

**Inquiry into the effectiveness of the *Trade Practices Act 1974*
in protecting small business**

**Second Supplementary Submission by the
Australian Competition and Consumer Commission to the
Senate Economics References Committee**

1. Following the High Court handing down its decision in *Rural Press Limited v ACCC* [2003] HCA 75 on 11 December 2003, the Senate Economics References Committee has invited the Australian Competition and Consumer Commission to lodge a supplementary submission on the impact, if any, the *Rural Press* decision has on the Commission's views about section 46 of the *Trade Practices Act 1974* ("the Act") that it has expressed in previous written submissions, and in oral evidence given by Commission representatives, to the Committee.

Background

2. In summary, the background facts to the Commission's appeal before the High Court of the decision by the Full Court of the Federal Court that the conduct of Rural Press Limited ("Rural Press") and its subsidiary Bridge Printing Office Pty Ltd ("Bridge Printing") alleged by the Commission was not a contravention of section 46 of the Act are as follows.
3. Bridge Printing, a wholly owned subsidiary of Rural Press, published a regional newspaper called the Murray Valley Standard, which was circulated within the Murray Valley district (including the township of Mannum). In the adjacent Riverland area to the north of the Murray Valley district, Waikerie Printing House Pty Ltd ("Waikerie Printing") published and circulated a regional newspaper called the River News. Prior to July 1997, only a small number of copies of the River News were sold in and around Mannum.

4. In July 1997, following a restructure of local councils in the area, Waikerie Printing decided to expand its circulation of the River News southward into the area around Mannum, which would make the River News a competitor of the Murray Valley Standard. Rural Press and Bridge Printing became concerned about this expansion. In reaction to the competitive threat from the River News, Rural Press and Bridge executives indicated to Waikerie Printing executives on a number of occasions that unless Waikerie Printing reversed the move south by the River News, Rural Press would consider establishing a regional newspaper in the Riverland area. Rural Press had the physical resources to do this. Rural Press and Bridge further indicated to Waikerie Printing that if the River News was withdrawn from the Mannum area, Rural Press would not set up a rival newspaper in the Riverland area.
5. In April 1998, Waikerie Printing agreed to withdraw the River News from the Mannum area. Rural Press took no steps to establish a newspaper in the Riverland area thereafter.
6. The relevant market, accepted at all judicial levels, was the market in the Murray Bridge area for the supply of regional newspapers.

The High Court's analysis of section 46

7. Given that the Full Court of the Federal Court held that Rural Press and Bridge Printing had the necessary market power and the necessary purpose, the Commission focused its submissions before the High Court on the finding of the Full Court that the two companies had not taken advantage of their market power in the Murray Bridge regional newspaper market, but rather had taken advantage of their access to a printing press in Murray Bridge and to the necessary administrative and professional structure to publish a competing paper¹.
8. The Commission submitted that the relevant conduct constituting the “taking advantage” component of section 46 was the making of conditional threats that unless Waikerie Printing withdrew the River News from the Mannum area, Rural Press and Bridge Printing would introduce a rival newspaper in the

¹ *Rural Press Ltd v ACCC* [2002] FCAFC 213 at [143]

Riverland market.² The Commission submitted that Rural Press and Bridge Printing *would* not have made such threats unless they had market power in the Murray Bridge market. The only purpose of making the threat was to protect that market power. The market power facilitated the conduct by giving the threats a significance that they would not otherwise have had. The Commission submitted that the Full Court erred in using a test of taking advantage that involved asking whether the companies *could* have made the threats in a competitive market (ie in the absence of their having a substantial degree of market power).

9. In rejecting the Commission’s submissions, the majority³ of the High Court held that:

- The words “taking advantage of” do not encompass conduct that has the purpose of protecting market power, but has no other connection with that market power. A firm can and is entitled to protect its market power by a method involving “power distinct from the market power”⁴.
- There was no reason or authority for overruling the Full Court’s “taking advantage” test of inquiring whether Rural Press and Bridge Printing *could* engage in the same conduct in the absence of market power⁵.
- It was not market power that materially facilitated the making of the threats by Rural Press and Bridge Printing, “but something distinct from market power, namely their material and organisational assets”⁶.

10. The High Court did, however, endorse⁷ as one of the tests of “taking advantage” the test previously suggested by the Commission before the High Court in *Melway*⁸ and given some level approval by the Court in that case, namely

² *Rural Press Limited v ACCC* [2003] HCA 75 at [50]

³ Gummow, Hayne and Heydon JJ, with whom Gleeson CJ and Callinan J agreed.

⁴ *Rural Press Limited v ACCC* [2003] HCA 75 at [51]

⁵ *Rural Press Limited v ACCC* [2003] HCA 75 at [52], quoting the High Court in *Melway Publishing Pty Ltd v Hicks* (2001) 205 CLR 1 at [61].

⁶ *Rural Press Limited v ACCC* [2003] HCA 75 at [53]

⁷ *Rural Press Limited v ACCC* [2003] HCA 75 at [53]

⁸ *Melway Publishing Pty Ltd v Hicks* (2001) 205 CLR 1

whether a firm's impugned conduct was materially facilitated by its substantial degree of market power.

11. The High Court's acceptance of the Full Court's "taking advantage" test of inquiring whether Rural Press and Bridge Printing *could* engage in the same conduct in the absence of market power has further narrowed the application of section 46. What this test means is that so long as it *could* physically be possible for a firm to engage in the conduct in the absence of its having market power, it will be held not to have taken advantage of its market power, even though it *would not on any rational commercial basis* have engaged in the conduct in the absence of market power. The Commission agrees with Kirby J's criticism of this test⁹. In the Commission's view, such a test defeats the Parliament's intention in amending the Act in 1986 of lowering the application threshold for the section.
12. Of concern also to the Commission is that the strong suggestion in the Full Court's judgment that a firm will only be found to have taken advantage of its market power when the impugned conduct took place in the market where the power existed¹⁰ was not the subject of any comment, adverse or otherwise, by the majority of the High Court¹¹. This is the issue discussed in the Commission's original written submission to the Committee under the heading "Leveraging market power – conduct in a second market" on pages 22-23.
13. In the absence of any observations or findings by the majority of the High Court, the state of the law on this issue is at best unclear. The likely, and in the Commission's view unfortunate, outcome is that, in light of the observations of the Full Court, single judges of the Federal Court will feel bound to reject any section 46 allegation based on a firm using its market power to engage in anti-competitive conduct in a second market.

⁹ *Rural Press Limited v ACCC* [2003] HCA 75 at [131]-[134]

¹⁰ *Rural Press Ltd v ACCC* [2002] FCAFC 213 at [142-148]

¹¹ Kirby J touched on the issue: *Rural Press Limited v ACCC* [2003] HCA 75 at [135].

Summary

14. In the Commission's view, the net result of the High Court's decision is a further reduction in the scope and application of section 46. It is a reduction that runs counter to the Parliamentary intention lying behind the 1986 amendments to the Act. Accordingly, these are appropriate circumstances to justify further amendments to section 46, specifically in respect of the "could engage in conduct" test and the leveraging issue.
15. In summary, the High Court's decision reinforces the Commission's general view expressed in its original submission and oral evidence that:
 - (a) recent developments in the case law on section 46 suggests ever more clearly that the Courts are not applying the section in a way that is consistent with Parliament's intention; and accordingly
 - (b) amendments are required to the section to ensure that the Courts do apply the section consistently with Parliament's intention.