

TRADE PRACTICES LAW JOURNAL

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ARTICLES

The High Court's Rural Press decision: The end of s 46 as a deterrent against abuses of market power? – Frank Zumbo

The High Court's decision in *Rural Press Ltd v Australian Competition and Consumer Commission* (2003) 78 ALJR 274; [2003] HCA 75 raises further quite serious doubts regarding the effectiveness of s 46 of the *Trade Practices Act 1974* (Cth) as a deterrent against abuses of market power. Not only has the High Court through its earlier decision in the *Boral case* raised the bar on the key s 46 concept of "a substantial degree of market power", the court has now confirmed its extremely narrow interpretation of the additional key s 46 concept of "take advantage of". Indeed, in its *Rural Press* decision, the High Court has interpreted that key concept of "take advantage of" in a manner that is unlikely to be satisfied by even monopolists or near monopolists. In doing so, the High Court has set the level for establishing a breach of s 46 at such heights that it is now extremely doubtful that s 46 will ever catch unilateral abuses of market power by large and powerful corporations as intended by Parliament. 126

Gillette v Energizer – good law and good economics – Doug Shirrefs

The decision in *Gillette Australia Pty Ltd v Energizer Australia Pty Ltd* (2002) 193 ALR 629 establishes important principles for when a comparative advertisement will, or will not, be misleading or deceptive in contravention of the *Trade Practices Act 1974* (Cth). The decision could be criticised for winding back the constraints on comparative advertising, established in decisions such as *Makita (Australia) Pty Ltd v Black and Decker (Australasia) Pty Ltd* (1990) 18 IPR 270. Post *Gillette*, apples with apples comparisons are not required. Advertisers are relatively free to compare their products and others as long as they disclose the nature of comparisons made. This article argues that moving the law away from requiring "apples with apples" comparisons is consistent with the regulatory framework, and can lead to economic efficiencies. By emphasising the need for disclosure, rather than prescribing which type of comparisons can be made, the Full Court has appropriately balanced the need for consumer protection with the economic goal of efficiency. 135

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