

name amounts to bad faith, the UDRP provides that a complaint must show that there is a pattern of conduct showing intent to prevent the complainant from reflecting its trademark in a corresponding domain name.

PRECEDENT UNDER THE UDRP AND THE AUDRP

Decisions under the auDRP are not designed to be expressly binding for future panels; nevertheless, if practices in relation to the UDRP are at all indicative of practices that may come to emerge under the auDRP, decisions may come to have a strong persuasive effect on panels.

Under the URDP, decisions are officially published on the Internet and this has led to a practice by panels of citing back to previous decisions. Most decisions have used the previous cases with only the weight of persuasive authority, while a

few appear to view themselves as being bound by precedent. For instance, in *Zwack Unicorn Ltd. v. Duna* (zwackunicum.com) D2000-0037 the panelist cited the earlier decision in *World Wrestling Federation Entertainment Inc. v. Bosman* (worldwrestlingfederation.com) D99-0001 to establish the evidentiary burden as requiring proof of both registration and use in bad faith. The better view, and this is reflected in most UDRP decisions, is that previous decisions are merely persuasive.

As decisions become handed down by auDRP panels, and assuming that those decisions are subject to formal and public disclosure, the role (if any) of previous decisions as precedent will become clear.

LITIGATION

Clause 2.2 of the auDRP makes clear that the policy only applies to disputes which

meet the requirements set out in Schedule 4 Clause 4(a) (described above). Domain name disputes which do not fit within the scope of this provision may still be addressed by laws relating to passing off, misleading and deceptive conduct, and trade mark infringement. Likewise, other disputes which are very specific to domain names, such as those relating to meta tags and deep-hyperlinking, will also continue to be resolved by the courts.

As a final note, the decisions under the auDRP are not subject to appeal as a function of the policy. Nevertheless, it remains to be seen whether a party could effectively appeal a decision by way of the operation of administrative law.

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ACCC V Rural Press

Janey Draper reviews the recent Full Federal Court decision in 'Rural Press' regarding misuse of market power

The Full Federal Court recently overturned the decision of Justice Mansfield in *ACCC v Rural Press & Ors* [2001] FCA 1065, a case that extended the boundaries of the misuse of market power provisions in the *Trade Practices Act 1974* and made some interesting comments and observations on exclusionary provisions.

THE RURAL PRESS STORY

The Rural Press case concerned the actions of the Rural Press and Bridge Printing (the **Rural Press parties**), owners of *The Murray Valley Standard* (the *Standard*), in pressuring Walkerie Printing, owner of *The River News*, to stay out of Bridge Printing's territory. Walkerie Printing had begun to source advertising and news in Mannum, an area normally serviced by the *Standard*. Following telephone calls, discussions, correspondence and threats by Rural Press to start publishing a new rival newspaper in the Riverland in direct competition with *The River News*, Walkerie Printing agreed to revert to its prime circulation area, which stopped 40km north of the town.

Originally, Justice Mansfield found that the Rural Press parties had misused their market power in the market for regional

newspapers in Murray Bridge and that the Rural Press parties and a competitor, Walkerie Printing, had entered into an arrangement that substantially lessened competition, in breach of section 45 of the *Trade Practices Act 1974* (TPA) and involved an exclusionary provision.

Justice Mansfield's finding on market power was curious, because the relevant conduct was consistent with competitive conduct and the action of the Rural Press parties seemed not to be connected with their power in the relevant market. Not surprisingly, the Rural Press parties appealed to the Full Federal Court. The ACCC cross-appealed on the issue of penalties.

The Full Court overturned Justice Mansfield's decision on exclusionary provisions and misuse of market power, but upheld his decision on substantial lessening of competition and, to a lesser extent, on penalties.

EXCLUSIONARY PROVISIONS

An exclusionary provision is an arrangement between competitors which prevents, restricts or limits supply to, or acquisition from, particular persons or classes of persons. Justice Mansfield found that those Mannum residents who no longer received *The River News* as a result

of the arrangement between the Rural Press parties were a 'class of persons'. On appeal, the Rural Press parties argued that the relevant class of persons should not be defined only by reference to the fact of their exclusion, but that they should share some positive characteristic. Alternatively, they argued that even if a particular class of persons was defined on the basis of exclusion only, the arrangement should still be specifically targeted at that class at the time it was made.

In finding that the arrangement did not involve an exclusionary provision, the Full Court held that the 'class of persons' must be the intended and specific object of the conduct and, unless this is so, they will not constitute a particular class for the purposes of the TPA. In this respect, the Full Court followed both Justice Finn at first instance in *South Sydney District Rugby League Club Ltd v News Ltd* (2000) 177 ALR 611 and Justice Heerey on appeal (in dissent) in *South Sydney District Rugby League Football Club Ltd v News Limited* (2001) FCA 862. That case is now on appeal to the High Court. Furthermore, the Full Court held that there was no reason to find that either party had any purpose of injuring or disadvantaging those who no longer received *The River News*, because it was the effect of the geographic zoning

arrangement, not its purpose, that stopped Mannum residents having access to a second newspaper.

MARKET DEFINITION

Justice Mansfield found the relevant market was the market for regional newspapers in Murray Bridge. On appeal, the Rural Press parties argued that the market should include other print media and commercial radio, which competed with regional newspapers. However, there was evidence that Bridge Printing had never enquired about the local commercial radio station's advertising rates, in contrast to its preoccupation with the rates of nearby newspapers. Despite evidence from advertisers who chose to advertise their product through either radio and newspapers, or both, the Full Court upheld Justice Mansfield's definition of the market.

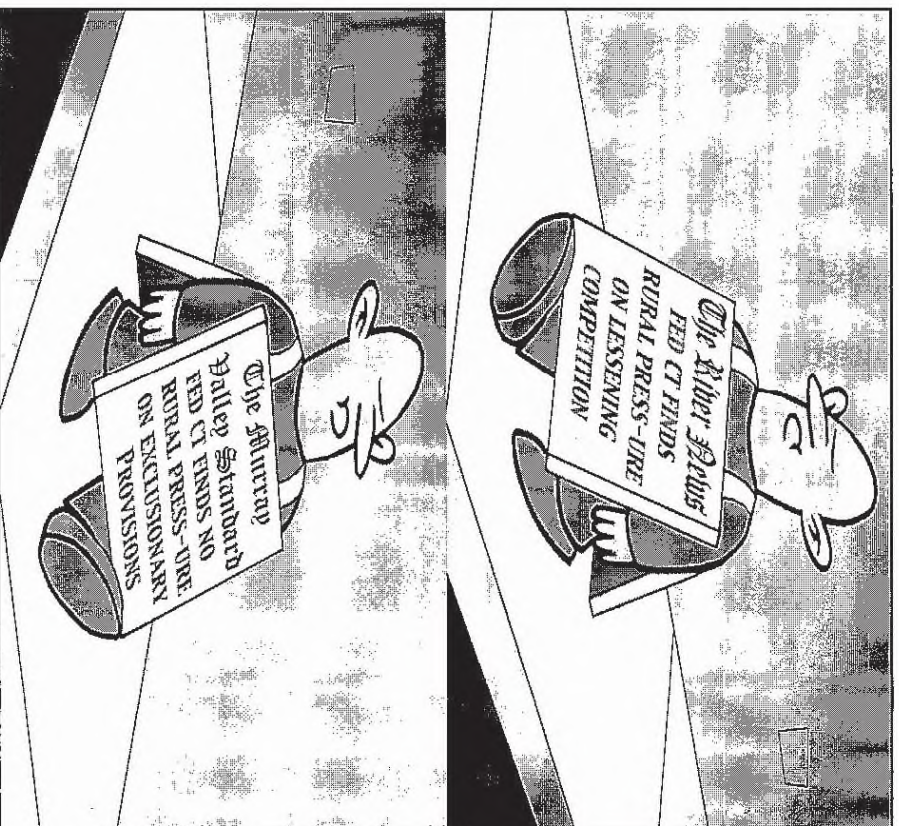
SUBSTANTIAL LESSENING OF COMPETITION

Although the Full Court did not find that the arrangement involved an exclusionary provision, it did find that it resulted in a substantial lessening of competition. The fact that newspaper sales in Mannum were modest and affected a small part of the market, did not mean that the level of competition in question was trivial or insubstantial. The scale of the Rural Press parties' actions in response to Waikerie Printing's conduct indicated that the impact of the arrangement was, in fact, substantial. The effect of the Rural Press parties' conduct was to nip the actual and potential competition in the Murray Bridge newspaper market 'in the bud' and snuff out any potential competition. Otherwise Waikerie Printing could have continued to service Mannum.

MISUSE OF MARKET POWER

The Rural Press parties accepted that they had a substantial degree of power in the market and so the Full Court considered whether their conduct was a misuse of that market power. It found that the Rural Press parties had the proscribed purpose of preventing Waikerie Printing from competing in the market, but the critical issue was whether they had taken advantage of that market power.

Justice Mansfield decided that financial and publishing resources and expertise were relevant to the determination of market power and that the private nature of communications between the Rural Press parties and Waikerie Printing amounted to a taking advantage of market power rather than an exercise of



competitive rights.

Applying the test in *Melway Publishing Pty Ltd v Robert Hicks Pty Ltd*, the Full Court held that, even in a perfectly competitive market, the Rural Press parties could have threatened to enter or actually enter the Riverland market. As such, they were utilising something other than market power in making their threats. While the ACCC conceded that the use, or threatened use, of financial resources in itself could not be an exercise of market power, the Full Court noted that the issue of whether financial resources are relevant to the existence of market power is debatable. The Full Court went on to state that, while the existence of resources in this case may have been either the ultimate cause or the result of market power, using those resources was not 'taking advantage of' market power.

PENALTIES

The Full Court then considered penalties. At trial, the ACCC sought penalties of \$6,500,000 for Rural Press and \$1,500,000 for Bridge Printing. In the original case Justice Mansfield had imposed penalties of \$400,000 on Rural Press, \$200,000 on Bridge Printing, \$60,000 on Waikerie Printing and penalties totalling \$70,000 on Rural Press employees. The ACCC argued that the penalties against the Rural Press parties

were manifestly inadequate. It also argued that Justice Mansfield had taken into account an irrelevant consideration - the conduct of the parties during a trial - in imposing them. The Full Court agreed that conduct of parties during a trial is irrelevant when considering penalties, but noted that it may be relevant to costs orders. Despite finding for the Rural Press parties on two issues, deciding that there was only one breach rather than three and then 'exercising afresh' the discretion to fix penalties, the Full Court imposed the same penalties as Justice Mansfield.

FOLLOW UP

Justice Mansfield found that Rural Press' compliance program was genuinely directed to ensuring a culture of compliance and refused to order the Rural Press parties to implement a trade practices compliance program that complied with the Australian standard. The Full Court upheld that decision, emphasising its reluctance to delegate to a third person the task of specifying obligations the subject of injunctive orders.

The ACCC has sought special leave to appeal the Full Court's decision on exclusionary provisions and misuse of market power to the High Court.

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