

Business
Council of
Australia



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**Additional Submission to the
Senate Economic References Committee**

**Inquiry on the
Trade Practices Act 1974 (Cth) –
The Rural Press Case**

14 January 2004

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1 INTRODUCTION

The Business Council of Australia (“**Business Council**”) welcomes the opportunity to make this additional submission to the Senate Economic References Committee’s (“**Committee**”) inquiry into whether the *Trade Practices Act 1974 (Cth)* (“**TPA**”) adequately protects small business from anti-competitive or unfair conduct.

As requested by the Committee, the purpose of this submission is to provide the Committee with a short assessment of whether the recent decision of the High Court in *Rural Press Limited v Australian Competition & Consumer Commission & Ors*¹ (“**ACCC**”) materially impacts on the scope and operation of section 46 of the TPA.

This submission is supplemental to, and should be read in conjunction with, the Business Council’s submission to the Committee dated 29 August 2003 which examined section 46 of the TPA in detail.

¹ [2003] HCA 75, 11 December 2003



2 JUDICIAL INTERPRETATION OF SECTION 46

Prior to the High Court's decision in *Rural Press*, there were a number of recently decided cases which dealt with the interpretation of section 46 of the TPA and which provided further clarification of the scope and operation of the section.

In effect, the decision of the High Court in *Boral Besser Masonry Ltd (now Boral Masonry Ltd) v ACCC*² and other decisions of the Full Court of the Federal Court³ demonstrated that:

- a) a corporation will contravene section 46 only if it satisfies all three elements set out in the provision, namely:
 - i) a corporation must have a *substantial degree of market power*. Section 46(3) provides a guide to the way in which the degree of market power is determined. It requires consideration to be given to the extent to which the conduct of the body corporate is constrained by competitors, potential competitors, suppliers or purchasers⁴;
 - ii) a corporation has *taken advantage* of its market power. In this context, "taken advantage" means a corporation has "used" its power to engage in conduct in which it would not have engaged (in the "reality of the market") if it did not have substantial market power⁵. It does not require conduct which is predatory or morally blameworthy⁶; and

² (2003) 195 ALR 609

³ *Universal Music Pty Ltd v ACCC* [2003] FCAFC 193 and *ACCC v Australian Safeway Stores Pty Ltd* (2003) 198 ALR 657

⁴ See the *Boral* decision [2003] HCA 5 [121] per Gleeson CJ, Callinan J and [168] per Gudrow, Gummow and Hayne JJ.

⁵ See the majority judgment in *Melway Publishing Pty Ltd v Robert Hicks Pty Ltd* (2001) 205 CLR 1 at 25 [55] ("**Melway**")

⁶ *Melway* (2001) 205 CLR 1 at 17 [26]



- iii) the conduct satisfies *one of three proscribed purposes*⁷. Section 4F(1)(b) provides that the purpose specified in section 46 need not be the only purpose to attract the operation of section 46 -- it need only be a “substantial” purpose. In addition, section 46(7) assists parties with proving the “purpose” element. It provides that a corporation may be considered to have taken advantage of its market power for one of the proscribed anti-competitive purposes, even though its purpose is ascertainable only by inference from the conduct of the corporation, or of any other person, or from other relevant circumstances;

- b) market share is not the only determinant of market power. Depending on the competition dynamics in any given market, corporations may have a substantial degree of market power even with a relatively low market share; and

- c) a corporation having a substantial degree of market power takes advantage of that power when it engages in conduct which is only “materially facilitated” by the existence of that power.

The Business Council believes that the recent decision of the High Court in *Rural Press*, which is examined in Section 3 below, confirms this judicial interpretation and reiterates the Business Council’s view that section 46 is sufficiently clear at this time and is dealing with misuses of market power.

⁷ “Purpose” simply refers to an intention to achieve a particular result - *Queensland Wire Industries Pty Ltd v Broken Hill Propriety Limited* (1989) 167 CLR 177 at [214] per Toohey J.



3 RURAL PRESS

3.1 *Factual background*

This decision concerned actions of Rural Press (owners of *The Murray Valley Standard*) in pressuring Waikerie Printing (owner of *The River News*) to stay out of its territory. Following telephone calls, discussions, correspondence and threats by Rural Press to commence publishing a rival newspaper in direct competition with *The River News*, Waikerie Printing agreed to revert to its prime circulation area, which stopped 40km north of the Rural Press territory.

3.2 *Decision at first instance*

Mansfield J at first instance found that Rural Press had misused its market power. On appeal, Rural Press accepted that it has a substantial degree of market power in the market and so the Full Court of the Federal Court considered whether their conduct had amounted to a *misuse* of that power.

3.3 *Decision of the Full Court of the Federal Court*

The Full Court of the Federal Court found that Rural Press had the proscribed purpose of preventing Waikerie Printing from competing in the market, but the critical question was whether it had taken advantage of its market power. Following the *Melway* decision, the Court held that, even in a perfectly competitive market, Rural Press could have threatened to enter or actually enter the market in which Waikerie Printing competed. On this basis, the Court found that Rural Press was utilising something other than market power in making those threats.

The Court noted that the issue of whether financial resources are relevant to the existence of market power is debateable. It went on to state that while the existence of resources in this case may have been either the ultimate cause or result of market power, Rural Press' use of those resources was not "taking advantage of" market power.



4 HIGH COURT'S DECISION

On appeal, the ACCC argued that the relevant conduct for the purposes of section 46 was the making of conditional threats that unless Waikerie Printing withdrew *The River News* from Rural Press' territory, Rural Press would introduce a new newspaper in Waikerie Printing's territory. This condition provided a causal connection to Rural Press' territory in which Rural Press had substantial market power. Accordingly, the ACCC argued that this conditional threat *would* not have been made if Rural Press had not had market power in its territory and, furthermore, this market power also facilitated the conduct in question by giving the threat a significance it would not otherwise have had.

However, a majority of the High Court held that the "taking advantage" element in section 46 does not extend to any type of causal connection between the existence of market power and the proscribed purpose. The High Court reasoned that if a firm with market power has a purpose of protecting that power and a choice of methods by which to do so, that firm will **not** contravene section 46 if it chooses a method which is distinct from its market power.

In this context, therefore, the High Court rejected the ACCC's argument that Rural Press took advantage of its market power because they would have been unlikely to have engaged in the conduct in question without having the requisite purpose.

The High Court held that the "taking advantage" and "purpose" elements of section 46 are quite distinct and the two should not be confused.

In addition, the High Court also rejected the ACCC's argument that the Full Court of the Federal Court had erred for asking whether Rural Press "could" engage in the same conduct in the absence of market power. Rather, the High Court held that the Full Court of the Federal Court had been correct in applying the test of whether Rural Press *could* have engaged in that conduct but for its market power.



The High Court also found that the ACCC had failed to show that the conduct of Rural Press was *materially facilitated* by the market power by giving its threats significance that they would not have had without it. The High Court found that it was Rural Press' material and organisational assets (as opposed to its market power) which gave its threats significance.

5 IMPLICATIONS AND CONCLUSION

The Business Council believes that the decision of the High Court in *Rural Press* does not have a material impact on the scope and operation of section 46. Rather, the Business Council believes that this judgment further clarifies and crystallises the judicial interpretation of the scope of section 46, by reiterating that each element of the provision is distinct and must be proved separately and sequentially.

In particular, the High Court's judgment affirms that "taking advantage" of market power is an essential element of section 46 and it is not permissible to conclude that a corporation has "taken advantage" of its market power, merely because it has a "substantial degree of market power" and there is evidence of a proscribed purpose. Rather, complainants will have to adduce evidence that a corporation engaged in conduct that it *could* not have engaged in, absent market power.

By confirming the "traditional" interpretation of section 46, the Business Council considers that the operation of section 46 has crystallised even further, such that businesses are now better placed to understand the conduct which may give rise to issues under section 46. This level of certainty in business dealings is important for **all** businesses and the Business Council submits, as before, that a legislative amendment specifically to protect small business from anti-competitive or unfair conduct.