Note

The Trade Practices Act, equity and professional sport: *News Limited and Ors v Australian Rugby Football League Limited and Ors*

1. *Introduction*

The two lengthy decisions of the *Super League* litigation have produced the most extensive analysis to date of the legal doctrines governing professional sport. At trial, in *News Limited v Australian Rugby Football League Limited and Ors*,[1] Burchett J found overwhelmingly for the Australian Rugby League, dismissing the Trade Practices Act claims brought by News Ltd ("News") and upholding a raft of cross-claims. On appeal, in *News Limited & Ors v Australian Rugby Football League Limited and Ors*,[2] the Full Federal Court of Lockhart, Von Doussa and Sackville JJ reversed Burchett J's decision, drawing quite different factual inferences and entering a unanimous judgment substantially in terms sought by News. The distance between the two decisions emphasises the difficulty of the issues raised in the case. These issues include the application of restrictive trade practices laws to non-profit organisations, the difficulties of market definition with respect to non-essential leisure and entertainment services, and the legal and equitable consequences of structures adopted by sporting bodies.

2. *The Facts*

A. Background - Structure of the League

The premier professional rugby league competition in Australia was run by the Australian Rugby Football League Ltd, the New South Wales Rugby League Ltd (collectively, "the League") and the various clubs. The relationship between the clubs and the League was regulated by provisions in the memoranda and articles of the various bodies which vested in the League powers to "regulate and control the operation of all member bodies", to admit or exclude clubs from the league, to require alterations of the memoranda and articles of the clubs. Amongst others, two representatives from each club sat on the board of the League.[3] The League had been established for the specific purpose of running a professional football code (as opposed to the amateur game of Rugby Union).[4] However, its structures and activities differed in

1 (1995) 58 FCR 447 (Burchett J).
2 Full Federal Court (Lockhart, Von Doussa and Sackville JJ) (1996) 64 FCR 410. Leave to appeal to the High Court has been refused: High Court of Australia Bulletin No 8 (1996).
3 Above n1 at 455.
4 Id at 453-4.

many respects from "an ordinary commercial joint venture or partnership": new clubs were admitted without any requirement of entry fee or purchase of goodwill;[5] surplus funds were shared rather than divided on a merit basis;[6] non-commercial loans were made to clubs in special need;[7] steps were taken to ensure some degree of equality was maintained between the clubs (such as a 'salary cap' on player wages);[8] and on winding up the surplus assets of the clubs were to go not to the members but to bodies with similar objects or to charities.[9] On the other hand, clubs were each admitted to the competition on an annual basis only and were required to meet detailed conditions of financial and competitive viability; new entrants had to lodge a substantial deposit with the League.[10]

B. The Dispute

The idea of a 'Superleague' was "secretly promoted" to News during 1994 by Mr John Ribot, Chief Executive of the Brisbane Broncos club.[11] Press reports and speculation that News was considering the setting up of a second rugby league competition began surfacing from mid-1994, and were confirmed to League executives in November 1994.[12] The League responded by drafting a "Commitment Agreement" to be entered between each club and the league, admitting and binding the club to the League for the next five years. Each club executed such an agreement by the end of November 1994.[13] Meanwhile, several clubs signed "Confidentiality Agreements" with News.[14] News was allowed to make a presentation to a meeting of club representatives on 6 February 1995, outlining a plan for a 12 team competition administered by the ARL in which News would secure broadcasting rights.[15] The meeting was then reminded by League Chairman, Mr Arthurson, that the League had granted television and Pay TV rights to Channel Nine until the year 2000, and by Nine's proprietor, Mr Packer, that those rights would not be surrendered.[16] Each club then expressed support for the League; the League put a second "Loyalty Agreement" to each of the clubs, which each club executed in the next few days, and which included detailed commitments by the club not to be involved in any rival competition.[17] Burchett J found that various assurances were made by News to the League around this time, to the effect that "there would be no rebel or breakaway competition".[18] Despite these comments, at the end of March 1995 News began the "blitzkrieg" — the mass-

---

5 Id at 458.
6 Id at 459.
7 Id at 459.
8 Id at 459.
9 Id at 457; Above n2 at 443, 444.
10 Above n2 at 450, 464–5, 508.
11 Above n1 at 460.
12 Id at 462.
13 Id at 463.
14 Id at 464. The Commitment and Loyalty Agreements will be referred to collectively as "the Agreements".
15 Id at 465.
16 Id at 465.
17 Id at 466-8.
18 Id at 462, 465, 466, 469.

signings with Superleague of coaches of selected clubs and large numbers of players. Players were escorted to secret destinations late at night to sign complex documents containing offers of "overwhelming" sums. There was no opportunity for legal advice. News granted broad indemnities to the clubs and their directors and officers from liability as a result of entering these contracts.[19]

3. *The Decision*

A. The Issues

On the day that the 'assault' commenced with the signing of the coaches, News commenced proceedings in the Federal Court to have the Commitment and Loyalty Agreements ("the Agreements") set aside. Three breaches of Part IV of the Trade Practices Act 1974 were alleged:

i) That a contract, arrangement or understanding between the League and the clubs contained exclusionary provisions (as defined in s4D of the Act).[20]

ii) That a contract, arrangement or understanding between the League and the clubs had the purpose or (likely) effect of substantially lessening competition.[21]

iii) That in making the Agreements, the League and the clubs had engaged in the misuse of market power.[22]

There were a number of other claims made, the most important being the cross-claims by the League and aligned clubs that the Super League clubs breached contractual and fiduciary duties by transferring assets to Super League entities, and that News and Super League tortiously induced these breaches of contract and knowingly participated in the clubs' breaches of fiduciary duty.

B. First Instance

It can be said without hyperbole that the judgment entered by the trial judge, Burchett J, found against News on each significant issue in dispute in the proceedings, under every claim and cross-claim. None of the elements of the exclusionary provisions claim was made out. There was no horizontal contract, arrangement or understanding made between the clubs containing the terms of the Commitment and Loyalty Agreements. Additionally, the clubs were not in competition with each other in relation to the supply or acquisition of any of the services to which the Agreements related. Finally, the terms of the agreements did not have the substantial purpose of preventing, restricting or limiting the supply or acquisition of the relevant services. In fact, rather than being competitors engaging in exclusionary boycotts, the clubs and the League were engaged in a joint venture,[23] the purposes of which were, to a significant extent, of a non-profit nature.[24] Further, the clubs and the League

---

19 Id at 473.
20 Making such an agreement is prohibited by s45(2)(a)(i); giving effect to it by s45(2)(b)(i).
21 Similar, making contravenes s45(2)(a)(ii); giving effect contravenes s45(2)(b)(ii).
22 Contrary to s46.
23 Above n1 at 545.
24 Id at 458, 481-2, 498-9;

owed to each other reciprocal fiduciary duties arising out of this joint venture — duties which were breached by the Super League clubs and officials.[25] News and Super League knowingly participated in these breaches.[26]

Similarly, there was no horizontal contract, arrangement or understanding between the clubs which could have the purpose or (likely) effect of substantially lessening competition. Even if there had been a horizontal agreement, its effect on competition could be assessed only once a market had been delineated; but News had failed to establish any of its pleaded markets (all of which were limited to rugby league), as the relevant market extended beyond rugby league to include at least rugby union, soccer, Australian Rules football and basketball, and possibly also encompassed other popular entertainments.[27]

Finally, News' failure to delineate a market made it impossible to evaluate whether the League had any market power to misuse. At any rate, the League's purposes in entering the Agreements were not the anti-competitive purposes proscribed in s46(1), but were legitimate purposes in line with its role in the non-profit joint venture with the clubs.

Burchett J also found that the Super League clubs had committed numerous breaches of contract (including the Agreements), and News had induced these breaches.[28] Accordingly, Burchett J made a large number of orders, some very wide-ranging in scope. Their net effect included effectively prohibiting News and the Super League clubs from setting up or promoting a rival competition anywhere in the world until 31 December 1999 and binding the clubs to the ARL until the end of the 1999 season.[29]

C. On Appeal to the Full Court

In a lengthy joint judgment, the Full Federal Court of Lockhart, Von Doussa and Sackville JJ upheld a large part of News' appeal. While leaving the primary findings of fact intact, the Full Court drew quite different inferences from them, accepting a far more commercial and profit-motivated characterisation of the League and the clubs. It found that the clubs had conflicting commercial interests, and that rather than being at the mercy of the clubs, the League exercised considerable control over them.[30] Accordingly, it held that the relationship between the clubs and the League was not such as to create reciprocal fiduciary obligations between the parties.[31] Turning to trade practices questions, the Full Court reversed Burchett J's findings as to exclusionary provisions, holding that there was a horizontal agreement between the clubs in the terms of the Commitment and Loyalty Agree-

---

25 Id at 470, 545-6.
26 Id at 470, 547.
27 Id at 493-503. Note comments at 492 that the respondents (the League) did not need to offer any precise alternative definition of the market, it being sufficient in order to defeat the applicants' claims that they show that the market was broader than the rugby league-alone market alleged by the respondents.
28 Id at 537-43.
29 Above n2 at 501. These orders are set out in the Appendix I to the decision of the Full Court. There was some modification of the orders after a subsequent hearing before a differently constituted Full Federal Court on 13 and 25 March 1996: Above n2 at 501–2, 587.
30 Id at 545, 547, 580.
31 Id at 551.

ments containing exclusionary provisions within the meaning of the Act.[32] The Agreements were therefore void.[33] This flowed from findings that

- When the agreements were entered into, the clubs were or were likely to be in competition for the services of the League,[34] were or were likely to be in competition for the services of News as a rival competition organiser, [35] and were likely to be in competition for the services of premier players;[36]
- There was a 'contract, arrangement or understanding' between the clubs (and the League);[37]
- A substantial purpose of entering the Agreements was to "restrict the supply of rugby league teams and players available to the rival competition".[38]

The conclusion that the Agreements created exclusionary provisions and were void made it strictly unnecessary to decide whether they also constituted a misuse of market power or substantially lessened competition. The Full Court therefore declined to address the question of market definition.[39]

Additionally, certain orders made by Burchett J directly affected the rights and obligations of non-parties to the litigation and were therefore set aside.[40] Residual issues were remitted to the trial judge for determination, including questions of breach of contract, but as only the contracts between the clubs and the League for admission to the 1995 season were breached by the Super League clubs, remedies for these breaches were to be confined to damages, which were likely to be nominal only.[41]

4. *The Issues*

The most novel and interesting questions raised in the case — and those ultimately most decisive of the outcome — are the trade practices issues: whether the arrangements between the League and the clubs contained exclusionary provisions, substantially lessened competition, or were a misuse of market power. The key to understanding the almost polar distinction between the results reached at trial and on appeal, however, lies in the alternative characterisations of the facts adopted by Burchett J and the Full Court. In particular, Burchett J's view that News and the Super League clubs had breached equitable standards of propriety was the cornerstone of his interpretation of much of the factual material before the court,[42] while the Full Court's repudiation of

---

32 See above n25.
33 Above n2 at 581–2.
34 Id at 566–7.
35 Id at 567–70.
36 Id at 570.
37 Id at 573–5.
38 Id at 577–80.
39 Id at 425. The court cited delay and extension of an already lengthy judgment as reasons for this decision: at 425.
40 Id at 527.
41 Id at 519, 527–8. The matter was referred back to the trial judge for assessment of damages.
42 See especially above n1 at 469–71.

this view informed many of the distinct inferences it drew from identical facts. Following the structure adopted by the Full Court, then, this note will first examine the claims of joint venture and reciprocal fiduciary duties. It will then be in position to evaluate the restrictive trade practices elements of each decision.

A. Joint Ventures and Fiduciary Duties

In *United Dominions Corporation Ltd v Brian Pty Ltd*,[43] the High Court addressed the question whether joint venture arrangements gave rise to fiduciary duties between the venturing parties. In a joint judgment, Mason, Brennan and Deane JJ pointed out that the term "joint venture" has no technical legal meaning; its meaning in ordinary language was insufficiently settled to support a "general proposition that the relationship between joint venturers is necessarily a fiduciary one".[44] All the judges based the implication of fiduciary duties upon the partnership-like form of the particular venture,[45] with Gibbs CJ and Dawson J in particular finding the joint venture in question to be one "based on the same mutual trust and confidence and requiring the same good faith and fairness [as a partnership]".[46]

Burchett J's reasoning on the question began with the characterisation of the rugby league competition as a joint activity of the League and the clubs. This view was supported principally by lengthy quotation from a series of United States cases which emphasised the necessity of joint decision-making in the organisation of sport, a criterion fulfilled by the League's position of control over the clubs.[47] Building upon this characterisation, the analysis of the fiduciary relationship between the clubs and the League was scanty, consisting essentially of some lengthy quotations from the judgments in *UDC v Brian* and the summary conclusion that,

> ... mutual trust and confidence, in pursuit of jointly held objectives in order to generate a product to be shared among the participants, each of whom will have contributed, is a description of the situation of the League and the clubs which matches what their Honours said in *United Dominions* ...[48]

His Honour went on to find that the Super League clubs held substantial assets on constructive trust for the joint venture and were in breach of their fiduciary duties; News had knowingly participated in these breaches of fiduciary duty so was similarly liable.[49]

The approach of the Full Court to this issue, with respect, is greatly to be preferred. The Court recognised that equity is less concerned with the formal classification of the relationship (eg: joint venture, partnership) than its substance

---

43 (1985) 157 CLR 1. ("*UDC v Brian*")

44 Id at 10.

45 Above n51.

46 Id at 7-8, per Gibbs CJ. See also id at 16, per Dawson J.

47 Above n1 at 510-13. Ironically, these were the very cases which Burchett J had distinguished on the question of market definition, in large part because of structural differences between the two countries: "It cannot be taken for granted that the structure of professional sports ... is the same in Australia as it is in the United States.": at 491.

48 Id at 544.

49 Id at 546-7, applying *Royal Brunei Airlines Sdn Bhd v Philip Tan Kok* [1995] 2 AC 378 (PC).

and that analysis must begin with the content of the obligations which the parties actually owe to each other:[50]

> It is important to appreciate that the existence of a fiduciary relationship does not determine the *content* of the duties owed by one fiduciary to another. It has long been recognised that the nature and extent of the duties depend on the circumstances surrounding the particular relationship and the context in which relief is sought ... [51](original emphasis)

Indicia of fiduciary duty include the vulnerability of the beneficiary to the fiduciary, while the freedom of a party to act in its own interests "presents an "overwhelming obstacle" to a comprehensive fiduciary relationship".[52] A thorough examination of the relationship between the clubs and the League revealed a number of indicia relevant to the question of fiduciary obligations. Rather than being vulnerable to the clubs, the League was in a considerable position of control over them, as evidenced particularly by the power to set conditions for (or indeed refuse) admission to the competition - a power which had been relied upon frequently.[53] The League had been established to make decisions independently of the vested interests of the clubs, rather than jointly with them.[54] Despite their non-profit status, the clubs conducted significant commercial activities in their own interest and built up substantial assets which were never treated as being held upon trust.[55] Importantly, the clubs had a clear right to withdraw from the competition, contradicting the pleaded fiduciary duty to maintain the standards and quality of that competition.[56] Distribution of profits was discretionary rather than as of right, the creation of goodwill was not determinative of a fiduciary relation, and competition between the clubs weighed against a fiduciary characterisation.[57] Predictably, then, the relationship between the clubs and the League was not consistent with the wide fiduciary obligations pleaded by the League, although there could be some narrower fiduciary obligations owed.[58] This result is unsurprising and undoubtedly correct, being a principled and orthodox application of the established Australian approach which sees fiduciary duties as arising out of, rather than creating, obligations to act in the interests of the other party.[59] This rejection of the joint venture/fiduciary duty characterisation expresses the key distinction between the two decisions: the moralistic and judgmental tone which pervades Burchett J's discussion of News' actions finds no counterpart in the judgment of the Full Court, which strives for a far more detailed and less morally charged evaluation of the evidence at hand. The result is a radically different view of the events in question.

---

50 Above n2 at 538–9.
51 Id at 539.
52 Id at 540–1.
53 Id at 542–5.
54 Id at 545.
55 Id at 545–6, 548.
56 Id at 546–7.
57 Id at 548–9.
58 Id at 551.
59 See for example *Breen v Williams*, (1996) 186 CLR 71, per Gummow J, McHugh and Gaudron JJ; also Parkinson P, "Fiduciary Law and Access to Medical Records: *Breen v Williams*" (1995) 17 *Syd LR* 433 at 439-43.

B. Exclusionary provisions

In order to make out its exclusionary provisions claim, News had to establish three elements. Firstly, there had to be a contract, arrangement or understanding.[60] Secondly, two or more of the parties to that agreement had to be in competition.[61] Specifically, they had to be in competition "in relation to the supply or acquisition of all or any of the goods or services to which the relevant provision ... relates".[62] Competition in this sense includes "likely competition as well as actual competition",[63] where 'likely' denotes "a real chance or possibility" rather than "more likely than not".[64] Thirdly, relevant provisions of the horizontal agreement had to have the "purpose of preventing, restricting or limiting" supply or acquisition of the relevant goods or services to or from particular persons (or classes of persons).[65] The purpose was to be found in "the subjective purposes of the individuals responsible for including the provision",[66] and had to be a "substantial" purpose of the provision.[67]

(i) Agreement between the clubs

Both the Commitment and Loyalty Agreements were formally executed as contracts between an individual club and the League, rather than between the various clubs. As the League was not claimed to be in competition with the clubs, News argued that the court should infer a horizontal 'agreement' between the clubs in the same terms as the Agreements. For such an 'agreement', there had to be a "meeting of the minds" of the parties to the contract, arrangement or understanding:[68]

> There must be a consensus as to what is to be done and not just a mere hope ... Independently held beliefs are not enough.[69]

Burchett J found that there was no such horizontal agreement between the clubs, who had "no more than a hope or expectation that others would execute the Commitment and Loyalty Agreements".[70] Reliance was placed on the absence of evidence of direct communication between the parties, which was more significant given the non-commercial natures of the League, the clubs and their respective officials. As opposed to the wily commercial parties between whom a horizontal understanding had been inferred in *Re British Basic Slag Ltd's Agreements*,[71] these "unsophisticated" club officials would have left behind "abundant" evidence of any such communications.[72]

---

60 s45(2), read with s4D.
61 s4D(1)(a).
62 s4D(2).
63 Above n1 at 509; s4D(2): "... is, or is likely to be ... ' in competition ..."
64 Above n2 at 564–5.
65 s4D(1)(b).
66 s4F; above n2 at 576.
67 Ibid.
68 Above n2 at 571. Above n1 at 528, citing Lockhart J in *TPC v Email Ltd* (1980) 43 FLR 383 at 385.
69 Ibid.
70 Above n2 at 572.
71 [1963] 2 All ER 807 (CA).
72 Above n1 at 528-30.

Rejecting the non-commercial characterisation which had "heavily influenced" Burchett J's interpretation of the evidence, the Full Court came to the opposite conclusion. Both the Loyalty and Commitment Agreements were finally executed by the League only after meetings of representatives of all the clubs; the Agreements were all executed by the clubs within a short time and were known by the clubs to be in substantially identical form; Mr Arthurson and Mr Quayle functioned as a nexus between the clubs.[73] In these circumstances, the clubs "were not merely hoping that the other clubs would join in; what they were doing made sense only as a common undertaking".[74] The inference to be drawn was not be one of "mere 'conscious parallelism'", but of an understanding between the several clubs.[75] This reversal is to be welcomed, as Burchett J's approach seemed to leave the way open for trade associations, particularly in less commercial fields such as the professions, to use multiple vertical agreements to evade the inference of a proscribed horizontal agreement.

(ii) Competition between the clubs

Three areas of competition were relied on by News: competition for the services of the League as competition organiser, competition for the services of News as an alternative competition organiser, and competition for the services of premier players.[76] At trial, Burchett J held that no such competition had been established. Firstly, there could be no relevant competition for the services of premier players, as these services, acquired under standard-form employment contracts from which there was "no likelihood" the parties would depart, were excluded from the definition of 'services' in s4 of the Act.[77] Secondly, the relationship between the clubs and the League was one of "joint activity" rather than competition;[78] given the minimal chances of the League refusing to admit a club, there was therefore no competition between the clubs for the services of the ARL.[79] Finally, at the time the Agreements were made, there was no likelihood of competition between the clubs for the services of Super League: News intended to organise a competition between franchises, not the clubs, and News had made representations that it would not set up an alternative competition; by the time of the Loyalty Agreements, "Superleague was then 'dead in the water'."[80]

The Full Court reversed all three findings. Again rejecting Burchett J's joint venture characterisation, it emphasised instead the varying commercial concerns of the parties:

> each of the clubs and the League and ARL had its own distinct commercial interests. In many respects the clubs were in vigorous competition, notably for spectators, sponsors and television viewers.[81]

---

73 Above n2 at 573–5.
74 Id at 575.
75 Ibid.
76 Id at 566–571.
77 Above n1 at 518.
78 Id at 510–13; above pp6–7.
79 Id at 513–4.
80 Id at 515–6.
81 Above n2 at 565.

With respect to competition for the services of the League, the court pointed to the annual process of admission of the clubs to the competition, the strict financial and other requirements to be met for such admission, the pressures for a reduction in the number of teams in the competition and the history of exclusion of unsuccessful clubs as "overwhelming" evidence of such competition at the time of the Agreements.[82] Competition for the services of News as an alternate competitive organiser, similarly, was the inevitable conclusion from the evidence: "the threat posed by News' potential rival competition was very much at the forefront of the minds of the representatives of the League and ARL and of the clubs".[83] Burchett J's finding that no alternate competition organiser existed at the time of the Agreements was simply negated: it was precisely this threat which accounted for the making of the Agreements in the first place.[84] Finally, although stating that the question was strictly not necessary to resolve, the court in dicta departed from Burchett J's approach to the services of premier players, reasoning that as the clubs were free to engage players under contracts for services rather than contracts of service, they could be and were likely to be, in competition for these services.[85]

Although the second of these findings seems unassailable, the Full Court does seem, with respect, to have been carried a little too far by its determination to avoid Burchett J's conclusions on the first and third points. The argument that *de minimis* competition is insufficient for the purposes of s4D was canvassed (although not relied upon) by Wilcox J in *Eastern Express Pty Ltd v General Newspapers Pty Ltd*[86], and seems similarly applicable in relation to competition for the services of the League in this case. More importantly, the cavalier attitude taken to evidence of the actual form of the player's contracts seems to encourage a significant widening in the application of the Act to include services under contracts of employment: at the least, wherever the parties are free to adopt a contract for services, there would seem to be scope for "likely competition" for services under such contracts, and exclusionary provisions claims could arise.

(iii) Purpose of the Agreements

The difference in findings as to the purpose of the agreements between the trial judge and the Full Court was inevitable given their respective accounts of the facts. In line with the familiar non-profit joint venture approach, Burchett J discounted any causal connection between the advent of Super League and the execution of the Agreements, accepting that the League's purpose was that of its guiding mind, Mr Arthurson: "to preserve the quality of [the rugby league] competition" — a competition "unrivalled in the world" — "through the joint participation of the clubs";[87] Burchett J saw no reason to infer any proscribed purpose.[88] Burchett J also noted that the requirement that the purpose be a substantial one should not be relaxed, lest the per se ban on exclusion-

82 Id at 565–7.
83 Id at 568.
84 Id at 567–570.
85 Id at 570–1.
86 (1991) 30 FCR 385 at 419-20.
87 Above n1 at 469.
88 Id at 524-6.

ary provisions be interpreted "so as to widen the area of its interference with general freedom of contract".[89]

The Full Court began by specifically rejecting this latter "gloss" on the provisions of the Act, pointing out that "the very point of those sections is to 'interfere with general freedom of contract' ",[90] It went on to draw opposing inferences from the evidence as to purpose, holding it to be clear on the evidence that "on any view open of the word 'substantial' ", a substantial purpose of the clubs and the League in entering the Agreements was to prevent the clubs supplying teams to or acquiring the services of an alternate competition organiser[91] — a conclusion which is difficult to dispute.

(iv) Conclusion - Exclusionary Provisions

The exclusionary provisions finding is the considered and closely-argued foundation of the Full Court's decision in favour of News Ltd. Examined piece by piece, it is a rigorous and correct application of sections 4D and 45(2) of the Trade Practices Act to the facts of the case. Considered at a more general level, it raises considerable concerns about the recourse to per se provisions in the regulation of a subject matter as complex as competition policy, and has already drawn criticism from those working in this area.[92] Although the three-part test for exclusionary provisions apparently places significant obstacles in the path of a plaintiff, the Full Court's decision shows that the per se prohibition can still have a significant (and perhaps unintended[93]) width. Of particular concern is the application of the exclusionary provision sections to joint ventures, where restrictions on the supply or acquisition of goods or services may well be necessary to the success (and so the broader pro-competitive effects) of the venture; the per se prohibition of such restraints leaves the participants in any joint venture vulnerable to 'free riders' with superior economic resources.[94] While arguably correct on its facts, the *Super League* result does demonstrate the extent to which the existing test can focus on — and protect — the wrong level of competition. Concentrating on the (relatively unimportant) competition between clubs for the services of competition organisers, it ignored the effects at the real competitive level — that of Super League and the ARL. This inherent myopia can only strengthen calls for a competition analysis test to replace the per se prohibition upon exclusionary provisions.[95]

C. *Market Definition*

(i) Background

In order make out the claims that the Agreements either gave rise to a contract, arrangement or understanding which substantially lessened competition

89 Id at 522.
90 Above n2 at 576–7.
91 Id at 577.
92 For example Gray M and Robertson D, "A Swift Kick in the Networks", *Australian Financial Review* 9 October 1996.
93 Ibid.
94 Ibid; Corones S, "Reaping Without Sowing: The Free Rider Problem in the Context of Joint Ventures", (1993) 21 *ABLR* 158 at 161-3.
95 Ibid.

or constituted a misuse of market power, News first had to establish the boundaries of the market within which the League could effect competition or hold market power. Section 4E of the Act provides that a market for goods or services includes a market for goods and services "that are substitutable for, or otherwise competitive with, the first-mentioned goods or services". In the test approved by the High Court in *Queensland Wire*,[96] a market is "the area of close competition between firms",

> the field of actual and potential transactions between buyers and sellers amongst whom there can be strong substitution, at least in the long run, if given a sufficient price incentive...
>
> ... in determining the outer boundaries of the market we ask a simple but fundamental question: If the firm were to 'give less and charge more' would there be, to put the matter colloquially, much of a reaction?[97]

News pleaded a number of markets, the full details of which it is unnecessary to reproduce. Most importantly, the product dimension of each of these markets was limited to rugby league alone. No attempt was made to argue that the League had market power or was effecting competition in any market extending beyond its own sport,[98] meaning that failure to establish this market at trial was fatal to News's market power claims.[99] Two markets are demonstrative of the definitions alleged. Firstly, a 'Rugby League Competitions Market' was alleged for the supply of "the service of conducting national premier rugby league competitions". This market characterised the competition organiser as supplier of various services to customers, including: viewing of matches to the public attending games and watching on television; television and pay television broadcast transmission rights to the relevant television proprietors; radio broadcast rights to radio proprietors; merchandising rights and sponsorship rights. Secondly, News argued there was a "Teams Market" for the supply of "teams of premier players suitable for participation in a competition". In this market, corporate clubs supply the teams and compete with each other for "money and prizes, gate receipts, and selling of sponsorship rights, corporate boxes and merchandising rights".[100] The other markets pleaded consisted of combinations of these basic elements.

(ii) Argument and Findings

Beginning with basic tests quoted above, Burchett J conducted an exhaustive survey of the authorities and general principles on the question of market definition,[101] in terms which are "undoubtedly... correct".[102] Particular emphasis was placed upon the need to look to a "wider rather than a narrower market"[103] in both product and temporal dimensions.[104] This need persisted even when substi-

---

96 *Queensland Wire Industries v BHP* (1989) 167 CLR 177.
97 *Re QCMA Ltd* (1976) 25 FLR 169 at 190 (Trade Practices Tribunal).
98 Above n1 at 475.
99 Id at 492, 504. Note that market definition was not critical in the remaining s45(2) action regarding exclusionary provisions: 504.
100 Id at 475.
101 Id at 475-504.
102 Pengilley W, "Rugby League at trial", (1996) 11 *Australian and New Zealand Trade Practices Law Bulletin* 113 at 120.
103 Above n1 at 478.

tution possibilities were complex and there were in reality overlapping markets or 'submarkets', as in Australian law the concept of 'submarket' was "a tool of analysis and not as an element of a legal standard to attract liability."[105]

On the facts, Burchett J found that News failed to establish any of the pleaded markets, meaning that the various market power claims failed and it was strictly unnecessary to make any concrete finding on the question of market definition. However, the judgment suggested that the proper market for assessing the s45 and s46 claims extended beyond rugby league to include, at least, rugby union, soccer, Australian rules football and basketball; it possibly also encompassed cricket, the 2000 Olympics and other popular entertainments.[106]

A brief survey of the arguments from the evidence is necessary to view Burchett J's findings in context. News' basic claim was that "a major professional sport is, at the least, a market in itself ...".[107] In particular, it argued that there was a "core crowd",

> " ... a large number of rugby league fans throughout Australia, but particularly in New South Wales and Queensland, for whom no other sport provides an acceptable substitute. They may have an interest in other sports to a greater or lesser extent, but their sport is rugby league'."[108]

This position was the starting point for an extensive amount of evidence relating to market definition. Burchett J dealt first with News' claim that the League conduct was that of a monopolist in a single-product market: that its failure to address internal problems and its cheap sale of long-term television rights indicated lack of exposure to competitive forces. This short-term conduct was explicable in the longer term by reference to the non-profit nature and motives of the League: rather than being a badge of monopoly, the cheap sale of TV rights flowed from the League's "great interest in promoting the game ...",[109]

> Like... those in charge of a church hospital, the board of the League is motivated in large part by considerations other than the pursuit of profit. It is concerned with the preservation and enhancement of the traditions of the game ... the Good Samaritan delayed his business, and expended some of his funds, to serve a higher duty.[110]

Next, there was evidence of the "industry's own perception of the breadth of the market",[111] as found in the conduct and opinions of those involved. These showed that other sports and even News itself made frequent reference

---

104 Id at 477-9, 481.

105 Id at 479, quoting from Brunt M, "Market Definition: Issues in Australian and New Zealand Trade Practices Litigation" (1990) 18 ABLR 86 at 117.

106 Above n1 at 493-503. Note comments at 492 that the respondents (the League) did not need to offer any precise alternative definition of the market, it being sufficient in order to defeat the applicants' claims that they show that the market was broader than the rugby league-alone market alleged by the respondents.

107 Ibid at 492.

108 Ibid.

109 Id at 482.

110 Id at 481.

111 Id at 492.

to competition between the sports for spectators and sponsors, and that the clubs were often concerned to schedule games at times not clashing with other sports in their localities.[112] A major point of contention was price competition, with News arguing strenuously that a small increase in admission prices would not adversely affect attendances. Apart from evidence that officials took account of prices in other codes, Burchett J answered this submission by reference to expert witness Prof. Kolsen's opinion that "It is not valid to apply standard microeconomic theory to non-profit organisations without considerable modification".[113] In particular, the League's prices, like those of a "school tuck-shop", were subject to constraint not only from the level of commercial prices but also the "moral constraint imposed by the attitude of those responsible for the tuck-shop", in this case a consciousness of the game's working-class origins: the League's low prices were set for reasons "more moral than commercial".[114] As for the "core crowd" argument, it "completely [misconceived] the principle of substitutability", as the risk of losing its substantial peripheral audience was a significant restraint upon the League's ability to "lower standards or raise prices".[115] Finally, in relation to free to air and pay television rights, News claimed that the sport's uniqueness resulted in a freedom from competitive restraints, as evidenced by the very large amounts of money expended by the media barons in this very case to secure league broadcasting rights. Burchett J rejected News' witnesses on this point, preferring those of the League, but stated that the "key to decision on this aspect of the case" was the fact that rugby league was a "desirable, but not essential input" into a national programming mix, as evidenced by the Nine Network's ratings dominance at times when it did not hold league broadcasting rights.[116]

The factual finding, then, was that the products and services provided by at least the four sports mentioned were sufficiently close demand-side substitutes for those services provided by the League and the clubs: broadcasters (TV, Pay TV and radio), crowds, sponsors and possibly merchandisers would switch to one of these other sports if the League chose to "give less and charge more"[117] for its 'product'. Both Burchett J's particular reasoning and this application of the general principles of market definition to the peculiar area of professional sport raise questions for competition law, some of which are relatively novel in Australian antitrust jurisprudence.

(iii) Market definition and non-profit entities

Although not specifically addressed on appeal, those parts of Burchett J's treatment of market definition which rely upon the non-profit nature and motives of the League and the clubs cannot stand with the Full Court's systematic rejection of the characterisation of the League as a non-commercial entity.[118] In particu-

112 Id at 493-8, 502.
113 Id at 498.
114 Id at 498-9.
115 Id at 500.
116 Id at 503-4.
117 The phrase is used by the Trade Practices Tribunal in *Re QCMA* (1976) ATPR 40-012 at 17,246.
118 Above n2 at 545–8, 565, 573; above pp5, 7-8.

lar, three of News' principal arguments from the evidence were dealt with by Burchett J in terms inconsistent with the appellate decision: the arguments that the League's failure to deal with internal problems indicated monopoly power, that the League's sale of television rights below their market value indicated insulation from competitive forces, and that the League's ability to raise prices without "much of a reaction" indicated the possession of market power.[119]

While the effect of these problems upon Burchett J's conclusions will be discussed below, it can be said at this stage that the appellate judgment sends a clear signal that the court will apply the Act's competition law provisions strictly to any organisation falling within their purview, and will not engage in the business of manufacturing exemptions based in its own assessment of policy or justice. At the least, "there is a general message here that professional sport is covered by the Trade Practices Act."[120] However, the Court's approach may be equally significant to the various fields only recently brought within the scope of the Act, such as the professions and other non-incorporated bodies,[121] who can expect arguments about their special non-commercial circumstances and motivations to find little favour with courts applying the provisions of Part IV.

(iv) Market Definition, Product Differentiation and Leisure Services

The peculiarities of the sporting and entertainment industries add particular difficulty to the determination of market boundaries. Clearly, the services which are the 'product' of a professional sport are non-utilitarian in nature: falling within the general rubric of entertainment, they are not strictly necessary to their consumers.[122] However, as the 'core crowd' argument demonstrates, they can fill quite different needs in different consumers. To some, there is a specific need for the sport in question — or for a particular club.[123] To others, the sport is merely one of the multitude of entertainment options, fulfilling a generalised need for entertainment without any particular feature of distinction: they might just as easily "watch another sport or go to the beach or on a picnic",[124] or simply "decline to purchase the sport or entertainment product at all".[125] This variety of functions or uses of entertainment 'products', existing both within one product and between different products, greatly complicates the patterns of substitution between them. It is submitted that, given this complexity and the very indirect nature of the evidence of functional distinctions, the court should be reluctant to rely upon these distinctions when drawing the boundaries of product markets within the entertainment industry: evidence of actual patterns of substitution should be preferred. This distinction, however, was not always observed by Burchett J. Particularly in relation to television rights, his reason-

---

119 Above, pp13-4.

120 Comment of Professor Fels, ACCC Chairman, as quoted in *The Weekend Australian*, 5-6 October 1996, p8.

121 See: *Legal Profession Reform Act 1993 (NSW)*; *Competition Policy Reform (New South Wales) Act* 1995.

122 Seal J L, "Market Definition in Antitrust Litigation in the Sports and Entertainment Industries" (1993) 61 *Antitrust LJ* 737 at 740.

123 Above n1 at 499-500.

124 Ibid.

125 Seal, above n122 at 740.

ing was quite explicitly that if the purchaser can substitute X for Y and maintain its own success and profitability, then X and Y are in the same market.[126] This approach confuses function and substitution. Instead of asking what degree of change in the product would lead the purchaser to make a substitution, Burchett J's test asks what effect the *total* unavailability of the product will have upon the purchaser's success in their own downstream market. This places undue emphasis upon the objective necessity of the product to the purchaser (ie, function), rather than examining the actual cross-elasticities of demand for the product (ie, substitution, upon which necessity is no more than a boundary constraint). By asking a yes-or-no question, it also obscures the extent to which substitution is a question of degree.

The 'core crowd' argument raised related concerns. The League responded by pointing to a more peripheral crowd who:

> might attend only a few games in a season, games which aroused their interest, but who on other occasions might watch another sport or go to the beach or on a picnic.[127]

It is difficult not to find Burchett J's response — that peripheral substitution is a sufficient constraint upon market power — plausible.[128] Upon reflection, however, such a response is not without difficulty.[129] Firstly, it seems to abdicate any consumer protection function with respect to that core crowd, glossing over the consideration that "product differentiation itself indicates the existence of market power" by allowing producers to price above cost.[130] Secondly, it may be asked how the process of market definition is to proceed from here when the need arises (as it did not in this case).[131] Are all those peripheral substitutes — an enormous range of alternative entertainments - to be included in the market, as the conventional analysis would seem to suggest? That approach would produce a market so broad that all its constituents would be carried beyond the reach of antitrust regulation in any familiar form - and would seem to directly contradict principles explicitly approved by Burchett J earlier in the judgment:

> "(E)conomically meaningful markets", as is stated in the *United States Merger Guidelines* (1984) quoted by Prof. Brunt in her article "Market Definition: Issues in Australian and New Zealand Trade Practices Litigation" (1990) ABLR 86 at 101 (the proposition was repeated in s.1 of the *Department of Justice and Federal Trade Commission Horizontal Merger Guidelines* issued 2 April 1992), are "*markets that could be subject to the exercise of market power*". The idea in economic theory is that a market is an area within which one firm or a combination, dominating production of the relevant product, could exercise market power without being

---

126 Above n1 at 503; above p13.

127 Id at 499-500.

128 Id at 500.

129 Also: cf with previous authority acknowledging significance of a core consumer group: *Arnotts v TPC* (1990) 97 ALR 555, per Lockhart, Gummow, Wilcox JJ; see also *Australian Meat Holdings v TPC* (1989) ATPR 50, 082.

130 Keyte J A, "Market Definition and Differentiated Products: the Need for a Workable Standard" (1995) 63 *Antitrust LJ* 697 at 698.

131 Above n47.

> restrained by the attraction of competitive intervention from firms producing substitutable products.[132] [Emphasis added].

Burchett J's judgment, then, points to something of a dilemma for conventional notions of market definition when dealing with markets for non-essential services, especially entertainment services. The first option is a narrow, single product market, defined only by ignoring peripheral substitution; competition analysis would then be limited to the (presumably anti-competitive)[133] effects of the agreement or conduct within that market. The alternative is a wider product market accounting for peripheral substitution; in such a market, the anti-competitive conduct would effectively drop from view, the market being too broad for a given firm to have market power, or a given restraint to substantially lessen competition.[134] Both approaches fail to comprehend the full range of competitive forces at work. A better approach would recognise that individual types of entertainment may form submarkets within the broader entertainment market, and that firms holding market power within these submarkets may well engage in anti-competitive conduct of the type the Act is intended to prohibit. In order to properly evaluate the competitive effects of conduct in such an area, the courts would then need to *balance* anti-competitive effects within the submarket against pro-competitive effects in the wider market. This is a task which Australian courts are not presently at liberty to undertake. As Burchett J explicitly stated, where an United States court might conduct such a weighing process by way of submarket and 'Rule of Reason' analysis, the Australian law requires a single market definition, and our competition analysis can examine only competitive effects *within* that market.[135] Burchett J attempted to avoid this restriction by arguing that wider competition effects could be considered in exercising the discretion to grant remedies;[136] but this approach seems limited in light of the Full Court's ruling that there is no such discretion in relation to contracts in breach of s45, which are simply void.[137] This difficulty then seems unavoidable except by amendment of the statute - which may help explain the Full Court's reluctance to even address the question of market definition.

---

132 Above n1 at 479.

133 Failure to take account of peripheral substitution would lead to overstatement of the market power of the firm, whilst the narrowness of the market would increase the likelihood that competition within that market was adversely effected.

134 As required by ss46 and 45 respectively.

135 Above n1 at 533: referring to a balancing of competitive effects within and outside a market, Burchett J commented that ".. that question may never arise in Australia". Of course, if the submarket is of sufficient size a competitive effect within it may be significant in the wider market: *Dandy Power Equipment Pty Ltd v Mercury Marine Pty Ltd* (1982) ATPR at 43,888 per Smithers J; *Singapore Airlines Ltd v Tabrobane Tours WA Pty Ltd* (1991) 33 FRC 158. The position of the Australian courts can be contrasted with that of the ACCC, which can look to pro-competitive effects outside a market under the "public benefit" limb when considering authorisations and notifications: Trade Practices Act 1974 (Cth), ss90, 93.

136 Above n1 at 533-4.

137 Above n2 at 581-2, holding that the discretionary power in s87(2)(a) does not alter the normal rule that contracts contrary to law are void (subject to severability).

(v) Conclusion - Market Definition

The weight to be given to Burchett J's specific market definition finding is not easy to assess. Although offering no direct comment on market definition, the Full Court's rejection of the non-profit characterisation of the League undermines a significant part of Burchett J's reasoning from the facts.[138] There are also substantial doubts about some other aspects of the trial judge's reasoning, such as the weight placed upon the necessity of (rather than the demand for) rugby league from the perspective of television broadcasters.[139] Finally, despite the length of the judgment, it is difficult to get an accurate picture of the evidence led by News, making the strength or weakness of the case made for a single product market almost impossible to assess. In light of these considerations, it would be unwise to assume that Burchett J's multi-sport market definition will be of great significance.

More generally, Burchett J's treatment of market definition for professional sport contains important lessons for the application of provisions relating to substantial lessening of competition and misuse of market power to the entertainment and leisure services industry. These are areas which were clearly not contemplated by the drafters of Part IV, and in which the provisions of s45 and s46 are simply inadequate. At the risk of over-simplification, the reality is a very large entertainment market containing, *inter alia*, a large number of single-product submarkets. It is submitted that many of these submarkets, including those representing major professional sports, are of such size and commercial importance that the lessening of competition or the misuse of 'submarket' power is conduct of a kind which the provisions of Part IV are intended to address. However, to define one of these submarkets as a market for the purposes of Part IV would be, as Burchett J pointed out, to "completely distort the picture gained of the competitive forces at work"[140] — as the court would then be focusing solely on the anticompetitive effects of a given restraint within that (sub-)market, and ignoring possible pro-competitive effects in the wider entertainment market. Alternatively, the gathering of a small number of such submarkets as the market seems necessarily arbitrary, while the acceptance of an entertainment market would seem to foreclose any possibility of application of Part IV. Short of amendments being made, market definition within the Australian entertainment industry will remain a capricious and unpredictable exercise with little prospect of gaining a full picture of the vital "competitive forces".

5. *Conclusion*

Taken as a whole, the *Super League* decisions probably contain more disappointments than innovations for those concerned with the application of law, particularly that regarding restrictive trade practices, to professional sport. At first instance, Burchett J was overly swayed by both the evidence of the traditions and motivations of the League and by the League's portrayal of News as

138 Above p14-15.
139 Above p15-16.
140 Above n1 at 478.

ciary duty and rigorously applying the statutory tests to reach a finding that there were exclusionary provisions. Both these conclusions are unexceptional. The question of greatest interest, by comparison, was that of market definition. Unfortunately, however, the case offers little of value on this issue, and the Full Court's reluctance to even address the question lends weight to the suspicion that there were serious problems with Burchett J's treatment of the evidence before the court. An authoritative analysis of the boundaries of markets within the sports and entertainment industries remains a question for another day.

DAMIEN HAZARD*

* I would like to thank Dr Kathryn McMahon for her comments and advice on a draft of this article.