HIGH COURT OF AUSTRALIA

GLEESON CJ,
GUMMOW, KIRBY, HAYNE, CALLINAN AND HEYDON JJ

Matter No A197/2003

RURAL PRESS LIMITED & ORS — APPELLANTS

AND

AUSTRALIAN COMPETITION AND CONSUMER COMMISSION & ORS — RESPONDENTS

Matter No A203/2003

AUSTRALIAN COMPETITION AND CONSUMER COMMISSION — APPELLANT

AND

RURAL PRESS LIMITED & ORS — RESPONDENTS

Rural Press Limited v Australian Competition and Consumer Commission
Australian Competition and Consumer Commission v Rural Press Limited
[2003] HCA 75
11 December 2003
A197/2003 and A203/2003

ORDER

1. *Appeal No A197 of 2003 dismissed with costs.*

2. *Appeal No A203 of 2003 allowed.*

3. *Set aside par 3 of the orders made by the Full Court of the Federal Court of Australia on 16 July 2002 as amended on 18 October 2002, and in lieu thereof, substitute the following:*

"3. Set aside the orders made by the Federal Court on 23 March 2001, and in lieu thereof, order that the following orders be made:

(a) Declare that the First, Second and Fifth Respondents contravened section 45(2) of the Trade Practices Act by making and giving effect to an arrangement that contained provisions under which:

(i) the Fifth Respondent agreed to cease soliciting advertising and newsworthy information from the Mannum area for inclusion in its regional newspaper, the River News, and to cease promoting the sale of the River News in the Mannum area; and

(ii) the First and Second Respondents agreed not to publish a regional newspaper in the Riverland area.

(b) Declare that each of the Third and Fourth Respondents were knowingly concerned in or party to the First and Second Respondents' contraventions of section 45(2) of the Act as set out in sub-paragraph (a) above.

(c) Declare that the Sixth Respondent was knowingly concerned in or party to the Fifth Respondent's contravention of section 45(2) of the Act as set out in sub-paragraph (a) above."

On appeal from Federal Court of Australia

Representation:

Matter No A197/2003

F M Douglas QC with T D Blackburn and R C Scruby for the appellants (instructed by Blake Dawson Waldron)

N J Young QC with M H O'Bryan for the first respondent (instructed by Australian Government Solicitor)

No appearance for the second and third respondents

Matter No A203/2003

N J Young QC with M H O'Bryan for the appellant (instructed by Australian Government Solicitor)

F M Douglas QC with T D Blackburn and R C Scruby for the first to fourth respondents (instructed by Blake Dawson Waldron)

No appearance for the fifth and sixth respondents

CATCHWORDS

Rural Press Limited v Australian Competition and Consumer Commission
Australian Competition and Consumer Commission v Rural Press Limited

Trade practices – Exclusionary provisions – Arrangement between regional newspaper publishers providing that one would withdraw newspaper services from the prime circulation area of the other – Whether provision had purpose of preventing, restricting or limiting supply of services to, or acquisition of services from, particular persons or classes of persons – *Trade Practices Act* 1974 (Cth), ss 4D, 45(2)(a)(i), 45(2)(b)(i).

Trade practices – Where regional newspaper publisher threatened to circulate new newspaper in prime circulation area of a second regional newspaper publisher, unless second publisher ceased circulation of its own newspaper in first publisher's prime circulation area – Where second publisher subsequently ceased circulation of newspaper in first publisher's prime circulation area – Whether an "arrangement" – Whether arrangement had purpose or effect of substantially lessening competition – *Trade Practices Act* 1974 (Cth), ss 45(2)(a)(ii), 45(2)(b)(ii).

Trade practices – Accessorial liability – Whether officers of newspaper publisher were "involved in" publisher's contraventions – Whether officers participated in or assented to contraventions with actual knowledge of essential elements constituting the contraventions – *Trade Practices Act* 1974 (Cth), ss 75B(1), 76(1), 80(1).

Trade practices – Misuse of market power – Whether publisher took advantage of market power in its prime circulation area in threatening to enter prime circulation area of second publisher – *Trade Practices Act* 1974 (Cth), s 46(1).

Practice and procedure – Orders – Form of declarations.

Words and phrases – "arrangement", "involved in", "take advantage of", "purpose", "particular persons or classes of persons".

Trade Practices Act 1974 (Cth), ss 4D, 45(2)(a)(i), 45(2)(a)(ii), 45(2)(b)(i), 45(2)(b)(ii), 46(1), 75B(1), 76(1), 80(1).

1 GLEESON CJ AND CALLINAN J. The facts, and the issues, in these appeals are set out in the reasons for judgment of Gummow, Hayne and Heydon JJ ("the joint reasons"). We agree with the orders they propose.

2 As to the issues in relation to ss 45(2)(a)(ii), 45(2)(b)(ii), and 46 of the *Trade Practices Act* 1974 (Cth) ("the Act"), accessorial liability, penalties, and the form of orders, we agree with the joint reasons, and have nothing to add.

3 As to the issues in relation to ss 4D, 45(2)(a)(i) and 45(2)(b)(i), we agree with the joint reasons given for allowing the appeal of the Australian Competition and Consumer Commission ("the ACCC") against the decision of the Full Court of the Federal Court[1]. However, we wish to add some brief observations, not because they determine the outcome of the present case, but because of the wider implications of some of the propositions advanced in argument.

4 The legislative history of s 4D is set out in the reasons of the Full Court[2]. That history is significant in the light of s 15AB of the *Acts Interpretation Act* 1901 (Cth). After the decision of the Full Court, this Court dealt with certain aspects of s 4D, and ss 45(2)(a)(i) and 45(2)(b)(i), in *News Ltd v South Sydney District Rugby League Football Club Ltd*[3].

5 In applying s 4D, courts have had to consider the statutory concept of a provision (of a contract, arrangement or understanding) which has the purpose of preventing, restricting or limiting supply to or acquisition from particular persons or classes of persons. This is a compound concept involving a certain kind of purpose, having as its object particular persons or classes of persons[4]. The particularity of the persons or classes of persons who are the objects of the purpose as defined and proscribed is essential to the concept of an exclusionary provision[5]. The significance of a finding that a provision is an exclusionary provision within s 4D and ss 45(2)(a)(i) and 45(2)(b)(i) is that such a finding engages a *per se* legislative prohibition. It becomes unnecessary to consider

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1 *Rural Press Ltd v Australian Competition and Consumer Commission* (2002) 118 FCR 236.

2 (2002) 118 FCR 236 at 260-263 [86]-[96].

3 (2003) 77 ALJR 1515; 200 ALR 157.

4 (2003) 77 ALJR 1515 at 1519-1520 [17], 1528 [68], 1530 [79]; 200 ALR 157 at 162, 174, 177.

5 (2003) 77 ALJR 1515 at 1520 [20]; 200 ALR 157 at 163.

whether it has the purpose or effect of substantially lessening competition in a market.

6 If attention were not paid to the compound nature of an exclusionary provision, and the requirement of particularity of its object or objects, there is a danger that s 4D would be given an operation that would greatly reduce the statutory significance of lessening competition, in relation to agreements between competitors generally. Contracts, arrangements or understandings between competitors commonly involve some form of prevention, restriction or limitation of supply or acquisition of goods or services. If two hairdressers in a suburban main street were to have an understanding that one would provide services to men, and one would provide services to women, it may be unlikely that their understanding would involve a substantial lessening of competition in a market. It would be surprising if it were held, nevertheless, to contravene the Act. To the extent to which it had an anti-competitive purpose, that purpose would not be "directed toward"[6] particular persons or classes of persons.

7 In the past, judges have sought to elucidate the meaning of this concept by examining the legislative history. That process of construction is legitimate, provided it is not taken too far. The paradigm case, singled out for the purpose of parliamentary consideration, was that of a boycott. This has sometimes led to the treatment of the paradigm as if it were the only case to which the legislation applies. It has also driven courts to the unproductive and inappropriate task of seeking to construe the parliamentary materials and speeches rather than the statute. The precise meaning of boycott itself is far from clear. The emphasis placed upon boycotts in the development and explanation of the legislation reinforces the importance of the compound nature of the concept, and the necessity for particularity of objects, and to that extent it is useful in construing the legislation. But it cannot be permitted to divert attention from the text. We agree with Gummow, Hayne and Heydon JJ that there was sufficient particularity in the present case, but we can think of other cases in which it would be absent, notwithstanding the existence of a purpose of preventing, restricting, or limiting supply or acquisition. If it were not so, the references to particular persons or classes of persons would be redundant.

8 The Full Court referred to the changes that have taken place in the form of s 4D. In its original form, the proscribed purpose was of preventing, restricting or limiting supply to or acquisition from particular persons. The words "or classes of persons" were added in 1986, following some decisions that were thought to reveal an undue narrowness in the legislation in its original form. Those words were clearly intended to widen the provision, but not to change its

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6 (2003) 77 ALJR 1515 at 1530 [79]; 200 ALR 157 at 177.

entire character. The proscribed purpose must still be one that is directed toward particular persons or classes of persons. Parliament did not delete the word "particular" and substitute the word "any". Nor did it remove all reference to persons as objects of the proscribed purpose. The legislative history, as well as the text, tends strongly against a reading of the section which requires only that a provision of a contract, arrangement or understanding has the purpose of preventing, restricting or limiting, in any way, supply or acquisition. Supply or acquisition will always be to or from persons. Ordinary principles of construction require that the references to particular persons or classes of persons be given work to do; they are not mere drafting verbosity. A court construing a provision in an Act "must strive to give meaning to every word of the provision"[7]. A court will seek to avoid a construction of a statute that renders some of its language otiose. Here, that consideration is powerfully reinforced by the legislative history, which shows that the reference to particular persons was originally an essential feature of s 4D, and that the addition of the reference to classes was intended to expand it, not to make it superfluous.

9 In argument in the Full Court in the present case, the ACCC itself appears to have given some encouragement to what was identified in *News Ltd v South Sydney District Rugby League Football Club Ltd* as an error of approach. The joint judgment of the Full Court records the following[8]:

> "[Counsel for the ACCC] accepted in principle that s 4D can properly be described as a primary boycott provision, and that breach of it requires that there be a target aimed at by the provision. He submitted, however, that the section should not be read down on this account, but must be given full effect according to its terms. If that is done, so he argued, the class identified by the primary judge could be said to be the target of a boycott."

10 In the light of that argument, it is perhaps not surprising that the Full Court approached this aspect of the case as it did.

11 A danger in treating s 4D as concerned only with boycotts is that it fosters an assumption that the section applies only when there is some form of animus towards the object or objects of an exclusion. In the present case, the Full Court concluded[9]:

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7 *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at 382 [71].

8 (2002) 118 FCR 236 at 263 [97].

9 (2002) 118 FCR 236 at 265 [103].

> "There is no reason to suppose that either party should have had any purpose to injure or disadvantage [readers or advertisers in the nominated geographic area]."

12 Section 4D does not require such a purpose, although it may sometimes exist. An exclusionary provision may be directed toward particular persons or classes of persons without necessarily having a purpose of injuring or disadvantaging them. However, a purpose of the kind defined and proscribed must exist, and must be directed toward particular persons or classes of persons, for the legislative prohibition to apply.

13 GUMMOW, HAYNE AND HEYDON JJ. After a trial of proceedings brought by the Australian Competition and Consumer Commission ("the Commission"), the Federal Court of Australia made declarations and orders against the surviving respondents in relation to contraventions of the *Trade Practices Act* 1974 (Cth) ("the Act"). It found[10] that the corporate respondents had made an arrangement which contravened s 45[11] in two ways. It contained provisions having the purpose and effect of substantially lessening competition in a market and it contained an exclusionary provision (as defined in s 4D)[12]. The Federal Court

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10 *Australian Competition and Consumer Commission v Rural Press Ltd* (2001) ATPR ¶41-804 (Mansfield J).

11 Section 45 provides in part:

"(2) A corporation shall not:

(a) make a contract or arrangement, or arrive at an understanding, if:

(i) the proposed contract, arrangement or understanding contains an exclusionary provision; or

(ii) a provision of the proposed contract, arrangement or understanding has the purpose, or would have or be likely to have the effect, of substantially lessening competition; or

(b) give effect to a provision of a contract, arrangement or understanding … if that provision:

(i) is an exclusionary provision; or

(ii) has the purpose, or has or is likely to have the effect, of substantially lessening competition."

12 Section 4D provides:

"(1) A provision of a contract, arrangement or understanding, or of a proposed contract, arrangement or understanding, shall be taken to be an exclusionary provision for the purposes of this Act if:

(a) the contract or arrangement was made, or the understanding was arrived at … between persons any 2 or more of whom are competitive with each other; and

(b) the provision has the purpose of preventing, restricting or limiting:

(Footnote continues on next page)

also found a contravention of s 46[13]. And it found that certain executives were knowingly concerned in these contraventions.

14 The Full Court of the Federal Court of Australia allowed an appeal brought by Rural Press Ltd ("Rural Press"), Bridge Printing Office Pty Ltd ("Bridge"), Trevor McAuliffe ("McAuliffe") and Ian Law ("Law") ("the Rural Press parties") but only so far as it related to exclusionary provisions and s 46. It dismissed an appeal and cross-appeal by the Commission in relation to penalty[14].

15 Two appeals have been brought from those orders. The Rural Press parties take three points: that there was insufficient evidence to find an arrangement, that there was no purpose or effect of substantially lessening competition, and that McAuliffe and Law had insufficient knowledge to make them liable for ancillary contraventions. The Commission appeal contends that the Full Federal Court should have found that s 46 was contravened and should have found that the arrangement contained an exclusionary provision.

(i) the supply of goods or services to, or the acquisition of goods or services from, particular persons or classes of persons; or

(ii) the supply of goods or services to, or the acquisition of goods or services from, particular persons or classes of persons in particular circumstances or on particular conditions;

by all or any of the parties to the contract, arrangement or understanding …"

13 Section 46(1) provides:

"(1) A corporation that has a substantial degree of power in a market shall not take advantage of that power for the purpose of:

(a) eliminating or substantially damaging a competitor of the corporation or of a body corporate that is related to the corporation in that or any other market;

(b) … or

(c) deterring or preventing a person from engaging in competitive conduct in that or any other market."

14 *Rural Press Ltd v Australian Competition and Consumer Commission* (2002) 118 FCR 236 (Whitlam, Sackville and Gyles JJ).

The facts

16 *The pre July 1997 position: the Standard's monopoly.* Rural Press was a publisher of regional newspapers in many parts of Australia. One of its wholly-owned subsidiaries, Bridge, published a regional newspaper called the Murray Valley Standard ("the Standard"). It was published in Murray Bridge (a township of about 13,000 population one hour's drive east of Adelaide on the River Murray). It was sold on Tuesdays and Thursdays at a price of ninety cents. On Tuesdays its circulation was about 4,000-4,500; on Thursdays it was 4,500 or perhaps more. It circulated in, published news and advertising about, and solicited advertising from, the Murray Bridge district.

17 Within the prime circulation area of the Standard was the township of Mannum (of about 3,000 population, located thirty kilometres north of Murray Bridge), together with the townships of Sedan, Cambrai and Palmer, and smaller rural settlements.

18 There were regional newspapers published in areas adjacent to the Murray Bridge district – the Leader, the River News, the Southern Argus, the Times and the Courier. But until July 1997 few copies of those other regional newspapers were sold in the Murray Bridge district.

19 Further up the River Murray from Mannum was the Riverland area. In it was Waikerie (a township of about 1,800 population) where Waikerie Printing House Pty Ltd ("Waikerie Printing") published a regional newspaper, the River News. It was sold weekly on Wednesdays at a price of sixty cents. It had a circulation of 2,000-2,500 copies. Before July 1997 it circulated around Waikerie, west to Morgan and south to Nildottie and Swan Reach — about halfway between Murray Bridge and Waikerie. It sold a few copies in Cambrai, Sedan and Mannum, but Mannum was not regarded as part of its prime circulation area.

20 Still further up the River Murray were Loxton and Renmark. At Loxton, Loxton News Pty Ltd published another small regional newspaper, the Loxton News, and at Renmark, Murray Pioneer Pty Ltd published the Murray Pioneer. Paul Taylor and Darnley Taylor were directors and controllers of Waikerie Printing, Loxton News Pty Ltd and Murray Pioneer Pty Ltd. John Pick ("Pick") was Managing Editor of the River News, made most day-to-day decisions about it, and was also a director of Waikerie Printing. The River News was printed under arrangement with Murray Pioneer Pty Ltd, which operated a printing press at Renmark.

21 *The events of and following 1 July 1997: the River News expands south.* On 1 July 1997 the structure of Councils in the area changed. A new Council called the Mid Murray Council was established. Its northern and central areas were in the prime circulation area of the River News; but it extended into the Mannum area, part of the prime circulation area of the Standard. The new Council area was serviced by the Standard in the south, the River News in its northern and central parts, and the Leader (published in the Barossa Valley) in the central and eastern parts.

22 Pick conceived the idea of causing the River News, which aimed to publish local government notices and advertisements for the Mid Murray Council, to circulate not only in the northern and central parts of the Mid Murray Council area, but also in its southern part around Mannum. This would make the River News a competitor with the Standard for readers and advertisers in the part of the Standard's prime circulation area which was around Mannum. Acting within his authority, but without notice to the Taylors or to the Rural Press parties, Pick put in place arrangements to procure news and advertisements from advertisers in the Mannum area and small towns to the north. He appointed casual local correspondents in those towns. He engaged Duncan Emmins ("Emmins") to procure news and advertising – from September 1997 to January 1998 on a piecework basis, from January 1998 on what was described as "a permanent part time basis at twelve hours per week." He publicised Emmins' appointment. In late June or early July 1997 Pick delivered to all households in Mannum two free successive editions of the River News. Mannum residents were told that the River News would be available at the Mannum newsagency or on order. From July 1997, the River News expanded in size by four pages per issue in order to publish its articles about the Mannum area. The result of introducing this competition into the Mannum area was that the circulation of the River News in that area increased by between one hundred and five hundred copies.

23 *The reaction of the Rural Press parties to new competition in the Mannum area.* Beryl Price ("Price") was Manager of Bridge. She reported to McAuliffe, Regional Manager of Rural Press for South Australia. He in turn reported to Greg Watson ("Watson"), General Manager for Special Projects of Rural Press until December 1997, and thereafter to Law, General Manager of the Regional Publishing Division of Rural Press. Watson and Law reported to Brian McCarthy ("McCarthy"), Managing Director of Rural Press.

24 From July 1997 these executives began to worry about the move of the River News into the Mannum area. As early as 1 August 1997 Price recommended distributing a free regional newspaper throughout the Riverland area, and she repeated that proposal on at least 21 November 1997, 24 December 1997 and 3 February 1998. She badgered her superiors for action and taunted

them about their pusillanimity, urging them to show that "we are serious", asking if "we" are "serious about our threat to enter the Riverland market", saying that "We are looking like wimps" and warning of the ineffectiveness of being "nice". She and her superiors repeatedly indicated to the Taylors and to Pick that unless Waikerie Printing reversed the move of the River News south, Rural Press would have to consider reacting commercially, perhaps by establishing a rival newspaper in the Riverland area. They did so by conversations in July 1997 (between Price and Pick), on 29 July 1997 (between McAuliffe and Pick), in November 1997 (between Watson and Paul Taylor), in late January 1998 (between Law and Darnley Taylor), on about 30 January 1998 (between McAuliffe and Paul Taylor), on 3 March 1998 (between Law and Paul Taylor) and on 3 April 1998 (between Law and Anthony Robinson, Managing Director of Leader Newspapers Pty Ltd, the publisher of the Leader). They also did so by a letter of 20 March 1998 from Rural Press to Paul Taylor. They kept each other informed about these communications and the reactions of the Taylors to them.

25 McAuliffe and Law were each aware of the general financial strength of Rural Press and of its relationship with Bridge; of the general market in which the Standard competed; of the physical resources available to Rural Press and to Bridge if it were desired to embark upon publishing a regional newspaper in the Riverland area; of the fact that the activities of the River News in the Mannum area were in competition with those of the Standard; and of the fact that the Taylors would have perceived that they were being threatened with a new regional newspaper in the Riverland area which would potentially reduce the profitability of their businesses there greatly. McAuliffe and Law each intended to procure a cessation in the provision by the River News of services in the Mannum area, the quid pro quo being that the Rural Press parties would not establish a Riverland newspaper in rivalry to those of the Taylors[15].

26 As a result of the communications up to and including 3 March 1998, on that day Paul Taylor gave a "mild assurance" to Law about gradually withdrawing from Mannum within a month. Perhaps because Pick was not enthusiastic to do this, a further threat on 3 April 1998 was issued. The Taylors thereafter decided to withdraw because the officers of the Rural Press parties had told them that if they did not withdraw, a new newspaper in the Riverland area would be started, and if they did withdraw, it would not be. On 9 April 1998 Paul Taylor told McAuliffe that the River News would revert to a line forty kilometres north of Mannum. Waikerie Printing terminated Emmins' engagement, ceased to promote the paper in the Mannum area, ceased its focus

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15 *Australian Competition and Consumer Commission v Rural Press Ltd* (2001) ATPR ¶41-804 at 42,743-42,744 [138]-[140].

on Mannum news, ceased to seek advertising revenue in Mannum, and caused the paper to revert to its previous prime circulation area, which stopped about forty kilometres north of Mannum. A significant fall in circulation in the Mannum area resulted. Rural Press took no steps towards establishing a newspaper in the Riverland area thereafter.

The Rural Press parties' appeal to this Court: background

27 The trial judge found that there was "a market in the Murray Bridge area for the supply of regional newspapers such as the Standard, which provide the services of providing information news and advertising to persons within that area."[16] The Full Federal Court rejected an attack on that finding[17], and it was not renewed in this Court.

28 The Commission alleged that in March-April 1998 an arrangement was made by which Waikerie Printing committed itself to withdraw the River News from circulation in the Mannum area and Rural Press and Bridge committed themselves not to pursue the introduction into the Riverland area of any new newspapers in competition with the newspapers published by the Taylors[18]. The trial judge upheld those allegations[19]. He found that the making of that arrangement contravened s 45(2)(a)(ii), and that effect had been given to it contrary to s 45(2)(b)(ii)[20]. The Full Federal Court agreed[21].

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16 *Australian Competition and Consumer Commission v Rural Press Ltd* (2001) ATPR ¶41-804 at 42,738 [109].

17 *Rural Press Ltd v Australian Competition and Consumer Commission* (2002) 118 FCR 236 at 268-272 [109]-[121].

18 *Australian Competition and Consumer Commission v Rural Press Ltd* (2001) ATPR ¶41-804 at 42,729 [75].

19 *Australian Competition and Consumer Commission v Rural Press Ltd* (2001) ATPR ¶41-804 at 42,733 [90].

20 *Australian Competition and Consumer Commission v Rural Press Ltd* (2001) ATPR ¶41-804 at 42,738-42,739 [115]-[116], 42,744 [143].

21 *Rural Press Ltd v Australian Competition and Consumer Commission* (2002) 118 FCR 236 at 259-260 [84], 275 [133].

The first Rural Press complaint: was there an arrangement?

29 The Rural Press parties contended that the Commission's case was based on reciprocity of commitment, and that it failed because there was no evidence or finding that, in consideration for the River News being withdrawn from Mannum, the Rural Press parties would not publish a newspaper in Waikerie rivalling the River News. Rather, they contended that Waikerie Printing had decided to withdraw unilaterally "in the face of a perceived commercial threat without any arrangement having been reached."

30 This characterisation by the Rural Press parties of the relevant events, which was rejected in both courts below, concentrates on a very narrow segment of the evidence. It cannot survive examination of the much greater range of evidence analysed by the courts below. Since their decisions are reported, it is not necessary to repeat that analysis. On the facts as summarised above a conclusion that an arrangement had been arrived at was inevitable.

31 The Rural Press parties' submission that there was no finding that in consideration for the River News being withdrawn from Mannum, the Rural Press parties would not publish a newspaper in the Riverland area pays no attention to those facts. It also pays no attention to the trial judge's finding that the parties had a shared purpose "to secure the withdrawal of the River News from the Mannum area in exchange for the understanding that Rural Press and Bridge would not initiate the publication of a regional newspaper in the Riverland area."[22] And it pays no attention to the trial judge's use of the words "quid pro quo" to describe the Rural Press parties' promise not to set up a rival Riverland paper if the River News was withdrawn[23]. In truth, the courts below did indeed make the findings which, the submission contended, were lacking.

32 The Rural Press parties argued that the existence of an arrangement was negated by the following incident. On or about 7 April 1998, Law composed the following letter to Paul Taylor:

> "The attached copies of pages from The River News were sent to me last week. The Mannum advertising was again evident, which

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22 *Australian Competition and Consumer Commission v Rural Press Ltd* (2001) ATPR ¶41-804 at 42,738 [111].

23 *Australian Competition and Consumer Commission v Rural Press Ltd* (2001) ATPR ¶41-804 at 42,744 [140].

> suggests your Waikerie operator, John Pick, is still not focussing on the traditional area of operations.
>
> I wanted to formally record my desire to reach an understanding with your family in terms of where each of us focuses our publishing efforts.
>
> If you continue to attack in Mannum, a prime readership area of the Murray Valley Standard, it may be we will have to look at expanding our operations into areas that we have not traditionally services [sic].
>
> I thought I would write to you so there could be no misunderstanding our position. I will not bother you again on this subject."

The attached pages revealed at least seven Mannum-sourced advertisements and an article by Emmins on the opening of Mannum Hardware as a Thrifty-Link Hardware store. The letter was typed on Rural Press letterhead. It was signed by Law as "General Manager". He retained that document, but sent an unsigned copy to McCarthy with the message: "We are holding original in case you wish to make an amendment. Will post Thursday." The document was dated 9 April 1998, which was a Thursday.

33 McCarthy amended the letter so as to read:

> "The attached copies of pages from The River News were sent to me last week. The Mannum advertising was again evident, which suggests your Waikerie operator, John Pick, is still active in the Mannum market.
>
> This is of ongoing concern to me, as Mannum is a prime readership area of the Murray Valley Standard. It could well be that we need to review our current publishing strategies in view of the changed market position.
>
> I thought I would write to you so there could be no misunderstanding of our position. I will not bother you again on this subject."

McCarthy also wrote the following perceptive note to Law on the amended document: "I am concerned about any TPC implications in what's written." Though McCarthy's language was more veiled than Law's, it still had plenty of "TPC implications" adverse to the legality of the Rural Press parties' conduct.

Neither letter was sent, but the trial judge found that the letter drafted by Law represented his state of mind at the time[24].

34 The argument that there was no arrangement because of McCarthy's fears about there being trade practices implications in the letter which Law wanted to send fails. All the material communications had taken place before 9 April 1998, apart from the final communication of assent from the Taylors on 9 April 1998. None of these earlier communications was withdrawn. And in any event, the draft letters were probative of a desire that the parties reach an arrangement of the kind alleged.

35 The Rural Press parties' final submission was that after April 1998 the River News continued to circulate in the Mannum area. That submission ignores the trial judge's findings about how radically attenuated its posture there had become.

The second Rural Press complaint: was there a purpose or effect of substantially lessening competition?

36 *Rural Press parties' contentions.* In this Court the Rural Press parties attacked the concurrent findings of the courts below[25] that there had been a substantial lessening of competition in four ways.

37 First, the Rural Press parties stressed the small scale of the trade involved. The incursion by the River News was for a trial period of twelve months only. Waikerie Printing had no intention of further extending the prime circulation area of the River News. It was customary for publishers of regional newspapers in South Australia generally to circulate their newspapers within well-defined geographical areas, because it was highly unlikely that a second regional newspaper could survive in those areas. The circulation numbers, readership and areas of circulation were very small. The incursion involved increased production costs of $15,333 and increased total revenue of less than $20,000, producing, even after adjusting the costs in various respects, profits of only $5,000-$10,000.

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24 *Australian Competition and Consumer Commission v Rural Press Ltd* (2001) ATPR ¶41-804 at 42,731 [84].

25 See in particular the trial judge: *Australian Competition and Consumer Commission v Rural Press Ltd* (2001) ATPR ¶41-804 at 42,738-42,739 [114]-[116].

38 Secondly, the Rural Press parties contended that it was misleading to speak of the River News being "withdrawn" from Mannum once the arrangement was put into effect. Though Emmins was no longer promoting circulation and advertising in the Mannum area or writing stories about the Mannum area, the paper continued to circulate in Mannum and its neighbouring towns, and Mannum residents could advertise in it. It continued to sponsor significant local events. Its advertising revenue did not fall substantially.

39 The third contention of the Rural Press parties was that there was no realistic proposal of the River News offering a potentiality of competition. The Rural Press parties could legitimately have started a competitive publication in the prime circulation area of the River News. If the threat of this stopped competition from the River News in the Mannum area, it is unlikely that the incursion would have lasted long in any event.

40 The fourth criticism advanced by the Rural Press parties was that the courts below had failed to have regard to the extent of competition in the regional newspaper market from "local radio, regional television and statewide newspaper and television services provided in other markets."

41 *Conclusions on competition.* The relevant questions in this case are whether the effect of the arrangement was substantial in the sense of being meaningful or relevant to the competitive process, and whether the purpose of the arrangement was to achieve an effect of that kind[26].

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26 *Stirling Harbour Services Pty Ltd v Bunbury Port Authority* (2000) ATPR ¶41-752 at 40,732 [114]; *Australian Competition and Consumer Commission v Australian Medical Association Western Australia Branch Inc* (2003) 199 ALR 423 at 483 [329]. The test set out in these cases was advocated by the Commission and not disputed by the Rural Press parties. In the *Stirling* case French J referred to three authorities. In *Tillmanns Butcheries Pty Ltd v Australasian Meat Industry Employees' Union* (1979) 27 ALR 367 at 382 Deane J said he inclined to the view that "substantial loss or damage" as used in s 45D(1) meant "real or of substance and not insubstantial or nominal." In *Radio 2UE Sydney Pty Ltd v Stereo FM Pty Ltd* (1982) 44 ALR 557 at 564 Lockhart J said that in s 45(2) "the lessening of competition must be at least real or of substance", and said that he saw "considerable force in the view … that, in the context of s 45, the word means substantially in the sense of considerably." In *Eastern Express Pty Ltd v General Newspapers Pty Ltd* (1991) 30 FCR 385 at 420-422 Wilcox J rejected the view that an effect on competition which was more than insignificant was for that reason alone substantial. While the Commission favoured the less demanding of these tests and the Rural Press parties the more demanding, it is not necessary to decide between them in order to determine this appeal. What is plain is that those

(Footnote continues on next page)

42 The impact of local radio, regional and statewide television and statewide newspaper services must be left out of account. The trial judge was asked to include at least some of those services within the market. His finding of market definition excluded all of those services. That finding is not the subject of a ground of appeal. The contention that the courts below wrongly failed to take account of those services in assessing competition is either a contradiction in terms or an impermissible attempt to challenge the market found by the courts below without making the challenge directly as a ground of appeal.

43 It is not decisive that the River News only circulated in part of the Murray Bridge regional newspaper market, or that the overall trading activities of participants in the Murray Bridge regional newspaper market were not extensive. Section 50(6) of the Act in its then form provided that in s 50 "market" meant a "substantial" market for goods or services in Australia, a State or a Territory of Australia. There is no equivalent provision in s 45.

44 While neither the area nor the increases in sales, advertising revenues and profits achieved were large, it does not follow that the River News did not achieve a substantially pro-competitive impact by its move south or that the arrangement did not have a substantially anti-competitive impact in causing its retreat north. The move was profitable. There was no reason to suppose that it would not remain profitable or that Waikerie Printing would not seek to continue gaining those profits. The trial judge found that but for the arrangement Pick would have continued to publish the River News in the Mannum area. The success of Pick's experiment invalidates the Rural Press parties' argument that regional newspaper markets in South Australia must inevitably be single firm markets. The fact that the River News continued to be available after April 1998 does not mean that competition was not substantially lessened: the Rural Press parties have not successfully challenged the findings of the trial judge that from April 1998 it ceased to promote circulation or seek advertising revenue in Mannum, and that its circulation dropped "very significantly"[27].

45 The Rural Press parties did not answer a fundamental question. If they had not seen the competitive impact of the River News as actually or potentially

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authorities do not support the proposition that it would be sufficient for liability if the relevant effect was quantitatively more than insignificant or not insubstantial. That proposition does not follow from the test stated by French J.

27 *Australian Competition and Consumer Commission v Rural Press Ltd* (2001) ATPR ¶41-804 at 42,726 [62].

substantial, why did they fear it? They paid extremely close attention to the new activities of the River News, they recorded them, they communicated about them orally and in writing and they exhibited adamantine opposition to them. In itself that can be the conduct of a bona fide competitor, and in limited respects the Rural Press parties did respond competitively, but they coupled this with much conduct which was not bona fide competition on the merits. Price pressed her superiors incessantly about the problem from July 1997. McAuliffe, her immediate superior, paid equally close attention to the problem, and kept his superiors, Watson and Law, informed. All four executives made threats to Waikerie Printing directors to retaliate in the Riverland areas. Even McCarthy, the Managing Director of Rural Press, felt it necessary to give the matter personal attention. That is significant. Rural Press was a national company publishing itself, or through its subsidiaries, 30 agricultural magazines and 147 regional newspapers throughout Australia. It had interests in New Zealand and the United States of America. It had sales in 1999-2000 of $438 million and a pre-tax profit of $99 million. It had net assets of $410 million as at 30 June 2000. The managing director of so large a company must have had heavy burdens and clamant demands on his time. The role McCarthy played must negate any suggestion that the advance of the River News was insignificant or that the competitive impact of its retreat was merely trivial. Though he rightly saw problems under the Act, he did not inquire into or disavow what had been happening. He was apparently content to let his subordinates solve the problem by forcing the River News to contract its activities. The views and practices of those within an industry can often be most instructive not only on the question of achieving a realistic definition of the market[28], but also on the question of assessing the quality of particular competitive conduct in relation to the level of competition and the impact of its cessation.

46 What Pick had done cannot be ignored. He saw a new commercial opportunity arising out of the change in Council areas. He exploited that commercial opportunity in the manner described above. The lower advertising rates offered had the effect of causing at least one substantial advertiser to move from the Standard to the River News. That the market had not been competitive before, but had become competitive, is suggested partly by the success of these measures, partly by the competitive response of the Standard (for example, publishing two new pages of Mannum community news and appointing an advertising canvasser in Mannum), and partly by the fact that the officers of the Rural Press parties decided to try to force the River News back into its traditional area in order to restore monopoly conditions in the Murray Bridge regional

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28 *Boral Besser Masonry Ltd v Australian Competition and Consumer Commission* (2003) 77 ALJR 623 at 662-663 [257] per McHugh J; 195 ALR 609 at 662.

newspaper market. What Pick did was to compete – to respond to a sudden change in the commercial environment by introducing rivalrous conduct into a part of a market that had previously not known it. His capacity, energy and determination caused the River News, at least in that part of the market, to become a small but potentially significant competitor. The presence of even one competitor of that kind tended to dilute the impact of the existing monopoly. The arrangement between the monopolist and Pick's employer almost totally negated the beneficial effects of Pick's competitive behaviour over the previous nine months – a choice for readers and advertisers where before there was none, a wider range of news in the Standard and lower advertising rates. That is why the arrangement had the purpose and effect of substantially lessening competition in the Murray Bridge regional newspaper market.

The third Rural Press complaint: were McAuliffe and Law accessories?

47 The trial judge held that McAuliffe and Law were "involved in" the contraventions established against Rural Press and Bridge within the meaning of s 75B(1) of the Act[29].

48 The trial judge rightly held that it was necessary to find that McAuliffe and Law participated in, or assented to, the companies' contraventions with actual knowledge of the essential elements constituting the contraventions. The Rural Press parties complained that he failed to make particular findings, but they are in fact inherent in his reasoning. In the end the argument was only that McAuliffe and Law "did not know that the principal's conduct was engaged in

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29 Section 75B(1) provides:

> "(1) A reference in this Part to a person involved in a contravention of a provision of Part IV … shall be read as a reference to a person who:
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> …
>
> (c) has been in any way, directly or indirectly, knowingly concerned in, or party to, the contravention …"

Strictly speaking it was unnecessary to consider whether s 75B applied so far as the remedies granted against McAuliffe and Law were penalties under s 76 and injunctions granted under s 80. Sections 76(1) and 80(1) each have provisions similar to s 75B(1) in relation to accessorial liability. However, the inquiry relevant to accessorial liability is the same in relation to those provisions. The trial judge also granted declarations against McAuliffe and Law, and s 75B(1) appears to have been thought relevant in that respect.

for the purpose or had the likely effect of substantially lessening competition … in the market as defined." It is wholly unrealistic to seek to characterise knowledge of circumstances in that way. Only a handful of lawyers think or speak in that fashion, and then only at a late stage of analysis of any particular problem. In order to know the essential facts, and thus satisfy s 75B(1) of the Act and like provisions, it is not necessary to know that those facts are capable of characterisation in the language of the statute[30].

The Commission's appeal: section 46

49 *The Full Federal Court's reasoning on s 46.* The trial judge found that Rural Press and Bridge had contravened s 46. The Full Federal Court disagreed on the ground that though they had the necessary market power and the necessary purpose, they had not taken advantage of *their 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 newspaper*[31]. Rural Press and Bridge could have credibly threatened to enter the Riverland market, and could have actually entered it, regardless of whether they had a substantial degree of power in the Murray Bridge regional newspaper market. "Had there been a perfectly competitive market in the Murray Bridge newspaper market, they may have lacked the motivation to make the threat, but they could have acted in precisely the same way."[32] The Full Federal Court said that the Commission, having chosen to plead and prove a very narrow market, with consequential advantages in terms of establishing market power and substantially anti-competitive purpose and effect, could not put that aside by treating the resources

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30 As the courts below correctly found: *Australian Competition and Consumer Commission v Rural Press Ltd* (2001) ATPR ¶41-804 at 42,743 [138]; *Rural Press Ltd v Australian Competition and Consumer Commission* (2002) 118 FCR 236 at 284 [163].

31 *Rural Press Ltd v Australian Competition and Consumer Commission* (2002) 118 FCR 236 at 277 [143]. The Rural Press printing press at Murray Bridge printed three newspapers for Rural Press other than the Standard, as well as one independent newspaper, each serving other areas (Kingscote, Strathalbyn, Tanunda and Victor Harbor).

32 *Rural Press Ltd v Australian Competition and Consumer Commission* (2002) 118 FCR 236 at 279 [150].

of Rural Press and Bridge, "which have no relevant relationship with that narrow market, as resources of or attributable to that market."[33]

50 *The Commission's s 46 arguments.* The Commission argued that the relevant conduct was "the making of conditional threats" that unless Waikerie Printing withdrew the River News from the Mannum area, Rural Press and Bridge would introduce a rival newspaper in the Riverland market. This condition provided a causal connection to the Murray Bridge regional newspaper market in which Rural Press and Bridge had substantial market power. The conditional threats would not have been made if Rural Press and Bridge had not had that market power. The market power also facilitated the conduct by giving the threat a significance it would not otherwise have had[34]. The Commission submitted one relevant question was: "Would [Rural Press and Bridge] be likely to engage in the same conduct in the absence of market power, that is to say, in a competitive market?"[35] A second was: "Why is the conduct being engaged in?"[36] The Commission answered the first question "No", because the purpose of Rural Press and Bridge was merely to protect their monopoly position in the Murray Bridge regional newspaper market. The Commission answered the second question: "To protect the monopoly position of Rural Press and Bridge in the Murray Bridge regional newspaper market." The Commission submitted that the trial judge had answered the first question correctly by concluding that but for their market power, Rural Press and Bridge "*would* not have acted in the way in

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33 *Rural Press Ltd v Australian Competition and Consumer Commission* (2002) 118 FCR 236 at 280 [151].

34 Referring to *Melway Publishing Pty Ltd v Robert Hicks Pty Ltd* (2001) 205 CLR 1 at 23 [51].

35 The first question was said to be based on what Mason CJ and Wilson J said in *Queensland Wire Industries Pty Ltd v Broken Hill Proprietary Co Ltd* (1989) 167 CLR 177 at 192 and what the majority said in *Melway Publishing Pty Ltd v Robert Hicks Pty Ltd* (2001) 205 CLR 1 at 23 [50]. The Commission referred to many other passages in these cases, and to *Dowling v Dalgety Australia Ltd* (1992) 34 FCR 109 at 144; *NT Power Generation v Power and Water Authority* (2002) 122 FCR 399 at 446-450 [172]-[179] and *Australian Competition and Consumer Commission v Australian Safeway Stores Pty Ltd* (2003) 198 ALR 657 at 722-724 [325]-[334].

36 The second question was said to be based on what Toohey J said in *Queensland Wire Industries Pty Ltd v Broken Hill Proprietary Co Ltd* (1989) 167 CLR 177 at 216.

which they did"[37] but that the Full Federal Court instead made an erroneous inquiry into how they *could* have acted[38]. Their conduct would not have been rational but for their market power and their desire to protect it.

51 *Conclusion on s 46.* The words "take advantage of" do not extend to any kind of connection at all between market power and the prohibited purposes described in s 46(1). Those words do not encompass conduct which has the purpose of protecting market power, but has no other connection with that market power. Section 46(1) distinguishes between "taking advantage" and "purpose". The conduct of "taking advantage of" a thing is not identical with the conduct of protecting that thing. To reason that Rural Press and Bridge took advantage of market power because they would have been unlikely to have engaged in the conduct without the "commercial rationale" – the purpose – of protecting their market power is to confound purpose and taking advantage. If a firm with market power has a purpose of protecting it, and a choice of methods by which to do so, one of which involves power distinct from the market power and one of which does not, choice of the method distinct from the market power will prevent a contravention of s 46(1) from occurring even if choice of the other method will entail it.

52 The Commission's criticism of the Full Federal Court for asking whether Rural Press and Bridge "could" engage in the same conduct in the absence of market power must be rejected. A majority of this Court in *Melway Publishing Pty Ltd v Robert Hicks Pty Ltd* adopted the same test in saying[39]:

> "Bearing in mind that the refusal to supply the respondent was only a manifestation of Melway's distributorship system, the real question was whether, without its market power, Melway could have maintained its distributorship system".

The Commission did not demonstrate either that that did not mean what it said, or that what it said should be overruled.

53 The Commission failed to show that the conduct of Rural Press and Bridge was materially facilitated by the market power in giving the threats a

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37 *Australian Competition and Consumer Commission v Rural Press Ltd* (2001) ATPR ¶41-804 at 42,742 [132] (emphasis added).

38 *Rural Press Ltd v Australian Competition and Consumer Commission* (2002) 118 FCR 236 at 276 [139], 279 [150].

39 (2001) 205 CLR 1 at 26 [61].

significance they would not have had without it. What gave those threats significance was something distinct from market power, namely their material and organisational assets. As the Full Federal Court said, Rural Press and Bridge were in the same position as if they had been new entrants to the Murray Bridge market, lacking market power in it but possessing under-utilised facilities and expertise[40].

54 The Commission's argument received no support from the authorities it relied on. It is only necessary to refer to two of them.

55 The Commission cited McHugh J's statement in *Boral Besser Masonry Ltd v Australian Competition and Consumer Commission* that "use" does not capture the full meaning of "take advantage", and that there "must be a causal connection between the 'market power' and the conduct alleged to have breached s 46."[41] Among the passages in *Melway Publishing Pty Ltd v Robert Hicks Pty Ltd* to which McHugh J referred in justification of what he said was the following[42]:

> "[I]t does not follow that because a firm in fact enjoys freedom from competitive constraint, and in fact refuses to supply a particular person, there is a relevant connection between the freedom and the refusal. Presence of competitive constraint might be compatible with a similar refusal, especially if it is done to secure business advantages which would exist in a competitive environment."

That is adverse to the Commission's submission, and suggests that McHugh J was not including within "causal connection" the mere existence of a purpose of protecting market power.

56 The Commission submitted that *Natwest Australia Bank Ltd v Boral Gerrard Strapping Systems Pty Ltd*[43] showed the need for a "causal connection between the substantial market power and the conduct" which "would be established if the corporation relied on its market power to insulate it from the

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40 *Rural Press Ltd v Australian Competition and Consumer Commission* (2002) 118 FCR 236 at 277 [143].

41 (2003) 77 ALJR 623 at 667 [279]; 195 ALR 609 at 668.

42 (2001) 205 CLR 1 at 27 [67].

43 (1992) 111 ALR 631.

consequences that competition would ordinarily visit [on it]." The relevant passage in the judgment of French J reads[44]:

> "The conduct must … constitute a use of that power. It is not sufficient to show that a corporation with market power has engaged in conduct for [one of the prohibited purposes] … If a corporation with substantial market power were to engage an arsonist to burn down its competitor's factory and thus deter or prevent its competitor from engaging in competitive activity, it would not thereby contravene s 46. There must be a causal connection between the conduct alleged and the market power pleaded such that it can be said that the conduct is a use of that power. In many cases the connection may be demonstrated by showing a reliance by the contravener upon its market power to insulate it from the sanctions that competition would ordinarily visit upon its conduct."

That, however, leaves the anterior question: did the corporation rely on its market power in that way? To possess the purpose of protecting it is not necessarily to rely on it.

The Commission's appeal: section 4D

57 *The trial judge's reasoning on s 4D.* The trial judge held that the arrangement had a subjective purpose[45]:

> "of preventing or restricting or limiting the supply of services to the particular class or classes of persons, being those in the Mannum area (or in that area and extending to a [line] about forty kilometres north of Mannum) who could otherwise receive the information and news in the River News or who could otherwise advertise in the River News or take advantage of advertising in the River News."

Those classes will be referred to below as readers and advertisers. The trial judge thus held that the arrangement contained an exclusionary provision.

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44 (1992) 111 ALR 631 at 637.

45 *Australian Competition and Consumer Commission v Rural Press Ltd* (2001) ATPR ¶41-804 at 42,733 [91]. The parties did not dispute that this was the correct test, as held in *News Ltd v South Sydney District Rugby League Football Club Ltd* (2003) 77 ALJR 1515 at 1520 [18] per Gleeson CJ, 1524 [43] per McHugh J, 1527-1528 [63]-[64] per Gummow J, 1556-1557 [212] per Callinan J; 200 ALR 157 at 162-163, 169, 173-174, 212-213.

58 *The Full Federal Court's reasoning on s 4D.* The Full Federal Court disagreed with the trial judge because it thought that the relevant class must be "the intended object of the discrimination envisaged by the section."[46] It must be "aimed [at] specifically"[47]. This requirement was not satisfied because there was no finding and no "evidence which would point to any of the persons involved in the arrangement having the actual purpose of specifically targeting the persons in the nominated geographic area"[48]. The purpose of Rural Press and Bridge was to preserve their market power in the Murray Bridge market and other markets; the purpose of Waikerie Printing was to preserve its market power in the Riverland area. The Full Court said[49]:

> "It is hardly surprising that there is no finding that the arrangement was aimed at the class of persons defined by his Honour, or that they were specifically targeted by any of the parties to the arrangement. For the parties to act in this way would make no sense. The class of persons identified by the primary judge simply consisted of customers or potential customers of the [River News]. They were not direct or indirect competitors of either party to the arrangement. There is no reason to suppose that either party should have had any purpose to injure or disadvantage those persons."

The readers and advertisers would suffer a limitation in their ability to have access to a second local newspaper, but that was the effect of the arrangement, not its purpose[50]. No purpose related to a "particular class" existed[51].

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46 *South Sydney District Rugby League Football Club Ltd v News Ltd* (2000) 177 ALR 611 at 661 [214] per Finn J.

47 *News Ltd v Australian Rugby Football League Ltd* (1996) 64 FCR 410 at 577.

48 *Rural Press Ltd v Australian Competition and Consumer Commission* (2002) 118 FCR 236 at 265 [103].

49 *Rural Press Ltd v Australian Competition and Consumer Commission* (2002) 118 FCR 236 at 265 [103]; see also at 267 [108].

50 *Rural Press Ltd v Australian Competition and Consumer Commission* (2002) 118 FCR 236 at 266 [104].

51 *Rural Press Ltd v Australian Competition and Consumer Commission* (2002) 118 FCR 236 at 267 [108].

59 The Full Federal Court thought that the trial judge's construction of "exclusionary provision" had three consequences so unacceptable as to demonstrate error in it. One was a statutory guarantee that customers could have access to goods or services provided by a particular supplier[52]:

> "[A]ny market sharing, zoning or other 'non-compete' provision will be a breach of s 45(2)(a)(ii) if it has the purpose, or would be likely to have the effect, of substantially lessening competition in a market. If a provision does not have that effect, it may be assumed that competing substitutable goods or services will be actually or potentially available in that market. The ... Act does not guarantee that customers will have access to the goods or services provided by a particular supplier. Pushing the concept of an exclusionary provision too far will have that consequence."

The second unacceptable consequence would be that s 4D of the Act would apply to "market sharing or zoning … without more"[53]. A third unacceptable consequence would be that s 4D would extend beyond "a conventional boycott situation where competitors come to an arrangement in order to prevent other competitors entering the market."[54]

60 The Full Federal Court also relied on implications it drew from other parts of the Act and from the explanatory materials. One was[55]:

> "[T]here is a clear distinction between purpose and effect, recognised in the express terms of s 45 itself. The difference is not eliminated in the case where the effect either is or could be predicted".

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52 *Rural Press Ltd v Australian Competition and Consumer Commission* (2002) 118 FCR 236 at 266 [104]. The first two sentences of this passage must be rejected in so far as they contend that the Full Federal Court's construction produces no mischief, because if the conduct is otherwise unlawful it will be stopped, and if it is otherwise lawful acquirers will have access to goods or services from sources other than the party restrained. That contention would justify reading s 4D down to the point of invisibility.

53 *Rural Press Ltd v Australian Competition and Consumer Commission* (2002) 118 FCR 236 at 266 [104].

54 *Rural Press Ltd v Australian Competition and Consumer Commission* (2002) 118 FCR 236 at 267 [107].

55 *Rural Press Ltd v Australian Competition and Consumer Commission* (2002) 118 FCR 236 at 266 [104].

Further, the Full Federal Court saw it as significant that though what is known as the Swanson Report[56] "recommended that the prohibition relate to arrangements having the relevant purpose *or effect*"[57], Parliament did not follow this: the "legislation only refers to purpose, and not to effect."[58]

61 Before examining the above arguments, it is convenient briefly to deal with some other matters advanced by the Commission.

62 *Contrary decisions?* The Commission submitted that the Full Federal Court's opinion that s 4D is inapplicable to a geographic market sharing arrangement between competitors was "contradicted by numerous decisions of the Federal Court that have applied s 4D to market sharing arrangements." This submission was incorrect. Of the nine cases referred to, seven were cases in which there were admissions of liability and the only issue was the level of the pecuniary penalty[59]. One of these seven cases does not even suggest that the matter was viewed in s 4D terms[60]. The eighth was a case where, though no contravention was admitted and the facts were contested, no argument is recorded along the lines of those advanced in the present case[61]. And the ninth

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56 Australia, Trade Practices Act Review Committee, *Report to the Minister for Business and Consumer Affairs*, Parliamentary Paper No 228/1976 (August 1976).

57 *Rural Press Ltd v Australian Competition and Consumer Commission* (2002) 118 FCR 236 at 262 [92].

58 *Rural Press Ltd v Australian Competition and Consumer Commission* (2002) 118 FCR 236 at 262 [92]; see also at 266 [104].

59 *Australian Competition and Consumer Commission v Jaycee Rectification and Building Services Pty Ltd* (1996) ATPR ¶41-539; *Australian Competition and Consumer Commission v SIP Australia Pty Ltd* (1999) ATPR ¶41-702; *Australian Competition and Consumer Commission v Tyco Australia Pty Ltd* (2000) ATPR ¶41-740; *Australian Competition and Consumer Commission v Tubemakers of Australia Ltd* (2000) ATPR ¶41-745; *Australian Competition and Consumer Commission v Simsmetal Ltd* (2000) ATPR ¶41-764; *Australian Competition and Consumer Commission v Roche Vitamins Australia Pty Ltd* (2001) ATPR ¶41-809; *Australian Competition and Consumer Commission v ABB Transmission and Distribution Ltd* (2001) ATPR ¶41-815.

60 *Australian Competition and Consumer Commission v Tyco Australia Pty Ltd* (2000) ATPR ¶41-740.

61 *Australian Competition and Consumer Commission v SIP Australia Pty Ltd* (2002) ATPR ¶41-877 at 45,012-45,013 [102]-[106], 45,014 [108(a)].

was a case where it was not disputed at the trial that the conduct was an exclusionary provision, the contrary was not asserted in the Notice of Appeal or the contravener's written submissions, and the Commission did not deal with the points in argument. Though the Full Federal Court did so, the circumstances were different from the present case and the arguments considered in the present case were not put[62]. In short, not one of the cases relied on is in any sense a decision – a conclusion necessary to resolve a concrete dispute reached after contest in argument – that geographic or other market sharing falls within s 4D of the Act. But that is not to say that the Commission fails in its other submissions that the Full Court erred in its treatment of s 4D.

63 *Introduced qualifications*. The Commission contended that if the Full Federal Court were intending to suggest that members of the s 4D class will usually or perhaps always be "direct or indirect competitors of the parties" and that s 4D only applied to "boycotts", there was no warrant for these qualifications in s 4D. This is so. As to the first qualification, s 4D does not require particular persons or classes of persons to be competitors of the parties. If it is appropriate to look at extrinsic materials, the Explanatory Memorandum, in discussing the amendments introduced in 1986 to include "particular classes of persons" in addition to "particular persons", said[63]:

> "A primary boycott is, in essence, collective refusal to deal by competitors to the detriment of another competitor *or a person from whom the parties to the collective action could or do supply or acquire goods or services*."

There is, in addition, authority against limiting s 4D to competitors of the parties to the arrangement[64]. It is also correct to reject the qualification about "boycotts" because the term "boycott" lacks "a precise meaning", and use of it carries the danger of distracting the inquirer towards seeking that meaning "rather than the proper task, which is finding the meaning of the statutory language."[65]

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62 *J McPhee & Son (Australia) Pty Ltd v Australian Competition and Consumer Commission* (2000) 172 ALR 532 at 564-565 [108]-[111].

63 See par 15 (emphasis added).

64 For example, *South Sydney District Rugby League Football Club Ltd v News Ltd* (2000) 177 ALR 611 at 659 [209]; *News Ltd v South Sydney District Rugby League Football Club Ltd* (2003) 77 ALJR 1515 at 1530 [78] per Gummow J; 200 ALR 157 at 176-177.

65 *News Ltd v South Sydney District Rugby League Football Club Ltd* (2003) 77 ALJR 1515 at 1520 [19] per Gleeson CJ; 200 ALR 157 at 163.

64 *What kind of purpose?* It is convenient now to examine the primary reason why the Full Federal Court reversed the trial judge – the absence of any finding of animus against the readers and advertisers of the Mannum area.

65 It may be accepted that in one sense the Rural Press parties meant no special harm to the readers and advertisers, wanted them to remain in the market as acquirers of the services offered by the Standard and wanted them to be as well disposed towards the Standard as possible. But that is not an answer to the s 4D case.

66 "The purpose of conduct is the end sought to be accomplished by the conduct."[66] The end which the parties endeavoured to accomplish by the arrangement was preventing, restricting or limiting the supply of newspaper services by Waikerie Printing to readers and advertisers in the Mannum area. The Rural Press parties did willingly contemplate harm to the readers and advertisers in the sense that they did not want them to enjoy the freedom of being able to acquire the relevant services from the River News.

67 The Full Federal Court's reasoning concentrates too narrowly on the purpose of preventing Waikerie Printing selling papers to readers and space to advertisers, and not enough on the correlative – the purpose of preventing readers buying papers and advertisers buying space from Waikerie Printing. The relationship between a buyer and a seller is not merely symbiotic. The link is inextricable. A supply by sale is an acquisition by purchase. There cannot be a seller without a buyer. There cannot be a supplier without an acquirer. There cannot be supply without acquisition. If one's purpose is to prevent the supply of services, an inevitable part of that purpose is to prevent the acquisition of those services by the person or persons to be supplied. Thus when the Full Federal Court accepted the trial judge's finding that the purpose of Rural Press and Bridge was to maintain their market power in Murray Bridge by preserving absence of competition in that market[67], it was accepting that their purpose was to maintain their market power in Murray Bridge by ensuring that the Standard would be the only paper and that readers and advertisers would not enjoy the services of the River News. The purpose of maintaining market power was indistinguishable from the purpose of preventing supply of certain services to,

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66 *News Ltd v South Sydney District Rugby League Football Club Ltd* (2003) 77 ALJR 1515 at 1520 [18] per Gleeson CJ; 200 ALR 157 at 163.

67 *Rural Press Ltd v Australian Competition and Consumer Commission* (2002) 118 FCR 236 at 265 [103].

and acquisition of those services by, readers and advertisers. Acquisition of those services by readers and advertisers from the River News was inconsistent with the prevention of supply by the River News. It was not possible for the Rural Press parties consistently to say both that they had a purpose of preventing the River News from supplying services to readers and advertisers and also that they did not have a purpose of preventing readers and advertisers from acquiring services from the River News. "You could not have one without the other, however much you protested that you did not really want the other."[68]

68 *Superadded purpose requirement: the text.* The Full Federal Court's construction required some element of purpose which was more than the purpose of limiting supply to readers and advertisers – some superadded purpose or animus of injuring or disadvantaging them beyond the limiting of supply. The requirement would only have textual support if s 4D(1)(b) commenced with the words "the provision has the purpose of injuring particular persons or classes of persons by preventing …" Yet it does not.

69 *Superadded purpose requirement: the cases.* The Full Federal Court relied on an obiter dictum[69] of Finn J in *South Sydney District Rugby League Football Club Ltd v News Ltd*[70]:

> "For the class to have significance for s 4D purposes it must be the intended object of the discrimination envisaged by the section. If it is not so 'aimed at' specifically … the members of the alleged class do not constitute a 'particular class' for s 4D(1) purposes".

Finn J gave a reference after the word "specifically" to *News Ltd v Australian Rugby Football League Ltd*[71]. The Full Federal Court in that case at the point identified said: "The Commitment Agreements were clearly aimed specifically at News as a rival competition organiser". The Court there was not making any decisive point about construction: it was merely summarising the facts. Finn J's

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68 *South Sydney District Rugby League Football Club Ltd v News Ltd* (2001) 111 FCR 456 at 473 [75] per Heerey J.

69 *News Ltd v South Sydney District Rugby League Football Club Ltd* (2003) 77 ALJR 1515 at 1528 [70] per Gummow J; 200 ALR 157 at 174-175.

70 (2000) 177 ALR 611 at 661 [214]. See also *South Sydney District Rugby League Football Club Ltd v News Ltd* (2001) 111 FCR 456 at 471-474 [61]-[78], 505-507 [197]-[198], 531 [295].

71 (1996) 64 FCR 410 at 577.

reference to "the intended object of the discrimination" was a reference to the discrimination which it was the purpose of the provision in the arrangement to achieve between those whose supply was to be cut off and those whose supply was to be maintained. Finn J's language is compatible with the readers and advertisers here being particular classes of persons in relation to whom the provision had the purpose of preventing supply; it does not support the need to establish some superadded purpose to injure. Finn J's language suggests only that the word "purpose" in relation to particular persons or classes of persons means that they must be the intended objects of the discrimination by reason of the provision having the purpose that one party to the arrangement is not to supply them while remaining free to supply other people. The "some" who are purposely not supplied and therefore cannot acquire are the intended objects of the discrimination.

70 The decision of this Court in *News Ltd v South Sydney District Rugby League Football Club Ltd*, handed down after the decision of the Full Federal Court, demonstrates that in s 4D there is no requirement of "aiming at" or "targeting". Gummow J pointed out that in 1986 s 4D was amended by the addition of the words "or classes of persons" after the words "particular persons". He said that this change reflected a particular legislative goal, namely[72]:

> "the legislative goal of removing a limitation upon s 4D which required the precise identification of those sought to be prevented, restricted or limited in their conduct by the purpose of the exclusionary provision. The goal was not to require the infliction of damage or harm to those persons by reason of the operation of the purpose. An object may be one on, or about whom, something (here, the purpose) acts or operates.
>
> … [B]oth Souths and the ACCC submit that the use of expressions in some of the later cases[73] such as 'targeted' and 'aimed at' places an unwarranted gloss upon s 4D and incorporates assumptions and requirements derived from case law concerning collective boycotts. These submissions correctly emphasise the need to construe the terms of the legislation free from notions of anti-competitive conduct which are not necessarily incorporated in s 4D …

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72 (2003) 77 ALJR 1515 at 1529-1530 [76]-[79]. McHugh J agreed with Gummow J at 1525 [46]. Kirby J agreed at 1544 [157]. Callinan J's opinion at 1558-1559 [226]-[227] is similar; 200 ALR 157 at 169, 176-177, 196, 215-216.

73 See *News Ltd v Australian Rugby Football League Ltd* (1996) 64 FCR 410 at 577.

> [T]he terms of s 4D take as a compound element the purpose of preventing, restricting or limiting the supply or acquisition of goods or services to or from particular persons or classes of persons. It is preferable to speak of the purpose of the provision being 'directed toward' a particular class rather than 'aimed at' or 'targeted'. This avoids the connotations of aggression or the inducement of harm, typically found in judicial discussions of boycotts, of which Souths and the ACCC rightly complain."

71 The purpose of the provision in this case was "directed towards" the readers and advertisers in the Mannum area because it was a purpose of maintaining the market power of the Rural Press parties in that area by limiting the supply of services to the readers and advertisers through causing the circulation of the River News to their advantage to cease. The readers and advertisers were objects, "on, or about whom" that purpose operated.

72 Was the Full Federal Court right to say that the inability of readers and advertisers to have access to a second local newspaper was no part of the purpose of the arrangement, but only an effect of it in the nature of "collateral damage"? Apart from Waikerie Printing, they were the only persons to suffer damage from the arrangement. Their damage was the obverse of its. Without Waikerie Printing's damage, that of the readers and advertisers would not have existed. The euphemism "collateral damage" refers to what happens when one target is aimed at, but by accident another is hit. Here the parties to the arrangement did not miss any target. What they hit they were aiming at.

73 *The history of s 4D.* The Full Federal Court's approach cannot be justified by recourse to the Swanson Report and the later history of s 4D. The legislative background to the Swanson Report is that in the 1974 form of the Act, s 45(2) prohibited contracts, arrangements or understandings "in restraint of trade or commerce". Section 45(3) provided that price fixing arrangements were not in restraint of trade or commerce "if the restraint has such a slight effect on competition between the parties to the contract, arrangement or understanding, and on competition between those parties or any of them and other persons, as to be insignificant." Section 45(4) provided that other arrangements were not in restraint of trade or commerce "unless the restraint has or is likely to have a significant effect on competition between the parties to the contract, arrangement or understanding or on competition between those parties or any of them and other persons." On the other hand, s 47 (exclusive dealing), s 49 (price discrimination) and s 50 (mergers) adopted a test of substantial lessening of competition in a market for the conduct described in those sections. That was one striking difference between s 45 as it then stood and as it now stands. The second is that what are now known as exclusionary provisions were not prohibited unless they could be held to be "in restraint of trade", which was

questionable in view of the construction given to those words shortly before the Swanson Report[74].

74 The Swanson Report recommended that the "restraint of trade" threshold should be abandoned[75]; that the test of insignificant or significant effect on competition between the parties in s 45 should be abandoned, and a test of substantial effect on competition in a market substituted[76]; but that for "collective boycotts" a different regime should apply[77]:

> "We consider that a collective boycott, ie an agreement that has the purpose of *or the effect of or is likely to have the effect of* restricting the persons or *classes of persons* who may be dealt with, or the circumstances in which, or the conditions subject to which, persons or classes of persons may be dealt with by parties to the agreement, or any of them, or by persons under their control, should be prohibited if it has *a substantial adverse effect on competition between the parties to the agreement or any of them or competition between those parties or any of them and other persons*."

The Committee continued[78]:

> "[S]uch matters are appropriate to be tested by reference to their competitive effect between parties and other persons, and not by reference to a market."

75 There were three respects in which s 4D as enacted in 1977 departed from the Swanson Report recommendations. First, as the Full Federal Court said, in requiring that the proscribed contract, arrangement or understanding turn on purpose, Parliament did not follow the recommendation about the effect or likely effect of restricting dealings. Secondly, Parliament did not adopt the recommendation about "classes of persons". Thirdly, Parliament did not follow the recommendation that the legality of the agreement should depend on there being "a substantial adverse effect on competition between the parties to the

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74 *Quadramain Pty Ltd v Sevastapol Investments Pty Ltd* (1976) 133 CLR 390.

75 Par 4.8.

76 Par 4.14.

77 Par 4.116 (emphasis added).

78 Par 4.117.

agreement or any of them or competition between those parties or any of them and other persons."

76 The two Second Reading Speeches of the Minister did not explain why any of these three departures from the recommendations took place. The Second Reading Speech of 3 May 1977 did say that "boycotting the commercial activities of particular persons is generally undesirable conduct"[79], but did not say why.

77 These extrinsic materials have no utility in solving the present problem for the following reasons. The Swanson Report was extremely brief and vague about what it called "collective boycotts". The Swanson Report was not dealing with the precise issue. Nor were the Second Reading Speeches. In any event, Parliament departed from the Swanson Report to a radical extent.

78 The next stage in the history of s 4D after its enactment in 1977 was in 1978. Section 4D(2) as enacted in 1977 did not require the parties to the arrangement to be competitive in relation to the supply or acquisition of the same goods or services as those to which the exclusionary provision related. Section 4D(2) as enacted in 1978 did. This change is of no present significance, save that it reveals an early consciousness that s 4D had teething problems.

79 The next change took place after Franki J, in *Trade Practices Commission v TNT Management Pty Ltd*, rejected an allegation that arrangements between various defendants not to deal with Tradestock Pty Ltd or any broker in relation to the carrying of freight contained exclusionary provisions on the ground that "an arrangement … not to deal with a class or category of persons does not satisfy the requirement of an arrangement … not to deal with 'particular persons'."[80] That authority was reversed in 1986 when s 4D assumed its current form.

80 The references which the Full Federal Court made to the Swanson Report, to the two Second Reading Speeches in 1977, and to parts of the Explanatory Memoranda in 1977 and 1986 may have been pursuant to the *Acts Interpretation Act* 1901 (Cth), s 15AB(1). While the Full Federal Court obviously took the contrary view, it cannot be said that the meaning attributed to s 4D by the trial

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79 Australia, House of Representatives, *Parliamentary Debates* (Hansard), 3 May 1977 at 1477.

80 (1985) 6 FCR 1 at 75-76; cf *Bullock v The Federated Furnishing Trades Society of Australasia (No 1)* (1985) 5 FCR 464 at 473.

judge was not the ordinary meaning; or that that meaning led to a manifestly absurd or unreasonable result; or that s 4D was in the relevant sense ambiguous or obscure. No doubt the general law justified resort to the extrinsic materials in order to attempt to identify the mischief with which the legislature was dealing. But whatever the justification for looking at the extrinsic materials, they do not cast light on the construction issue or support the construction adopted in the Full Federal Court. And it cannot be contended that the Executive said "that the proposed legislation means one thing in order to ensure the passing of the legislation and then [argued] in court that the legislation bears the opposite meaning."[81]

81 *Explanation of per se character of s 4D.* The Full Federal Court queried why arrangements containing exclusionary provisions lead to liability without proof of a purpose or effect of substantially lessening competition. Why are they given "such draconian treatment"[82]? The answer given was that the legislature felt "abhorrence of a boycott, namely, an intentional shutting-out of particular persons or classes of persons from access to goods or services, where that is the aim or object of the agreement."[83] That in turn led the court to a search for someone whom the provision was "aimed at" or "specifically targeted".

82 It is true that some have attributed the statutory prohibition of exclusionary provisions to a desire to avoid "unfair trading" because exclusionary provisions involve an "unfair … exercise of power against a targeted person or class of persons"[84]. That may be one purpose, but it is not the only one. There are practices which Parliament has seen as so generally offensive to the competitive goals underlying the Act that they are to be condemned without consideration of any purpose or effect of substantially lessening competition in a market. One practice is price fixing arrangements (s 45A), unless the conduct can also be characterised as exclusive dealing (in which event s 45(6)[85] may

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81 Steyn, "The Intractable Problem of the Interpretation of Legal Texts", (2003) 25 *Sydney Law Review* 1 at 15.

82 *Rural Press Ltd v Australian Competition and Consumer Commission* (2002) 118 FCR 236 at 262 [93].

83 *Rural Press Ltd v Australian Competition and Consumer Commission* (2002) 118 FCR 236 at 263 [93].

84 *South Sydney District Rugby League Football Club Ltd v News Ltd* (2000) 177 ALR 611 at 659 [209].

85 See generally *Visy Paper Pty Ltd v Australian Competition and Consumer Commission* (2003) 201 ALR 414.

remove them from s 45 for consideration under s 47), or unless they provide for the acquisition of shares or assets (in so far as they do, s 45(7) removes them from s 45 for consideration under s 50). Another example is resale price maintenance (ss 48 and 96-100, removed from s 45 by s 45(5)(c)). A third is that type of exclusive dealing known as third line forcing (s 47(6), (7), (8)(c) and (9)(d)). Another is taking advantage of a substantial degree of market power for prohibited purposes (s 46). Yet another is the prohibition against arrangements containing exclusionary provisions[86]. Parliament treated price fixing as unlawful without inquiry into anti-competitive purpose or effect because it shared the perception of United States courts that in general it lacked "any redeeming virtue"[87]. The same is true, it may be inferred, of the other practices described. Market sharing arrangements are commonly viewed as meriting treatment in that way, unless they are of the type exempted by s 51(2)(d) or (e) or unless they create sufficient public benefits to permit them to be authorised under ss 88 and 90[88]. Though the treatment of market sharing arrangements under United States law is not a closely relevant guide to the construction of s 4D, it is not surprising that they are per se violations of §1 of the *Sherman Act* 1890 (US)[89]. It is therefore not a reason to reject a particular construction of s 4D that it extends

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86 Kirby J assembled various economic arguments against exclusionary provisions in *News Ltd v South Sydney District Rugby League Football Club Ltd* (2003) 77 ALJR 1515 at 1535 [113], 1536 [115], 1536-1537 [118]; 200 ALR 157 at 184, 185, 186.

87 *Northern Pacific Railway Co v United States* 356 US 1 at 5 (1958).

88 Thus Walker, "The Trade Practices Act at Work", in Nieuwenhuysen (ed), *Australian Trade Practices: Readings*, 2nd ed (1976) 146 at 157 stated that market sharing "is in a sense more inherently anti-competitive than price-fixing. Excess capacity will often lead to surreptitious discounts or rebates which will lessen the impact of a price agreement, but a market-sharing agreement is designed to create an area of monopoly in which competitors themselves, and hence price competition, are totally absent."

89 *United States v Topco Associates Inc* 405 US 596 (1972); *Palmer v BRG of Georgia Inc* 498 US 46 at 49-50 (1990). The width of this line of authority has been criticised by Bork J ("The Rule of Reason and the Per Se Concept: Price Fixing and Market Division", (1966) 75 *Yale Law Journal* 373 at 380-384; *Rothery Storage & Van Co v Atlas Van Lines Inc* 792 F 2d 210 at 226-230 (1986)); but its correctness in relation to "naked" market sharing of the type engaged in by the Rural Press parties is not doubted. See also Hovenkamp, *Antitrust Law*, vol 11 (1998), ¶1910c at 255.

"draconian treatment" to the type of market sharing arrangement involved in this appeal[90].

83 *Examples of absurdity?* The Rural Press parties gave three examples of conduct which they said, on the Commission's construction, fell within s 4D. They said that that outcome was so absurd as to demonstrate error in that construction.

84 The first example was that of two restaurants in separate ownership having between them a combined capacity of one hundred, which their owners agreed to close and replace with a single new restaurant having a capacity of sixty. In practice, such an agreement would deal with the goodwill of the former restaurants; those items of goodwill would be assets; the new entity would doubtless acquire those assets; in so far as it did, and subject to the operation of s 51(2)(e), s 50 would apply to that acquisition and, by reason of s 45(7), s 45(2)(a)(i) and (b)(i) would not. But even if, and to the extent that, s 45 applied, for the reasons explained in *News Ltd v South Sydney District Rugby League Football Club Ltd*[91] there would not be any exclusionary provision. The purpose of the arrangement would have been to define the size of the restaurant. That would produce a result that only sixty persons could be served at one time. But there would be no purpose of denying service to any particular forty people or to any particular class of people, and no characteristic by reference to which those unable to dine could be described as "particular" objects of any purpose.

85 The second example concerned participants in a mining, oil and gas joint venture who set up "a joint marketing service arrangement by which they agree upon the geographical areas that they will service." This is a difficult example to analyse without more detail. If the participants sold their production to a company in which each of them owned shares subject to an arrangement containing a provision that the company would market the product and a provision that the participants would not supply those areas, this latter provision would be s 47(4) exclusive dealing which would not be treated as an exclusionary provision by reason of s 45(6). If the production and distribution were carried out entirely by a joint venture company formed before any activity by the parties as independent competitors, the Act would not be attracted at all.

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90 Kirby J assumed that market sharing fell within s 4D in *News Ltd v South Sydney District Rugby League Football Club Ltd* (2003) 77 ALJR 1515 at 1536-1537 [118]; 200 ALR 157 at 186.

91 (2003) 77 ALJR 1515 at 1520-1521 [20]-[23] per Gleeson CJ; 200 ALR 157 at 163-164.

If parties commenced activity as independent competitors and then one acquired the other's assets, or they created a joint venture company which acquired their respective assets, by reason of s 45(7), s 50 would apply, not s 45. If the joint venture were a partnership, s 45 would not apply to it because of s 51(2)(d). If each party, acting as an independent competitor, extracted from the mining prospect what it could and agreed to sell in some areas but not others, s 4D may well be attracted, but this is not an absurd outcome.

86 The third example was of the only two solicitors in Mannum going into partnership but agreeing not to provide family law services. Section 51(2)(d) of the Act avoids absurdity by providing that regard is not to be had to that term in determining whether a contravention of s 45 has been committed.

87 *Other issues?* The Full Federal Court said that it was unnecessary to come to a final view on whether there was a lack of particularity in the class of persons identified by the trial judge, namely customers and potential customers of the River News[92]. Very little attention was directed to it in argument in this Court because the Rural Press parties submitted that it was not necessary for this Court to become involved in that question. They did submit that the particular class could not be all readers and advertisers in the Mannum area, but must be limited to those deprived of the benefit of Emmins' services, and must be qualified by the fact that there were still readers of and advertisers in the River News from the Mannum area after April 1998. The weakness in the submission is that it confuses the qualified success of the arrangement with the absolute nature of its purpose. The Rural Press parties called no evidence to suggest that the purpose was qualified in the manner suggested. The purpose found by the trial judge is entirely consistent with the evidence, particularly the internal records of and the conduct of the Rural Press parties. In the circumstances it is sufficient to say that the trial judge adequately defined a class: even though the identity of all of its members at any one time might not be readily ascertainable, s 4D does not require that[93]. Even if s 4D does require that, it would be possible to draw up a list of advertisers who had used the River News, and that would be a sufficient class to render the provision an exclusionary provision. It would also be possible to draw up a list, though perhaps an incomplete list, of readers of the River News. The Commission's contentions cannot be dismissed by reason of issues on which such limited argument was offered.

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92 *Rural Press Ltd v Australian Competition and Consumer Commission* (2002) 118 FCR 236 at 267 [108].

93 *News Ltd v South Sydney District Rugby League Football Club Ltd* (2003) 77 ALJR 1515 at 1529-1530 [77] per Gummow J; 200 ALR 157 at 176.

88 The same is true of the question, which had a faint presence in argument, of whether it is erroneous to define a particular class by the fact of its exclusion from supply or acquisition. In *ASX Operations Pty Ltd v Pont Data Australia Pty Ltd (No 1)*[94] there is a passage which some have alleged to rest on an error of this kind. In this case no argument was directed in this Court to the question; the Full Federal Court came to no view about it[95]; and *News Ltd v South Sydney District Rugby League Football Club Ltd*[96] did not overrule the case in that respect and only one member of this Court criticised it. In any event, to define a particular class by reference to its geographical location is not to define it by the fact of its exclusion from supply or acquisition, because it is identified at the time of the arrangement[97] and indeed identifiable before that time.

Orders

89 *The trial judge's orders.* The trial judge made declarations that Rural Press and Bridge had contravened s 46; that Rural Press, Bridge and Waikerie Printing had contravened s 45; that McAuliffe and Law were directly or indirectly knowingly concerned in the contraventions by Rural Press and Bridge of ss 45 and 46; and that Paul Taylor was directly or indirectly knowingly concerned in the contraventions by Waikerie Printing of s 45. The Rural Press parties made no complaint about these declarations to the Full Federal Court or to this Court. The declarations spoke merely of "an arrangement" having a purpose and effect, without giving any content to that expression and without indicating the gist of the findings of the primary judge identifying the arrangement.

90 These declarations provide a bad precedent and were of a kind which the trial judge should not have agreed to make even if urged to do so by the parties. Close attention to the form of proposed declarations, particularly those "by consent", should be paid by primary judges.

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94 (1990) 27 FCR 460 at 488.

95 *Rural Press Ltd v Australian Competition and Consumer Commission* (2002) 118 FCR 236 at 267-268 [108].

96 (2003) 77 ALJR 1515. Callinan J criticised the passage at 1557-1558 [217] and 1559 [228]; but Gummow J accepted it at 1529 [74], McHugh J concurred with Gummow J at 1525 [46], and neither Gleeson CJ nor Kirby J referred to it; 200 ALR 157 at 169, 175-176, 214, 216.

97 *News Ltd v South Sydney District Rugby League Football Club Ltd* (2003) 77 ALJR 1515 at 1557-1558 [217] per Callinan J; 200 ALR 157 at 214.

91 Secondly, the trial judge granted injunctions for three years against each of the above respondents. The Commission drafted the injunctions, they correspond substantially with those sought in the Application which initiated the proceedings, and the Rural Press parties did not complain about them in the Full Federal Court or in this Court. However, in respects which need not be elaborated, the injunctions against a breach of s 46 and against a breach of s 45 in relation to exclusionary provisions appear to go beyond the Act impermissibly[98].

92 The trial judge also made penalty orders.

93 *The abandonment of the Notice of Appeal.* In oral argument the Commission abandoned its application for the orders set out in the Notice of Appeal. Instead the Commission proposed, and the Rural Press parties accepted, that the following orders should be made in the event of the Commission's appeal succeeding only on s 4D and the Rural Press parties' appeal failing:

> "1. The appeal be allowed.
>
> 2. The orders made by the Full Court of the Federal Court on 16 July 2002 and 18 October 2002 be set aside.
>
> 3. The orders made by the Federal Court on 23 March 2001 be set aside, and in lieu thereof substitute the following orders:
>
> (a) A declaration that the First, Second and Fifth Respondents contravened section 45(2) of the Act by making and giving effect to an arrangement that contained provisions under which:
>
> (i) the Fifth Respondent agreed to cease soliciting advertising and newsworthy information from the Mannum area for inclusion in its regional newspaper, the River News, and to cease promoting the sale of the River News in the Mannum area; and
>
> (ii) the First and Second Respondents agreed not to publish a regional newspaper in the Riverland area,

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98 *ICI Australia Operations Pty Ltd v Trade Practices Commission* (1992) 38 FCR 248 at 267.

as these provisions constituted an exclusionary provision within the meaning of sections 4D of the Act, and had the purpose and likely effect of substantially lessening competition in the market for the supply of regional newspapers in the Murray Bridge district of South Australia.

...

(c) A declaration that each of the Third and Fourth Respondents were knowingly concerned in or party to the First and Second Respondents' contraventions of [section] 45(2) ... of the Act as set out in [paragraph (a)] above.

(d) A declaration that the Sixth Respondent was knowingly concerned in or party to the Fifth Respondent's contravention of section 45(2) of the Act as set out in paragraph (a) above.

4. The Orders made by the Federal Court on 7 August 2001 (other than orders 7 and 9) be reinstated.

5. The First, Second, Third and Fourth Respondents pay the costs of the Appellants of this Appeal (No A203 of 2002) and the First, Second, Third and Fourth Respondent's Appeal No S141 of 2002 to the Full Federal Court.

6. The Appellant pay the First, Second, Third and Fourth Respondent's costs of the ACCC's Cross-Appeal No S141 of 2002 to the Full Federal Court in respect of remedial orders."

94 *Conclusion on orders.* Order 4 should not be made. The orders of the Full Federal Court did not set aside the trial judge's orders of 23 August 2001 relating to penalties.

95 The tailpiece to par 3(a) of the proposed orders should be omitted: it is defective for the same reason that the trial judge's declarations were defective. With that omission, there is some utility in the particular circumstances of these appeals in making the declarations to which the parties consent. The degree to which the Commission succeeded has changed from stage to stage of these proceedings, and it is convenient to have set out in the declarations not only the basis for the primary liability and accessorial liability found, but also the basis for the penalties ordered as it must now be understood.

96 The orders of the Full Federal Court made on 16 July and 18 October 2002 were the declarations and injunctions granted by the trial judge modified to accommodate the success of the Rural Press parties in relation to s 4D and s 46.

97 Even with the declarations now made, the Commission has not succeeded in this appeal in obtaining any order in substance more beneficial to it than the orders made by the Full Federal Court. Further, even if the Commission's construction of s 4D had been accepted in the Full Federal Court, it would have been in no materially better position there than it is now. The Full Federal Court would have made wider declarations and granted wider injunctions. But those wider declarations would have been in an unsatisfactory form, and the wider injunctions would not have given it any substantial advantage not secured by the narrower injunctions. For that reason there is no need to change the costs orders made by the Full Federal Court.

98 The Commission should receive its costs of the Rural Press parties' appeal to this Court. In its own appeal to this Court, it failed on one ground, succeeded on another and neither sought nor obtained any substantive order. Hence, there should be no order as to the costs of that appeal. Indeed, in view of the Commission's failure to obtain any substantive order on its own appeal, and at least to the extent to which it verged on a request for an advisory opinion, there is a strong argument that it should have to pay the Rural Press parties' costs of the appeal. However, the Commission's appeal can be justified as a defensive tactic, employed as a means of preserving its position on penalties against the possibility that the Rural Press parties' appeal might succeed, at least up to the time when it became clear that that possibility had vanished, namely, by the close of their argument on their appeal; and the Rural Press parties made no request for an order in their favour.

99 The orders of the Court should be:

1. Appeal No A197 of 2003 is dismissed with costs.

2. Appeal No A203 of 2003 is allowed.

3. Paragraph 3 of the orders made by the Full Court of the Federal Court of Australia on 16 July 2002 as amended on 18 October 2002 is set aside, and in lieu thereof the following orders are made:

   "3. The orders made by the Federal Court on 23 March 2001 be set aside and in lieu thereof, order that the following orders be made:

      (a) A declaration that the First, Second and Fifth Respondents contravened section 45(2) of the Trade Practices Act by

making and giving effect to an arrangement that contained provisions under which:

(i) the Fifth Respondent agreed to cease soliciting advertising and newsworthy information from the Mannum area for inclusion in its regional newspaper, the River News, and to cease promoting the sale of the River News in the Mannum area; and

(ii) the First and Second Respondents agreed not to publish a regional newspaper in the Riverland area.

(b) A declaration that each of the Third and Fourth Respondents were knowingly concerned in or party to the First and Second Respondents' contraventions of section 45(2) of the Act as set out in sub-paragraph (a) above.

(c) A declaration that the Sixth Respondent was knowingly concerned in or party to the Fifth Respondent's contravention of section 45(2) of the Act as set out in sub-paragraph (a) above."

100 KIRBY J. Once again, proceedings are before this Court concerned with the meaning and application of provisions of the *Trade Practices Act* 1974 (Cth) ("the Act")[99]. A principal object of that Act is to protect and advance competition in markets in the Australian economy[100]. This is a large national purpose. It is also important for Australia's international competitiveness. It invokes objectives beneficial for consumers in local markets and for the national economy. The Act should not be given a narrow interpretation that defeats its effectiveness. So far as its language permits, it should receive the meaning that ensures the achievement of its important objects[101].

101 These opening remarks reflect a theme stated by me in earlier decisions[102]. In my opinion, they help to explain differences that have emerged between the approaches taken by the majority of this Court in decisions delivered since *Queensland Wire Industries Pty Ltd v Broken Hill Proprietary Co Ltd*[103] and the opinions that I have favoured[104]. Generally speaking, in other contexts, this Court has adopted the principle of a purposive construction of legislation[105]. It is a principle having special application to legislation with protective objects beneficial to consumers and to the community at large. No exception should be

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99 ss 4D, 45, 46 and 75B.

100 The Act, s 2 (the Act's purpose is stated as "to enhance the welfare of Australians through the promotion of competition and fair trading and provision for consumer protection").

101 *Bropho v Western Australia* (1990) 171 CLR 1 at 20 approving *Kingston v Keprose Pty Ltd* (1987) 11 NSWLR 404 at 421-424 per McHugh JA (diss).

102 *Melway Publishing Pty Ltd v Robert Hicks Pty Ltd* (2001) 205 CLR 1 at 35-37 [90]-[92]; *Boral Besser Masonry Ltd v Australian Competition and Consumer Commission* (2003) 77 ALJR 623 at 676-677 [323]; 195 ALR 609 at 682; *News Ltd v South Sydney District Rugby League Football Club Ltd* (2003) 77 ALJR 1515 at 1531 [90]; 200 ALR 157 at 178-179.

103 (1989) 167 CLR 177.

104 cf Griggs, "Unconscionability in the High Court – the ACCC on the receiving end again!", (2003) 19 *Australian and New Zealand Trade Practices Law Bulletin* 21 at 23.

105 See eg *CIC Insurance Ltd v Bankstown Football Club Ltd* (1997) 187 CLR 384 at 408; *Newcastle City Council v GIO General Ltd* (1997) 191 CLR 85 at 112-113; *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at 381 [69], 384 [78]; *Eastman v Director of Public Prosecutions (ACT)* (2003) 77 ALJR 1122 at 1150 [140] fn 94; 198 ALR 1 at 39.

carved out for cases involving responses to anti-competitive conduct by corporations and their officers. Yet that, in my respectful opinion, is effectively what has happened.

The facts, legislation and issues

102 There are two appeals before this Court. The facts relevant to the appeals are set out in the reasons of Gummow, Hayne and Heydon JJ ("the joint reasons")[106]. Those reasons contain the sections of the Act in question[107]. They describe the successive decisions of the primary judge in the Federal Court of Australia (Mansfield J)[108] and of the Full Court of that Court[109]. I will avoid unnecessary repetition.

103 The joint reasons explain how the primary judge, after an extensive hearing, considering evidence concerned with events which occurred over many months and comprised in a great mass of evidentiary material[110], concluded that the Australian Competition and Consumer Commission ("the Commission") had proved that Rural Press Limited ("Rural Press"), Bridge Printing Office Pty Ltd ("Bridge"), Mr Trevor McAuliffe and Mr Ian Law (of Rural Press), and Waikerie Printing House Pty Ltd ("Waikerie") and Mr Paul Taylor (of Waikerie) were in breach of the anti-competition provisions of the Act. Relevantly, the primary judge found that the corporate interests of Rural Press and Waikerie had contravened s 45 of the Act in that they had:

(1) entered an arrangement or arrived at an understanding containing an exclusionary provision[111];

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106 Joint reasons at [13]-[28].

107 Joint reasons at [13], fnn 11, 12 and 13 (ss 4D, 45 and 46) and at [47], fn 29 (s 75B).

108 *Australian Competition and Consumer Commission v Rural Press Ltd* (2001) ATPR ¶41-804.

109 *Rural Press Ltd v Australian Competition and Consumer Commission* (2002) 118 FCR 236.

110 The hearing before the primary judge lasted nine days. The transcript of evidence and voluminous affidavits filled six appeal books in this Court.

111 The Act, s 45(2)(a)(i) as defined in s 4D of the Act.

(2) entered an arrangement or arrived at an understanding that contained provisions having the purpose or effect of substantially lessening competition in a market[112]; and

(3) given effect to this arrangement or understanding[113].

104 The primary judge also found contravention by the Rural Press corporate respondents of s 46 of the Act. He upheld the Commission's claim that officers of all corporations, notably Mr McAuliffe and Mr Law, were "knowingly concerned" in the corporate contraventions of Rural Press.

105 The Rural Press corporations and Messrs McAuliffe and Law appealed to the Full Court of the Federal Court. Their appeal was allowed in part. A cross-appeal by the Commission against the penalties imposed at trial was rejected. The Full Court upheld the submission by the Rural Press corporations that the primary judge had erred in finding that the Commission had proved contravention of the provisions relating to "exclusionary provisions" and of s 46 of the Act.

106 It was in this way that the battle lines in this Court were set, once special leave to appeal was granted to the remaining contesting parties. Rural Press, Bridge and Messrs McAuliffe and Law challenged the orders of the Full Court in so far as those orders upheld the findings of contraventions of s 45 of the Act and the conclusion that Messrs McAuliffe and Law were knowingly concerned in such contraventions. For its part, the Commission appealed against the dismissal of its claim that the Rural Press corporations had contravened the provisions of the Act concerned with "exclusionary provisions" and s 46 of the Act and that the executives were knowingly concerned in, or party to, such contravention[114].

107 Neither Waikerie nor Mr Taylor of Waikerie took any part in the Commission's appeal. In effect, this left the battle to be fought between the Rural Press interests and the Commission.

Concurrence and narrowing the divergence

108 *The Rural Press appeal*: The joint reasons explain the three complaints which the Rural Press interests argued in their appeal[115]. I agree that their appeal

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112 s 45(2)(a)(ii).

113 s 45(2)(b)(i) and (ii).

114 Joint reasons at [15].

115 Joint reasons at [29]-[48].

should be dismissed with costs on the basis stated in the joint reasons. This leaves the Commission's appeal challenging the decision of the Full Court to the effect that the arrangement impugned by the Commission did not contain an "exclusionary provision" (within s 4D of the Act) and that the Rural Press interests had not contravened s 46 of the Act.

109 *The Commission's appeal: s 4D of the Act*: I can deal first with the Commission's appeal relating to the requirements of s 4D. The nature of that appeal, its foundation in the reasoning of the Full Court and various issues argued in the appeal to this Court[116] are set out in the joint reasons in terms that I accept.

110 In *News Ltd v South Sydney District Rugby League Football Club Ltd*[117], a question arose that was also debated in the present appeal. That question concerned whether the "purpose" referred to in s 4D(1)(b) of the Act was a "subjective purpose of the parties to the contract, arrangement or understanding … or … an objective construct, deduced by a court when obliged to characterise the 'purpose' in question".

111 In *News*, for reasons that I explained, I concluded that the better view of the "purpose" in s 4D was that it required the court to decide its own characterisation of the purpose in question, ie to provide an objective classification[118]. In his reasons in *News*, McHugh J, although not pressing his opinion to a dissent, also considered that to be the better view of the Act[119]. I adhere to my opinion that the application of a subjective test by the Full Court, in this case, as in that, involved error. However, on the facts, as in *News*, this point is immaterial. The Commission was correct in its submission that whether a subjective or an objective approach was adopted, the requirements of s 4D of the Act were satisfied on the evidence established in this case. In any event, I am bound to accept (as the joint reasons point out)[120] that, following *News*, this Court has decided that the search for determining the "purpose" of the impugned

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116 Joint reasons at [57]-[88].

117 (2003) 77 ALJR 1515 at 1538 [126]; 200 ALR 157 at 188.

118 (2003) 77 ALJR 1515 at 1539 [130]; 200 ALR 157 at 189.

119 (2003) 77 ALJR 1515 at 1522-1524 [32]-[43]; 200 ALR 157 at 166-169.

120 Joint reasons at [57].

"arrangement" is for the *subjective* purpose of the parties[121]. It follows that no legal error occurred in the adoption by the primary judge of that approach.

112 Putting that point aside, I agree with the remaining analysis in the joint reasons concerning the requirements of s 4D. In *News*[122], I expressed my concurrence in the observations of Gummow J in that case[123], to the effect that notions of malice and the language of deliberate "targeting", "discriminating" or "aiming at" a competitor are not necessary for the purposes of s 4D of the Act. Nor is that section limited in its application to circumstances where the concerted action could be classified as a "boycott"[124]. I still hold those views. It follows that I agree with the conclusions in the joint reasons critical of the reasoning of the Full Court in this respect[125]. However, as the joint reasons point out, *News* was not handed down until after the decision of the Full Court in this case. It was not, therefore, available to the Full Court in this case.

113 I also agree with the conclusions in the joint reasons derived from the history of s 4D of the Act[126]. That analysis reflects some of my own reasoning in *News* concerning the legislative history of ss 4D and 45 of the Act, the terms of the report of the Swanson Committee[127], preceding approaches in United States anti-trust law[128] and the selective response of the Federal Parliament in Australia to the Swanson Committee's recommendations[129].

114 I therefore concur in the conclusions in the joint reasons as to the meaning of s 4D of the Act, its application to the facts of the present case and the lack of persuasiveness of the complaints of the Rural Press parties that this conclusion

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121 *News* (2003) 77 ALJR 1515 at 1520 [18] per Gleeson CJ, 1524 [43] per McHugh J, 1527-1528 [63]-[64] per Gummow J, 1556-1557 [212] per Callinan J; 200 ALR 157 at 162-163, 169, 173-174, 212-213.

122 (2003) 77 ALJR 1515 at 1544 [157]; 200 ALR 157 at 196.

123 (2003) 77 ALJR 1515 at 1529-1530 [77]; 200 ALR 157 at 176.

124 (2003) 77 ALJR 1515 at 1544 [157]; 200 ALR 157 at 196.

125 Joint reasons at [64]-[72].

126 Joint reasons at [73]-[80].

127 (2003) 77 ALJR 1515 at 1536-1537 [116]-[118]; 200 ALR 157 at 185-186.

128 (2003) 77 ALJR 1515 at 1536 [115]-[116]; 200 ALR 157 at 185.

129 (2003) 77 ALJR 1515 at 1537-1538 [119]-[124]; 200 ALR 157 at 186-188.

produces a "Draconian" outcome for the market-sharing arrangement between the Rural Press corporations and Waikerie impugned by the Commission. I do not find such a description apt. The application of the Act to such a market-sharing arrangement is precisely what one would expect from a modern statute of this kind, designed to protect and advance competition in Australian markets. Moreover, it is what s 4D of the Act provides in terms. I therefore agree with the joint reasons in their conclusions concerning the disposition of the Commission's appeal in respect of the Full Court's erroneous conclusions about ss 4D and 45(2)(a)(i) and (b)(i) of the Act.

Taking advantage of market power for proscribed purposes

115 *Decision of the primary judge*: This brings me to the point where I part company with the joint reasons. The Commission alleged that the conduct of Rural Press and Bridge involved "taking advantage" of their market power for a proscribed anti-competitive purpose, contrary to s 46 of the Act. The conduct relied upon by the Commission to constitute such "taking advantage" was the threats made by Rural Press and Bridge, and accepted by the primary judge to have been made, to the effect that, if Waikerie did not withdraw the activities of the *River News* from the Mannum area of South Australia, Rural Press would retaliate by publishing a rival newspaper in the Riverland area.

116 In his reasons, the primary judge found that the conduct alleged by the Commission to constitute a "taking advantage of market power" had occurred[130]. His Honour found that such conduct involved a breach of s 46 of the Act[131]. Bridge admitted, and consequently Rural Press accepted, that they enjoyed a substantial degree of market power in the Murray Bridge regional newspaper market. No attempt was made in the appeal to the Full Court to resile from that admission or to suggest that the factual foundation for it was mistaken or unproved[132].

117 *Decision of the Full Court*: Nevertheless, the Full Court held that, in making the conditional threat, Rural Press and Bridge had not "taken advantage" of their market power. Substantially, the reasons advanced for this conclusion were that the initiation of a rival newspaper in the Riverland area of South Australia would not have involved taking advantage of any power that Rural Press and Bridge held in the Murray Bridge market[133] and that Rural Press could,

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130 (2001) ATPR ¶41-804 at 42,721 [26], 42,727-42,728 [68]-[72], 42,740 [123].

131 (2001) ATPR ¶41-804 at 42,743 [134].

132 (2002) 118 FCR 236 at 275 [134].

133 (2002) 118 FCR 236 at 276-277 [142].

or might, have commenced a regional newspaper in the Riverland area irrespective of the existence, or absence, of any "market power". Any "market power" was therefore legally irrelevant[134].

118 Before explaining why I differ from other members of this Court in respect of this aspect of the Commission's appeal, and from the Full Court in its analysis and application of s 46 of the Act, I pause to remark upon what I respectfully regard as the unreality of the conclusion that is now adopted.

119 *The evidence and commercial realism*: Here was Waikerie, with its modest regional newspaper the *River News*, keen to take advantage of potentially new market opportunities arising from the formation of a new and larger local government authority. Waikerie hoped to expand its distribution and to give Rural Press' and Bridge's *Standard* some competition. Doing so would be for the benefit of readers and advertisers within the given market[135]. Here, on the other hand, was Rural Press, with its numerous subsidiary companies, with net assets of $410 million in 2000, large numbers of regional newspapers and magazines in Australia and overseas and an annual pre-tax profit in 2000 of $99 million, engaged in the threatening conduct found by the primary judge. Mr McAuliffe and Mr Law were well aware of the financial strength of Rural Press[136]. They were clearly conscious of its significant physical and capital resources and profitability, and of the capacity of the Rural Press parties to weather a battle with Waikerie to "persuade" (or bully) the latter out of the notion of competition – an idea which fondly, for a short time, Waikerie had embraced.

120 This Court now holds that the Full Court was correct to reverse the primary judge's decision and to conclude that the conditional threat by Rural Press and Bridge to Waikerie, which caused the latter's competitive dreams to collapse so quickly, happened without Rural Press and Bridge "taking advantage" of their "market power". In the end, this conclusion appears to be explained, in a comparatively short passage of reasoning, essentially by reference to the use by the Full Court of the word "could"[137] and the concurrence of that word with the language employed by the majority of this Court in a cited passage in *Melway Publishing Pty Ltd v Robert Hicks Pty Ltd*[138].

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134 (2002) 118 FCR 236 at 279 [149]-[150].

135 cf joint reasons at [44]-[46].

136 Joint reasons at [25].

137 (2002) 118 FCR 236 at 276 [140], 279 [150].

138 (2001) 205 CLR 1 at 26 [61].

121 In *Melway* the same word "could" was employed[139]. I dissented from the reasoning in *Melway*. I regard that decision as inconsistent with the holding of this Court in *Queensland Wire*[140] – a decision that has never been overruled. However, even accepting what was said in *Melway*, it takes a great leap of legal imagination, in my view, to dispose of the Commission's appeal in this case upon such a narrow, formalistic and substantially verbal ground.

122 If, for a moment, this Court turns from the words in judicial reasons to the reality of the pressure brought to bear by Rural Press and Bridge upon Waikerie, illustrated in the evidence adduced before and read by the primary judge in his extended hearing, realism suggests that the effect of that pressure, the speed of its impact and the success of its application to the starry-eyed officers of Waikerie involved "taking advantage" of the market power of Rural Press and Bridge. For a blissful moment Waikerie had conceived itself as entitled to pursue a policy of competition with Rural Press and Bridge. The suggestion that the application by Rural Press and Bridge of their "market power" was causally irrelevant to the swift retreat of Waikerie seems, with every respect, to border on the fanciful. At least it does so if the concept of "taking advantage" of market power is to be understood in the context of a market, ie in an economic and therefore a practical sense.

123 A closer examination of the facts found by the primary judge and the reasoning of the Full Court confirms the foregoing impression, based upon a practical assessment of the circumstances of the dealings between the parties which is the way, I believe, that the Act was intended to operate in such cases.

124 It was open to the primary judge to conclude as he did: (1) that the Rural Press parties made the economic threats to Waikerie; (2) that there was some evidence that Mr Law (from Rural Press) had informed Mr Darnley Taylor (from Waikerie) that the commercial response of Rural Press and Bridge might include the publication of a *free* newspaper in the Riverland area; (3) that Rural Press already published a free newspaper in competition with another local printer in another local market; (4) that Rural Press and Bridge were in a position to carry out their threats; (5) that the threats were only made because market power existed; (6) that they were made to maintain and preserve that market power; (7) that initiating private communications, such as were made in this case, is not routine nor conduct commonly involved in the exercise of competitive rights; (8) that the threats contained in the communications were credible because of the market power of the Rural Press interests in the Murray Bridge regional newspaper market; (9) that the market power enjoyed by Rural Press and Bridge

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139 Joint reasons at [52].

140 (1989) 167 CLR 177.

included their physical and financial resources; and (10) that the purpose of the communications was to deter Waikerie from engaging in competitive conduct in the Murray Bridge regional newspaper market and for the purpose of eliminating Waikerie from that market. On these findings, the conclusion of the primary judge that the Rural Press corporations had breached s 46 of the Act was correct, indeed inevitable.

125 As s 46 provides no explicit guidance as to the conduct designed to be prohibited in varying factual circumstances, the policy objectives of both the Act and the section should be borne in mind when interpreting the section[141]. I have already referred to the objectives stated in the Act[142]. This Court has acknowledged those objectives. In *Queensland Wire* it was said that "[t]he objective [of s 46] is the protection and advancement of a competitive environment and competitive conduct"[143]. Further, the former Trade Practices Commission, in relation to interpreting "take advantage of market power", said that it would "consider whether conduct:

- adversely affects the competitive process;
- adversely affects consumers in terms of price, quality, availability of choice or convenience"[144].

These views were expressed in 1990. They remain relevant today. They reinforce the policy objectives of s 46. The postulate of s 46 of the Act is that a competitive market will protect consumers and advance the interests of the public of Australia more generally.

126 The conditional threat from Rural Press and Bridge extinguished any chance of competition. It adversely affected consumers and the competitive process in terms of availability of choice, as it forced the withdrawal of a competitor and its product from the market. Rural Press and Bridge did not, as they were entitled to do, compete in the market on the basis of the price or quality of their product. Rather, they threatened to retaliate in a way that was a

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141 Corones, "The Characterisation of Conduct under Section 46 of the Trade Practices Act", (2002) 30 *Australian Business Law Review* 409 at 410.

142 See [100].

143 (1989) 167 CLR 177 at 194; see also at 213. See also *Melway* (2001) 205 CLR 1 at 13 [17].

144 Stewart, "The Economics and Law of Section 46 of the Trade Practices Act", (1998) 26 *Australian Business Law Review* 111 at 125-126 citing Trade Practices Commission, *Misuse of Market Power*, Background Paper (1990) at 33.

clear contravention of s 46. With respect, the result of the analysis in the joint reasons in this Court does not protect or promote competition or the competitive process. It stifles it.

127 *Misdescription of the relevant conduct*: A closer examination of the case confirms these impressions. First, the Full Court erred in describing the relevant conduct of Rural Press and Bridge as the "threat to compete with [Waikerie] in the Riverland market in which Rural Press and [Bridge] had no market power (or, indeed, presence)"[145]. That was not a complete description of the impugned conduct. Such conduct included a conditional threat. It was to engage in specified activities unless Waikerie withdrew the *River News* from the Mannum area. The condition inherent in the threat made it one relevant to the "market" in question. It provided the causal link between the "market power" of Rural Press and Bridge in the Murray Bridge regional newspaper market and Waikerie's proposed conduct.

128 The mischaracterisation of the impugned conduct of Rural Press and Bridge by the Full Court was central to its reasoning. The Full Court reached its conclusion on the basis that a threat to enter, or actually to enter, the Riverland market could be made by a corporation with no market power, provided it had access to the necessary printing facilities[146]. However, with all respect, this remark is irrelevant. It is not accurate, or sufficient, to describe the conduct of Rural Press and Bridge as confined to a foreshadowed or actual entry into the Riverland market. It was the conditional threat of Rural Press to enter the Riverland market unless Waikerie withdrew the *River News* from the Mannum area, and to follow this up with all of the considerable means at its disposal, that amounted to "taking advantage of market power".

129 The Full Court recognised that, had the Murray Bridge regional newspaper market been competitive, Rural Press and Bridge might have lacked the motivation to make the threat that they did[147]. However, acceptance of this fact should have demonstrated that there was no business or economic reason for the conditional threat that Rural Press and Bridge made, if they lacked substantial market power. The primary judge correctly recognised that, absent such "market power", deployed by Rural Press and Bridge in the Murray Bridge market, those companies would not have acted as they did. In making their conditional threats, Rural Press and Bridge were indicating a willingness to forego potential revenue and the expansion of their business. They gave conditional undertakings to

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145 (2002) 118 FCR 236 at 276 [141].

146 (2002) 118 FCR 236 at 277 [143].

147 (2002) 118 FCR 236 at 279 [150].

Waikerie that they would not expand into the Riverland area in return for a reciprocal undertaking by Waikerie to withdraw from the Murray Bridge market.

130 If Rural Press and Bridge did *not* enjoy substantial market power in the Murray Bridge market, they would have faced competitive restraints from other suppliers. Such restraints would have deprived them of any significant benefit from procuring an undertaking from Waikerie to withdraw from the Murray Bridge market. The only way in which the conditional threats made commercial sense, therefore, was because Rural Press and Bridge had enjoyed a near monopoly in the Murray Bridge market and were seeking to restore that monopoly position by taking advantage of their market power. Only this explanation discloses why they were willing to give up an opportunity for expansion because of what they stood to gain by the restoration of their monopoly in the Murray Bridge market. The primary judge was correct to so conclude. The Full Court erred in giving effect to its contrary view.

131 *The excusing criterion of possibilities*: The joint reasons justify the Full Court's opinion on this issue by reference to that Court's application of the criterion of whether Rural Press and Bridge "could" have engaged in the same conduct in the absence of market power[148]. It is here that, citing the passage from *Melway* where the same verb is used, a conclusion is reached that the Full Court has approached the matter in the correct and legally authorised way. I disagree.

132 The point made for the Commission was that the Full Court in the present case had used the word "could" in the sense of a "mere *physical* possibility" rather than (as *Queensland Wire* and *Melway* require) considering the impugned conduct by reference to *commercial* considerations, applied to the facts. As the Commission correctly submitted, there is a great difference between a test of *physical* possibility and one of *commercial* likelihood. There may be few forms of commercial conduct that are physically impossible, with or without substantial market power. However, such a criterion affords no assistance in distinguishing conduct that involves "taking advantage of market power", in a way forbidden by s 46 of the Act, from that which does not.

133 I am prepared to accept that "taking advantage of market power" involves something more than merely "using" such power[149]. I am also prepared to agree that a "causal connection" must be shown between the relevant "market power" and the conduct alleged to have breached s 46 of the Act. However, I do not accept that the primary judge fell into the error of believing that a temporal

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148 Joint reasons at [52].

149 *Boral* (2003) 77 ALJR 623 at 667 [279] per McHugh J; 195 ALR 609 at 668. See joint reasons at [55].

concurrence of power and outcome was all that was required. Nor did the Commission make such a rudimentary error. That this is true is shown by the Commission's reliance on the following passage from the reasons of the majority in *Melway*[150]:

> "To ask how a firm would behave if it lacked a substantial degree of power in a market … involves a process of economic analysis which, if it can be undertaken with sufficient cogency, is consistent with the purpose of s 46. But the cogency of the analysis may depend upon the assumptions that are thought to be required by s 46.
>
> In some cases, a process of inference, based upon economic analysis, may be unnecessary. Direct observation may lead to the correct conclusion."

134 As the Commission submitted, detailed economic analysis was unnecessary. It was sufficient to compare what occurred with patterns of commercial behaviour that could be expected in competitive markets and to ask whether the impugned conduct of Rural Press and Bridge in this case departed from such patterns. It was clearly open to the primary judge to conclude as he did. The Full Court erred in substituting a contrary opinion. The Full Court's reasoning cannot be endorsed simply because of the use of the word "could". Truly, that is to permit a relatively minor verbal coalescence to overwhelm the analysis undertaken by the primary judge addressed to the entirety of the conduct of Rural Press and Bridge by reference to the competitive norms to which the Commission properly urged that weight should be given.

135 *Identification of the pressure and the market*: The Commission also drew to notice a third error on the part of the Full Court. This was the Full Court's finding that the conduct of Rural Press and Bridge was not conduct that occurred in the Murray Bridge market where the market power was enjoyed[151]. In this Court, the Commission correctly emphasised that this finding presented a false issue because, ultimately, it was not the foundation of the Full Court's conclusions[152]. The Commission was surely correct in observing that the Full Court's reasoning portrayed a confusion about the conditional threat made by Rural Press and Bridge and the actions that were threatened, namely entry by Rural Press into the Riverland area. Even if the conduct of Rural Press and Bridge were viewed, incorrectly, as involving entry into another market, such conduct could also involve "taking advantage of market power" in the Murray Bridge regional newspaper market.

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150 (2001) 205 CLR 1 at 23-24 [52]-[53].

151 (2002) 118 FCR 236 at 276-277 [142], 277-278 [146]-[147].

152 (2002) 118 FCR 236 at 278-279 [148]-[150].

136 Ultimately, this possibility was recognised by the Full Court[153]. However, properly analysed, the impugned conduct was not entry into another market. It was a conditional threat of entry into Waikerie's market if Waikerie did not withdraw from the Murray Bridge market. The conditional threat was causally connected with the Murray Bridge market because it was only by virtue of the substantial market power of Rural Press and Bridge in the Murray Bridge market that a commercial reason existed for making the conditional threat. It was only because of the market power of Rural Press and Bridge in that market that they enjoyed the resources and economic power necessary to carry out their conditional threat so as to make it real and effective.

137 *Conclusion: restore trial decision*: It follows that it was well open to the primary judge to conclude that it was Waikerie's speedy recognition of the market power that Rural Press and Bridge exerted, and of the willingness, ability and resolve of Rural Press and Bridge to deploy that power, that caused Waikerie to back off and abandon its dream of new market competition. This deprived potential readers and advertisers of the services of Waikerie's newspaper[154]. Most important of all, it involved Rural Press and Bridge "taking advantage" of their "market power". It was therefore conduct that breached s 46 of the Act as the primary judge found. The Full Court had no warrant to disturb that finding. This Court should restore it.

138 *A trilogy and the doctrine of innocent coincidence*: This is the third recent decision of this Court (*Melway* and *Boral Besser Masonry Ltd v Australian Competition and Consumer Commission*[155] being the other two) in which a majority has adopted an unduly narrow view of s 46 of the Act. In effect, it has held, in each case, that the established large degree of market power enjoyed by the impugned corporation was merely incidental or coincidental to the anti-competitive consequences found to have occurred. Notwithstanding the proof of market power, the Court has held that the impugned corporations did not directly or indirectly "take advantage" of that power to the disadvantage of competition in the market.

139 In my view, the approach taken by the majority is insufficiently attentive to the object of the Act to protect and uphold market competition. It is unduly protective of the depredations of the corporations concerned. It is unrealistic, bordering on ethereal, when the corporate conduct is viewed in its commercial

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153 (2002) 118 FCR 236 at 277-278 [146].

154 cf joint reasons at [67].

155 (2003) 77 ALJR 623; 195 ALR 609.

and practical setting. The outcome cripples the effectiveness of s 46 of the Act. It undermines this Court's earlier and more realistic decision in *Queensland Wire*. The victims are Australian consumers and the competitors who seek to engage in competitive conduct in a naive faith in the protection of the Act. Section 46 might just as well not have been enacted for cases like these where its operation is sorely needed to achieve the purposes of the Act. Judicial lightning strikes thrice. A novel doctrine of innocent coincidence prevails. Effective anti-competitive threats can be made without the redress which s 46 appears to promise. Once again I dissent.

Objections to the form of orders in the Federal Court

140 In the joint reasons, comments are made critical of the form of the relevant declarations made in the Federal Court, although (as is pointed out)[156] the parties made no complaint about that matter either in this Court or below. I have previously expressed my hesitation over attempts to subject to the rigidities of traditional equity practice the scope of declaratory and injunctive orders of the Federal Court, made pursuant to broad powers in a remedial statute, in novel circumstances, to afford new protections for large and important social and economic purposes[157].

141 However, because, upon the majority of the issues that were contested in these appeals (specifically those concerning s 45 of the Act), I agree in the analysis and conclusions of the joint reasons, I am disinclined to press my hesitation over matters of form to dissent over the orders. I will therefore content myself with repeating my suggestion that this Court should avoid procedural traditionalism in this field of remedial statutory law.

142 This notwithstanding, in the conclusions that I reach, the Commission was entitled to succeed in its appeal in respect of the Full Court's decision concerning ss 4D and 46 of the Act. Having regard to that conclusion, it cannot be said that the Commission is in no materially better position than it was following the Full Court's decision[158]. To the contrary, in the view that I take of the application of s 46, the Commission has been fully vindicated.

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156 Joint reasons at [89]-[90].

157 *Melway* (2001) 205 CLR 1 at 48-49 [121]-[122]; cf *Levy v Victoria* (1997) 189 CLR 579 at 650-652; *Bass v Permanent Trustee Co Ltd* (1999) 198 CLR 334 at 367-369 [80]-[83].

158 Joint reasons at [97].

Orders

143 In the result, therefore, I agree in the orders proposed in the joint reasons.

144 However, to those orders should be added, in par 2, the words "with costs". It should be further ordered that par 1 of the orders of the Full Court of the Federal Court of Australia made on 16 July 2002 should be set aside and in its place, this Court should order that the appeal to that Court by the first, second, third and fourth appellants be dismissed with costs, such costs to be paid by the first and second appellants. As a result, par 2 of the orders of the Full Court of the Federal Court made on 18 October 2002 should be set aside. In addition to the orders proposed in par 3 of the orders contained in the joint reasons there should be added orders further varying those made by the primary judge as follows:

> "(d) A declaration that the First and Second Respondents contravened section 46(1)(a) of the Act by taking advantage of their substantial degree of power in the market for the provision of regional newspapers in the Murray Bridge district for the purpose of eliminating the Fifth Respondent, a competitor of the First and Second Respondents, in that market.
>
> (e) A declaration that the First and Second Respondents contravened section 46(1)(c) of the Act by taking advantage of their substantial degree of power in the market for the provision of regional newspapers in the Murray Bridge district for the purpose of deterring or preventing the Fifth Respondent from engaging in competitive conduct in that market."

I would also order liberty to apply for supplementary orders, such liberty to be exercised within 28 days.