourne, to the building and construction industry in Melbourne. Each of the concrete products supplied by Boral were generic products and there were many alternative products available to the building and construction industry to use in substitution for concrete masonry products. At the time of the alleged misuse of market power, Boral was considered to have approximately 30% of the market for concrete and masonry products.

One of Boral's competitors was C & M Brick (Bendigo) Pty Ltd ('C & M Brick'), who had about 40% of the market for concrete and masonry products. C & M Brick was considered a serious threat to Boral's market share, and eventually, C & M Brick and Boral engaged in a fierce price war. Boral was quoting extensively reduced prices for its products, which resulted in some competitors leaving the market for concrete and masonry products in

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<sup>1</sup> *Trade Practices Act 1974 (Cth)* s 46.

<sup>2</sup> *Competition and Consumer Act 2010 (Cth)* s 46.

Melbourne. The ACCC accused Boral of engaging in predatory pricing, with the intention of forcing its competitors out of the market. They argued that Boral could not have priced their products so low and remained in the market, unless they had a substantial degree of market power.

**Issues:**

This case was effectively about whether Boral had engaged in the practice of predatory pricing. The High Court was tasked with determining two issues. Firstly, the High Court needed to decide whether Boral had 'substantial power' power in the market for concrete masonry products in Melbourne (see s 46(1) of the *Trade Practices Act 1974* (Cth)). Secondly, the High Court needed to determine whether Boral had taken advantage of any substantial market power for the purpose of damaging or eliminating its competitors.

**Ratio:**

**Substantial market power**

It was decided by a 6:1 majority that Boral did not have substantial market power. The majority adopted the *Queensland Wire*<sup>3</sup> approach to market power, holding that 'market power' was the ability of a corporation to raise prices above supply costs without rivals taking away customers in due time. Gleeson CJ and Callinan J further indicated that market power also involved the ability to act without constraint.

The majority considered various indicia of market power as they applied to Boral and found the following:

- At the time of the alleged offending conduct, Boral did not have a very large share of the market – Boral had approximately 30% of the market, whereas its biggest competitor had 40% of the market and was steadily increasing its market share;



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<sup>3</sup> *Queensland Wire Industries v BHP* (1989) 167 CLR 177.