

RESTRAINT OF TRADE AND ANTITRUST: A PIGSKIN REVIEW POST SUPER LEAGUE[†]

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I. THIS PAPER COVERS RESTRAINT OF TRADE AND ANTITRUST ISSUES ONLY AND IS LIMITED TO “FOOTBALL”

A review of football litigation around the world may well lead the observer to the conclusion that lawyers feed from the skin of the pig more than from any other part of it. For when a pig's skin is ennobled by being turned into a football, it seems, at least in modern times, that litigation, and thus lawyer feeding, is not too far down the track.

In this paper, I restrict my observations to restraint of trade and antitrust issues. I thus do not here consider the ever expanding area of litigation relating to negligence and criminal liability involving football — such as the liability of a coach for playing a player physically unsuited to his position¹; the liability of a rugby referee for negligently packing down a scrum², the vicarious liability of a rugby league club for injury caused by its player in the course of effecting an illegal tackle³ or the criminal liability of a rugby league player for an on-field assault⁴. Neither do I intend to go into other more tangential, but nonetheless fascinating, areas of the law's impact on football and football related activity — such as the liability of venue providers for nervous shock suffered by those witnessing on television the deaths of spectators as a result of poor soccer crowd control⁵; whether or not Australian rugby league and soccer players should be eligible for union membership of the Media, Entertainment and Arts Alliance⁶; or whether or not a wide variety of contracts signed by rugby league footballers both with Super League and the Australian Rugby League are

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1 *Watson v Haines* 1987 CCH Torts Reporter 80-094.

2 *Hyde v Sydney Rugby Union & Ors* [Sup Ct of NSW No 13884 of 1988: Judgment of McInerney J: 28 November 1988 — Refusal to strike out Statement of Claim]; *Smoldon v Whitworth* [Curtis J — UK (Unreported)] — See articles in “Sports Law Administration & Practice” (Professional Information Publishing Ltd UK) — “Referees and the Law” (July/Aug 1996 p1) and “Follow through — Referees and the Law” (Jan/Feb 1997 p10).

3 *McCann v Fenech and North Sydney District RFL Limited* Sup Ct of NSW No 20394 of 1995.

4 *R v Stanley* NSW Court of Criminal Appeal No 60554 of 1994. Stanley was sentenced to one year's gaol for hitting an opposition rugby league player on the head and fracturing his jaw. In the United Kingdom, two high profile soccer players have been successfully prosecuted for on field assaults [*R v Cantona* (Manchester United): The Times 24 March 1995 and *R v Ferguson* (Everton) The Times 12 October 1995].

5 *Alcock v Chief Constable of South Yorkshire Police* [1992] IAC 310.

6 *Media Entertainment and Arts Alliance v Balmain District Rugby League Football Club* [Australian Industrial Relations Commission Dec 1697/95 M Print M3828] (rugby league players); *Media, Entertainment and Arts Alliance v Marconi Fairfield Soccer Club, Fairfield Soccer Club and the Australian Soccer Federation* [Australian Industrial Relations Commission Dec 663/95 S Print M0258] (soccer players).

unconscionable within the relevant New South Wales industrial legislation and can be voided on this ground.⁷

Having so confined my subject matter, I should now expand it.

I note the judicial observations of Mr Justice Burchett when in the *Australian Rugby League Case* his Honour referred to rugby union as:

“that other football game, played in New Zealand”⁸

I assume that, as this paper is delivered in New Zealand, most of my audience will be rugby union supporters. Indeed, perhaps Justice Burchett has judicially so held though I am not sure why his Honour believes that “that other football game” is the particular and apparently, in at least this part of his judgment, the exclusive province of the Shakey Isles.

Be that all as it may, it is appropriate to open up the discussion in this paper to games other than rugby but which are within the generic coverage of the word “football”. I take “football” to mean those sports where the foot and the pigskin are permitted to make contact. Hence I will refer in this paper to cases relating not only to rugby but also to that rugby schismatic game called rugby league, to that brand of football known as soccer and to football of both the native Australian and the native American varieties.

I must initially state my undoubted bias in that my personal football preference is for rugby. Mr Justice Burchett, in referring to rugby, commented that New Zealanders claimed it was “the game they play in heaven” observing that this was “an encomium having the merit of being unverifiable”⁹. His Honour’s judgment was comprehensively rolled on appeal, and in my view, for good reason.¹⁰ However, the above two observations constitute one small segment of it with which I find myself in heated agreement.

Thus I confine the legal coverage of this paper to restraint of trade and antitrust issues and I confine the sports coverage of the paper to those five sports to which I have referred and which feature the foot at some stage coming into contact with a bouncing pigskin object (i.e. rugby union, rugby league, soccer and American and Australian football). This restriction does not mean that the topic is bereft of law. Authorities in the area abound in

7 There is a barrage of such cases — brought, generally speaking, under s275 of the NSW Industrial Relations Act. Some such cases are *Daly, Stuart, Clyde, Walters & Mullins v NSWRFLLtd* (CT1167-CT1199 of 1995); *Pay, McCracken, Smith & Dymock v Canterbury Bankstown RLF Club* (CT1137-CT1140 of 1995 — Judgment of Hill J: Industrial Relations Court of NSW: 21 December 1995); *Riolo, Rodwell & Johnston v News Ltd & Ors* (CT1148-49 and CT1269 of 1995); *Carwright, Adamson, Alexander, Beckett, Carter, Farrar, Waddell, Walker, Silva & Mundine v ARFL Ltd* (CT1176-CT1185 of 1995); *Roberts v Furner* (CT1171 of 1995); *Ridge v Manly-Warringah District RLF Club* (CT1189 of 1995). In addition to the above Industrial Court proceedings, a number of players also took parallel proceedings in the Equity Division of the Supreme Court of New South Wales seeking orders that they were not bound by the contracts in question. In a different context an interesting judgment on the fairness of rugby league contracts is that in *Allen v Penrith District RLF Club* (4 Dec 1995: Marks J: Industrial Court of NSW: CT1010 of 1994). This list of cases is not claimed to be exhaustive.

8 *News Limited v Australian Rugby Football League Limited & Ors* (1996) ATPR 41-466 (Federal Court of Australia Burchett J at trial) at p41, 679.

9 n8.

10 *News Limited v Australian Rugby Football League & Ors* (1996) ATPR 42-521 (Full Federal Court of Australia: Lockhart, von Doussa and Sackville JJ).

New Zealand¹¹, Australia¹², the United Kingdom¹³ and the United States¹⁴. Football, in the form of soccer, has even contributed a leading precedent to the principle of freedom of movement in the European union.¹⁵

Even limiting the coverage of this paper in the way I have done, it is far from the case that we are short of material with which to work.

- 11 *Blacker v New Zealand Rugby Football League Inc* [1968] NZLR 547; *Kemp v NZ Rugby Football League* [1989] 3 NZLR 463; *Re The New Zealand Rugby Football Union Incorporated* [New Zealand Commerce Commission Authorisation Decision No. 281: 17 December 1996]. The Commerce Commission's decision authorised the New Zealand Rugby Draft as having public benefit, though it found a number of its provisions anticompetitive. The provisions of the draft are set out in detail in the decision. In Australia, there has yet to be an authorisation application for anything to do with any code of football. All decisions in Australia are thus court decisions. The New Zealand Commerce Commission Determination is, at the time of writing, under appeal.
- 12 *Buckley v Tutty* (1971) 125 CLR 353; *Foschini v Victoria Football League* [Supreme Court of Victoria: Crockett J: 15 April 1983 (Unreported)]; *Hoszowski v NSW Federation of Soccer Clubs* [Supreme Court of NSW: Helsham CJ in Eq: 6 October 1978 (Unreported)]; *Hall v VFL* [1982] VR 64; *Adamson v West Perth Football Club* (1979) ATPR 40-134; *Ex.p. Western Australian National Football League* (1979) ATPR 40-103 (High Court); *Adamson v NSW Rugby League Limited* [(1991) ATPR 41-084 Federal Court of Australia: Hill J at trial]; (1991) ATPR 41-141 (Full Federal Court of Australia: Sheppard, Wilcox and Gummow JJ)]; *News Limited v ARFL Ltd & Ors* [Federal Court of Australia: Burchett J at trial — see n8]; *News Ltd v ARFL Ltd & Ors* [Full Federal Court of Australia: Lockhart, von Doussa and Sackville JJ — see n10]; *Wayde v NSW Rugby League Limited* (1985) 180 CLR 459 (this case dealt with the *Corporations Law* issue of oppression in relation to the expulsion of a rugby league club from the Sydney premiership competition. However, it has competition law relevance on the question of when a club is treated fairly by a competition organiser — see n71 and related text); *Hawick v Flegg* (1958) 75 WN (NSW) 255 (Supreme Court of NSW: McClelland J).
- 13 *Eastham v Newcastle United Football Club* [1963]1 Ch 413. See also *Newport Association Football Club v Football Association of Wales Ltd* [1995]2 All ER 87 voiding on restraint on trade grounds a resolution that Welsh clubs not play in the English soccer competition. The chief relevance of English practice is in relation to the administration of soccer. The English soccer transfer system is briefly described in *New Zealand Rugby Football Union Incorporated* (n11) at para 313. For a buying club, the chief motive in purchasing a player appears to be team building. "For a selling club, a transfer may be negotiated with varying degrees of willingness because a player is no longer required, or because a player wishes to transfer or because the club is in financial difficulties. Transfer fees sought are said to depend upon the player's characteristics, the selling club's bargaining position, and that club's desire to seek compensation for the loss of the player's contribution and for his development". For a comment on the future of the United Kingdom soccer transfer system, see, however, n15.
- 14 For example, *US v National Football League & Ors* 1953 Trade Cases 67,614; *WTWV v National Football League and Miami Dolphins* 1982 Trade Cases 64,784; *Mackey v National Football League* 1976 Trade Cases 61,119; *NCAA v Board of Regents of the University of Oklahoma* 1984-2 Trade Cases 66,139; *Zimmerman v National Football League* 1986-2 Trade Cases 67,237; *Mid South Grizzlies v National Football League* (1986) 644 F.Supp 1040; (1988) 842 F.2d 1335; *National Football League v North American Soccer League* (1982) F.2d. 1249; *Sullivan v National Football League* (1994) 34 F.3d. 1091; *Radovich v National Football League* (1957) 352 US 445; (*Yazoo*) *Smith v Pro Football Inc* 1978-2 Trade Cases 62,338; 593 F.2d 1173.
- 15 *Union Royale Belge des Societes de Football Association ASBL v Jean-Marc Bosman*: [Case C-415/93: European Court of Justice: [1996] All ER (EC) 97]. In this case, it was held that Bosman, a Belgian soccer player whose contract had expired could not be prevented from leaving his club on the basis that his prior Belgian club and his new French club could not agree a transfer fee. The basis of the decision was that the restriction both distorted competition and, more importantly in the case, restricted the free movement of workers between European Union Member States. Fearing that their control of their own affairs would be further eroded, the VEFA (European soccer's governing body) and the Olympic Committees of EU Member States called for a special recognition in the EU Treaty of the right of sport to be self governing. It is doubtful, however, if these representations will be successful. To date, the European Court of Justice decisions have not affected internal transfers within individual countries though it must surely be only a question of time before inter-State freedom of transfer erodes intra-State national restrictions. For commentary on the case see Aust & NZ Sports Law Assn (ANZSLA) Newsletter, Vol 3 No 1 p10 and Vol 6 No 1 p7.

II. OUTLINE OF DISCUSSION IN THIS PAPER

I intend to discuss the following issues arising from the various “football cases”:

1. The nature of premier sporting competitions: What the *Australian Super League Case* has taught us. [PART III]
2. The relationship between clubs, competition organisers and individual players:
 - (a) as regards sporting drafts at common law [PART IV]; and
 - (b) issues under competition law affecting individual players [PART V].
3. What intra-enterprise restraints are permitted in the conduct of sporting competitions? [PART VI]
4. What follows from the *Australian Super League Case* in relation to preventing or hindering of activities of rival competition organisers? [PART VII]
5. What is the relevant market against which questions of misuse of market power by sporting organisers must be evaluated? [PART VIII]
6. What about public benefit? Does an Authorisation solve all the football problems?: An analysis of the 1996 New Zealand Commerce Commission’s Authorisation Determination relating to Player Drafts. [PART IX]
7. The current state of play. [PART X]

The facts of the *News Ltd v ARL* dispute are set out in ATTACHMENT “A” to this paper. The facts of the New Zealand Rugby Union Player Draft are set out in ATTACHMENT “B” to this paper.

III. THE NATURE OF PREMIER SPORTING COMPETITIONS: WHAT THE AUSTRALIAN SUPER LEAGUE CASE HAS TAUGHT US.

A considerable amount of law came out of the Australian rugby league litigation between News Limited and the Australian Rugby League (the “ARL”).¹⁶ The details of this joust are not here important. They are set out in somewhat more detail in ATTACHMENT “A” to this paper. Suffice it to say here that the case involved News Ltd setting up an alternative competition to the ARL (the ARL and its predecessor bodies being the sole rugby league premierships organisers since 1907) and signing up clubs to it. This action was in breach of ARL five year Loyalty Agreements which were set up to prevent such a result. The Loyalty Agreements were held valid at trial and void on appeal.

Although the dispute was ultimately determined under statutory provisions of the Australian *Trade Practices Act*, the case is mischaracterised in my view if it is regarded primarily as one involving competition law. What is probably the major enduring principle to come out of the case is a clear statement as to conceptually just what a premierships sporting competition is.

¹⁶ *News Ltd v Australian Rugby League Football League & Ors* — see n8 (at trial); n10 (on appeal).

1. The Trial Judge's conceptualisation of the ARL

At trial, Justice Burchett regarded the ARL as a kind of joint venture but something essentially non-commercial in nature. Whilst he regarded the constituent league clubs as being in competition with each other, this competition was sporting competition, not economic competition. The *Australian Trade Practices Act*, his Honour believed, had no relevance to sporting competition at all. His Honour spoke of the devotion of the ARL to the sport of rugby league. The ARL, he said, was not in the business of making profit for profit's sake but was primarily established to promote the game of rugby league, any monetary matters being subsidiary to this more noble end. By an extension of this analysis, his Honour found that all constituent clubs in the ARL held their assets and all their player contracts in trust for the ARL, the joint venture of which all clubs were part. When News Ltd signed various clubs to it, News was in sin because it knew of the trust which his Honour spelt out. News Ltd was, therefore, deliberately breaching, and inducing breaches of, a trust relationship. Nothing is, of course, more heinous to a judge than a wilful breach of trust.

His Honour's sympathy with the ARL and condemnation of News Ltd at trial was forcefully, dramatically and emotively expressed. The ARL was variously compared to a school tuckshop, a church hospital and the Good Samaritan. News Ltd was condemned as the initiator of a blitzkrieg involving suddenness and deception. Officials of clubs which signed with News Limited were condemned to the extent that one official, for no other apparent reason than that he had negotiated with News Ltd, was characterised by his Honour as "utterly corrupt". The "rebel" clubs who signed with News breached their fiduciary duties because:

"They were not merely leaving one competition to join another, but hastily, and with high handed disregard of the rights of other clubs, transferring all the joint assets that were within their control to Super League companies."¹⁷

To so transfer assets and allegiances was, to the trial judge, the ultimate legal sin — a breach of a fiduciary duty.

2. The Full Federal Court's conceptualisation of the ARL

The Full Federal Court would have none of this. It said that it was impossible to spell out from the joint arrangements a long term or, as the ARL would have it, a permanent, fiduciary relationship between clubs and the ARL. A fiduciary duty relating to property, said the Full Federal Court, had to be spelled out from the intention of the parties. The usual expression of this was by way of a deed of trust. If a fiduciary relationship was to be spelt out, such a deed would have to make it clear that it was the intention of the parties that all property was held not for its owner but pursuant to an obligation to deal with it in the best interests of the venture as a whole. There was no such deed of trust. The necessity for each club to apply for annual re-admission to the premierships competition made it clear that neither was there any necessary permanency in the clubs' relationship with the ARL. Further, in any event, the evidence clearly showed that clubs had their own financial arrangements and that these, including the

¹⁷ n8 at p41, 721. For an interesting article on the interaction of law, economics, sociology and psychology in relation to the market definition adopted by Burchett J and his conclusions in the *News Ltd v ARL Case* see C Sweeney "Professional Sporting Leagues and the Competition Laws", *Competition & Consumer Law Journal* (May 1997) Vol 4 No 3 pp173-202.

raising of capital, were frequently independent of the ARL. In addition, clubs, although they co-operated in conducting the rugby league competition, also competed against each other. They competed for players and coaches, sponsorships and marketing opportunities. This competition was inconsistent with the view that there was an overall fiduciary relationship between clubs and the ARL such that clubs must be regarded as holding all their assets in trust for the ARL¹⁸.

The Full Federal Court also had very little difficulty in finding that the clubs were engaged in trade and commerce, rather than this being an activity incidental to the loftier goal of promoting sport. The clubs, said the Full Federal Court, hired grounds, charged match entry fees and sold sponsorships. Many of the clubs shared revenue derived from trading activities with associated clubs. The national premiership competition itself, said the Full Federal Court, was an activity in trade and commerce. There were frequent references in ARL documents to maximising the revenue potential of the national competition and this showed a keen ARL interest in trade and commerce, whatever may also have been its interest in sport promotion.

3. Conclusion as to conceptualisation of the ARL

(i) Rugby league is in trade and commerce

I would have thought that the Full Federal Court's decision that professional rugby league clubs were engaged in trade and commerce, was a foregone conclusion, given the monetary and other realities of modern sporting competitions and the nature of the relationship between clubs participating in the rugby league premiership competition. The fact that the learned trial judge held to the contrary is clear enough evidence that my view was far from the certainty that I arrogantly presumed it to be.

The Full Federal Court's decision is, however, a clear holding that the ARL and its constituent clubs are engaged in trade and commerce rather than in the more lofty "Good Samaritan" activity of promoting rugby league. This holding necessarily means that all commercial laws, including the *Trade Practices Act*, apply to the ARL and its constituent clubs with their full vigour and that there is not some sort of judicial "sporting exemption" which is applicable to these entities.

¹⁸ Even on the Full Federal Court's analysis, there is a valid basis upon which a fiduciary duty may be spelled out. In the United States, it has been held that it is not possible to have an antitrust conspiracy between two independent *legal* entities if they are one *economic* entity. Thus a parent company cannot have an antitrust conspiracy with its wholly-owned subsidiary because each entity has the same economic objectives and is under the same administrative umbrella. [*Copperweld Corporation v Independence Tube Corporation* 1984-1 Trade Cases 66,056.] For some further citations see J Briggs and S Calkins "Antitrust 1986-1987: Power and Access"¹⁸ The Antitrust Bulletin Vol 32 No 3 [Fall 1987]. But most competitions cannot utilise this concept for the very reasons stated in the *News v ARL* case by the Australian Full Federal Court. [For a recent US holding to this effect and for citation of relevant US authority see *Chicago Professional Sports Limited Partnership v National Basketball Association* 1995-1 Trade Cases 70,936]. In Australia, a similar result may be achievable in the case of arrangements between related companies — broadly speaking companies 51 per cent owned and other companies in the same ownership "stable" [see *Trade Practices Act* s45(8)]. The same result is achieved in New Zealand under s44(1)(b) of the Commerce Act which exempts arrangements between "interconnected companies" as defined in s2(7).

It is to be noted that the Full Federal Court did find that the "rebel clubs" were in breach of their duty to the ARL in respect of the 1995 competition to which they had been admitted. They breached their duty to the ARL by participating in rival Super League promotions, by permitting high profile players to contract with News and by making it public that their clubs intended to sign with News at the end of the 1995 competition. News Ltd was also in sin in respect of its encouragement of these activities. The Court held that the ARL could recover damages in respect of these breaches.

(ii) *Conceptualisation of the rugby league competition*

Conceptualisation of the structure of sporting competitions is fundamental at a number of levels of law. This conceptualisation also carries over into other aspects of joint venture law into which it is not possible here to delve.

The trial judge could find, and in fact did find, in favour of the ARL without the necessity to resort to competition law principles at all¹⁹. To him, News Ltd and the “rebel” rugby league clubs were involved in a gigantic breach of trust. They could be restrained as a matter of equity law. In my view, perhaps the most important thing to come out of the *News v ARL* litigation is not anything to do with competition law but the holding by the Full Federal Court that the trial judge was incorrect in his conceptualisation of what sporting joint ventures are all about.

IV. THE RELATIONSHIP BETWEEN CLUBS, COMPETITION ORGANISERS AND INDIVIDUAL PLAYERS: SPORTING DRAFTS AT COMMON LAW

1. The relevance of the common law restraint of trade doctrine

In the heady world of competition law, we all too frequently tend to forget the relevance of common law restraint of trade issues. Yet, section 7(1) of the New Zealand *Commerce Act* specifically provides that nothing in that Act limits or affects any rule of law relating to restraint of trade “not inconsistent with” the Act’s provisions. Section 4M(a) of the Australian *Trade Practices Act* provides that the common law restraint of trade doctrine is to continue in effect “insofar as that law is capable of operating concurrently” with the Act.

So common law restraint of trade doctrine — especially as it affects the “employability”, the “freedom” or the “rights” of individuals, and particularly in relation to jointly imposed restrictions in the form of sporting drafts — is of considerable importance in considering the conduct of sporting competition organisers. The importance of the common law doctrine is shown by the fact that the whole validity of the Australian Rugby League Player Draft was determined in 1991 under the common law doctrine of restraint of trade and not pursuant to competition law principles²⁰.

19 Although, of course, he did in his judgment extensively deal with competition law. The point in the text remains valid, however. The trial judge found a breach of trust. He did not have to resort to competition law principles in order to find in favour of the ARL and issue an injunction against News effectively preventing it from starting the Super League competition.

20 *Adamson v NSW Rugby League Limited* (1991) ATPR 41-084 (Federal Court of Australia: Hill J); (1991) ATPR 41-141 (Full Federal Court of Australia: Sheppard, Wilcox and Gummow JJ).

2. Conclusions in relation to restraints on players from the leading common law restraint of trade cases²¹

The common law restraint of trade doctrine involves value judgments weighing what is reasonable in the interests of the public and what is reasonable in the interests of the individual. Normally, the two are in conflict and the issue is whether alleged public interest considerations outweigh the detriment caused by the imposition of restrictions on the freedom of the individual.

I have elsewhere²² covered the common restraint of trade doctrine in a sporting organisation and player draft context and I hope I will, therefore, be forgiven if I do not here revisit the basic issues but merely state any previously reached conclusions.

These conclusions are:

(i) From those leading common law cases dealing with combinations of capital directing their actions at rival traders, sporting organisations can conclude that they should be permitted to do as they wish in relation to player drafts. This is because, within the principles expounded in the leading common law restraint of trade cases²³, any restraints imposed, say by way of a player draft, are:

- not maliciously intended;
- not restraints of the kind deemed illegal under common law;
- reasonable in the public interest. This is especially so when the public interest at common law is thought to be best determined by the parties engaging in the restraints. In any event, a genuine public purpose obviously can be alleged in sporting draft restraints. The sporting bodies imposing such restraints obviously want to advance, not retard, the sport they administer. On the basis of common law decisions, the argument can be put that sporting organisations themselves are best equipped to determine what is in the overall best interests of the sports they administer; and
- there is no public detriment in the sense that unreasonably high prices are imposed on the public or shortages of services eventuate. Indeed, the sporting bodies imposing draft restraints argue with zeal that the restraints they impose aid the development of sporting talent and the survival of sporting clubs, not vice versa.

21 I regard the leading common law restraint of trade cases as being:

(a) In relation to the activities permitted by combinations of capital directing their actions at rival traders: *Mogul Steamship Company Ltd v McGregor & Ors* [1892] AC 25; *Nordenfjelt v Maxim Nordenfjelt Guns and Ammunition Company* [1894] AC 535; *A-G (Cwth) v Adelaide Steamship Co* (1913) AC 781. Successor cases to this leading trilogy are *North Western Salt v Electrolytic Alkali Co* [1914] AC 461 and *R v Crown Milling Co* [1927] AC 394. *Adelaide Steamships* was, in fact, decided under Australia's first competition law, the *Australian Industries Preservation Act*. *Crown Milling* was decided under the *Commercial Trusts Act* of New Zealand. However, each case is here regarded as a common law restraint of trade case as their hardships in the Privy Council seemed quite convinced that these pieces of legislation were not intended to alter the common law in any way.

(b) In relation to cases in which combinations of employers are involved or where individual employers impose restraints resulting in the restriction of "freedom of employment": *Mineral Water Bottle Exchange and Trade Protection Society v Booth* (1887) 36 Ch.D 465 (CA); *Mason v Provident Clothing and Supply Ltd* [1913] AC 724; and *Herbert Morris v Saxelby* [1916] 1 AC 688.

22 WJ Pengilly: *Sporting Drafts and Restraint of Trade*: Queensland University of Technology Law Journal Vol 10 (1994) pp89-121.

23 See cases listed at par (a) in n21.

(ii) On the other hand, players whose “freedom” is restricted by sporting drafts can conclude from common law cases where a group of employers, or individual employers, impose restraints on an individual’s “freedom of employment”²⁴ that sporting drafts are:

- restraints capable of being used oppressively to prevent a sportsman obtaining employment;
- an unfair restraint on a person exercising his or her skills. These skills are aspects of the sportsman’s abilities. They are not confidential secrets. They are perhaps skills which have been learnt with one club and which may be used, on transfer, to the benefit of another. But this is no different to any person changing employers. At common law, an employee cannot be restrained from transferring jobs purely because he or she acquired certain skills in his or her prior position;
- disadvantageous to the public in that a sportsman is not free to exercise his or her skills to the best benefit of himself or herself and those who wish to employ him/her;
- unjustifiable because they do not protect any goodwill in a vendor/purchaser sense. Therefore, such restraints constitute a simple covenant against competition, and should be declared void for this reason; and
- not justifiable because sporting bodies have no interest, or no sufficient interest, to support sporting draft restraints. Sporting draft restraints are not justified by an employer/employee relationship. In the case of joint employer arrangements, they are nothing more than unjustifiable restraints imposed by an agreement between employers to the detriment of employees whose freedom of employment is inhibited by the arrangements made. Obviously there are strong “civil rights” overtones to such an argument.

As was said by Lord Atkinson, as long ago as 1916:

“It is in the public interest that a man should be free to exercise his skill and experience to the best advantage for the benefit of himself and all those who desire to employ him”.²⁵

3. The recognition of the unique nature of sport

There is no doubt that case law recognises the unique nature of sport. The relevant issues were eruditely put by the United States Federal Court in *US v National Football League*²⁶. They have been also put in other cases in Australia and elsewhere and by the New Zealand Commerce Commission to which I later refer.

It is asserted in these cases that professional teams must not compete too well. On the playing field they must do so. But in a business sense, the stronger teams must not drive out the weaker for, if they do so, the whole League, including both the stronger and the weaker, will be worse off and then no team will survive profitably. Thus the courts acknowledge that it is appropriate for rules to be implemented which help the weaker clubs in their competition with the stronger ones, in order to keep the League fairly in balance. Even the most enthusiastic fans of strong teams will cease to

²⁴ See cases listed in par (b) at n21.

²⁵ *Herbert Morris v Saxelby* [1916] 1 AC 688 per Lord Atkinson at p699.

²⁶ *US v National Football League & Ors* 1953 Trade Cases 67,614.

attend home games if visiting teams are weak. To allow unrestricted competition would allow:

- the creation of greater and greater inequalities in the strength of teams;
- weaker teams to be driven out of business; and
- the ultimate destruction of the entire League.

The various possible methods of “balancing” teams are conveniently listed in the United States *National Football Case*.²⁷ It is appropriate to set out these as all sporting drafts seem to consist of one of these systems, or a combination of them. The methods are:

- limit bonus prices which can be paid to new players;
- give the weaker teams a prior right over stronger teams to draft new players;
- prohibit the sale of players after a certain time in the season;
- limit the number of players which can be drafted by various teams;
- limit the total amount of salaries which a team can pay;
- give the lowest team the right to draft a player from the highest team when and if the highest team has won a certain number of consecutive championships; and
- reasonably restrict the projection of games by radio or television into the home territories of other teams.

A very akin list of “team equalising” methods is set out in the New Zealand Commerce Commission’s Decision in the *New Zealand Rugby Football Union Authorisation Application*²⁸.

The National Football League Case²⁹ concluded that:

“The member clubs of the National Football League, like those of any professional League, can exist only as long as the League exists. The League is truly a unique business enterprise which is entitled to protect its very existence by agreeing to reasonable restrictions on its member clubs.”³⁰

Statements to the above effect have been made in a number of United States cases³¹.

Akin views have been expressed in Australia. The Australian High Court in *Buckley v Tutty*³² clearly recognised the legitimate interest of the NSW Rugby League and of its clubs:

“to ensure that the teams fielded in the competitions are as strong and well matched as possible, for in that way the support of the public will be attracted and maintained, and players will be afforded the best opportunity of developing and displaying their skill”.³³

Thus, said the High Court, it was legitimate for the NSW Rugby League to aim to provide a system to promote “balance” in the capacity of the various clubs and develop team spirit in such clubs. The court in *Buckley v Tutty* blessed the concept of a league player draft though, as is well

²⁷ n26.

²⁸ *New Zealand Rugby Football Union Incorporated Authorisation Application*: New Zealand Commerce Commission Decision No 281: 17 December 1996 para 351. NOTE: This decision at the time of writing is under appeal.

²⁹ n26.

³⁰ n26 at p68,937. The Court in this case was evaluating not a player draft but the reasonableness of restraints prohibiting one club’s games being televised into the area of another club when such other club was playing a home game.

³¹ *US v National Football League* (n26); *WTWV v National Football League and Miami Dolphins* 1982 Trade Cases 64,784; *Philadelphia World Hockey Club Inc v Philadelphia Hockey Club* 351 F.Supp 462 at p486; *Mackey v National Football League* 1976 Trade Cases 61,119 at p70,076; *NCAA v Board of Regents of the University of Oklahoma* 1984-2 Trade Cases 66,139 at 66,387-8; *Gaines v National Collegiate Athletic Association* 1990-2 Trade Cases 69,238.

³² (1971) 125 CLR 353.

³³ n32.

known, it invalidated the particular arrangements before it. Similarly the Victorian Football League has been held to have a legitimate interest in protecting the VFL competition³⁴, the VFL being judicially characterised as “an alliance of sworn enemies”.³⁵

There is no doubt that courts recognise the special nature of sporting competition and the necessity for sporting bodies to regulate such competition.

4. How, in fact, have sporting drafts been evaluated by the courts?

In fact, however, sporting drafts have not been treated at all kindly by the courts notwithstanding frequent judicial acknowledgments that sport has specific “team equalising” requirements. Probably this is so because an individual litigant can point in specific cases to a clear restraint on his or her freedom whereas the sporting organiser can point only to a philosophical theory which usually cannot be quantified with any degree of specificity.

In my search for court validated sporting drafts in Australia and New Zealand I was able to find but one. This is an unreported judgment of Mr Justice Helsham in the Supreme Court of New South Wales relating to soccer player transfer fees³⁶. Soccer contracts, usually for a period of one year, required the payment of a transfer fee to a player’s prior club if a player transferred to another club at the end of a season. The transfer fee to be fixed was to be based on a number of criteria including the cost of the player to the club, the length of player service with the club in question, coaching provided and “any other relevant information that will assist in arriving at a reasonable transfer fee”. If a transfer fee could not be agreed, there was an appeal procedure available pursuant to which the executive committee of the Federation could set a reasonable transfer fee. Justice Helsham held that the restraint involved was reasonable in the circumstances. A player’s club could not retain a player against that player’s wishes except by fixing an unrealistic transfer fee. The appeal mechanism was an appropriate check on any abuse of power by a club in setting a transfer fee which was unrealistic and which may have operated, in fact, as a refusal of a player transfer.

Against the above decision validating the NSW Soccer Federation player draft, there is, however, a barrage of decisions invalidating sporting drafts. Only the United States shows a track record of validating football restraints.

³⁴ *Foschini v VFL* [Supreme Court of Victoria: Crockett J 15 April 1983 (Unreported)].

³⁵ n34.

³⁶ *Hoszowski v NSW Federation of Soccer Clubs* [Helsham CJ in Equity: Supreme Court of NSW: 6 October 1978 (Unreported)]. The above comment does not include the Authorisation given to the *New Zealand Rugby Union Player Draft* (n11) as this was a public benefit determination under the *Commerce Act* and not a common law restraint of trade decision. American decisions have been excluded from this search because of the different applicable legal principles — see n37.

But this record does not help much in Australia or New Zealand because of the different legal backdrop applicable in America.³⁷

Common law restraint of trade invalidations have primarily involved restraints in which clubs did not have to offer employment to a footballer but could refuse his transfer to another club. This type of restraint was invalidated by the Australian High Court in the context of the Sydney rugby league competition on the grounds that it constituted an unreasonable restraint on freedom of employment of a rugby league footballer.³⁸ Akin restraints have been held invalid in relation to United Kingdom soccer transfer arrangements³⁹ and Australian football transfer arrangements in both Victoria⁴⁰ and Western Australia⁴¹. To similar effect, in New Zealand, rugby league rules giving the New Zealand Rugby League power to withhold a clearance to permit New Zealand players to play in another country were held to be an unreasonable restraint of trade. In the words of North J:

“It places in the hands of the respondent a complete and unfettered discretion to withhold its consent or to reference a clearance in respect of any of its players. It is unrestricted in point of time and place. It is no answer for the respondent to say that it exercises its wide powers in a reasonable manner.”⁴²

Courts have not been impressed by the argument that sporting organisations have no real power over players subject to their control. Thus, for example, the rules of the English Soccer Association, when considered as a whole and in conjunction with arrangements existing with soccer administrations in other countries, created a “united monolithic front

37 American evaluations on the question of draft validation are under United States antitrust laws, which laws are not applicable in the Australian or New Zealand common law restraint of trade context. This is because American antitrust law permits restraints which are agreed between player associations and clubs after a process of collective bargaining. The American evaluations are thus largely addressed to the question of whether there has been a genuine process of bargaining not at whether the restraints are reasonable at common law. See *Philadelphia World Hockey* n31 (but note in that case that there had not been good faith collective bargaining in relation to the reserve clause before the Court and thus this clause was invalidated); *Mackey v National Football League* n31 (no genuine collective bargaining purely by player union acceptance of a prior unilaterally imposed restraint); *Zimmerman v National Football League* 1986-2 Trade Cases 67,237 — potential players bound by the restrictive terms of a player-League bona fide negotiated arrangements; *Wood v National Basketball Association* 1987-1 Trade Cases 67,424 (player bound by draft and “salary cap” arrangements bona fide negotiated between player association and basketball league); *NBA v Williams* 45 F.3d. 684 (1995) [details a considerable number of issues in relation to labour bargaining including the economic force which may be used to implement demands]; *Silvermen v Major League Baseball Players Relations Committee* 67 F.3d 684 (1995) [free agency; anti-collusion and reserve issues are validly the subject of bargaining. An expired agreement cannot be varied until there is bargaining to an impasse in relation to a new agreement]. For a general discussion of the United States sporting drafts see JP Morris “Fair and Square: Antitrust Laws and Professional Sports in America” (1985) *Law Institute of Victoria Journal* 552. For the situation in the United States prior to the widespread adoption of collective bargaining procedures see “The Superbowl and the Sherman Act: Professional Team Sports and the Antitrust Laws” Comment in (1967) 81 *Harvard LR* 418. For observations on the US collective bargaining position see PART X.5.

38 *Buckley v Tutty* n32.

39 *Eastham v Newcastle United Football Club* [1963] 1 Ch 413.

40 *Hall v Victorian Football League* [1982] VR 64; *Foschini v VFL* n34.

41 *Adamson v West Perth Football Club* (1979) ATPR ¶ 40-134.

42 *Blacker v New Zealand Rugby Football League Incorporated* [1968] NZLR 547 at 556 (per North P). His Honour relied heavily upon *Mineral Water Bottle Exchange and Trade Protection Society v Booth* (n21 par (b)) in reaching his decision. See also *Kemp v NZ Rugby Football League* [1987] 3 NZLR 463. The League had an interest in controlling clearance of players to other countries but indefinite and vague rules giving absolute directions were unreasonable. “Uncertainty and lack of limitation are the hallmarks of unreasonableness”. “The duty to act reasonably in applying a rule does not render the rule reasonable. If the rule is unreasonable, the method of application becomes irrelevant” (p470).

all over the world".⁴³ Akin opinion has been expressed in relation to the New Zealand Rugby League.⁴⁴ It is no answer to say that a player may retire from the organisation because, if a player does this, he is prevented from playing the sport in question. As the Australian High Court said in *Buckley v Tutty*⁴⁵:

"It is not to the point to say that the player may resign from the League. If he does resign he may perhaps obtain employment as a labourer or as a cricketer but he will not be able to obtain employment as a professional rugby league footballer."

The restraint of trade doctrine has, however, also operated in favour of clubs. Recently the doctrine was extended to permit clubs to proceed against their national football association in the event that such association placed a considerable fetter on their freedom of action.⁴⁶

The latest major Australasian court case in the draft area to my knowledge is the 1991 Federal Court decision on the New South Wales Rugby League Player Draft. The League draft was very complex and it is not necessary for present purposes to set its provisions out in detail.⁴⁷ Basically, the player draft involved clubs selecting players who had placed themselves on transfer. This selection was to be in the reverse order in which clubs had finished the previous year's competition. Players could nominate their playing terms but, subject to an appeal in the case of personal hardship, they had to accept a contract with the club selecting them under the selection arrangements summarised above.

There was no question of the player draft having been negotiated between the NSWRL and player representatives. It was agreed between league clubs and, after such agreement, players and their representatives were informed of the decision made. It was significantly because there was no consultation with players that players mounted a court challenge to the arrangements.

At trial, Hill J, with some considerable doubts, said that the draft was reasonable in common law terms.

The Full Federal Court on appeal, however, found in quite passionate terms to the contrary. Perhaps this passion is echoed most fervidly in the words of Wilcox J. His Honour commented on the role of the League's Appellate Tribunal set up to determine personal hardship exemptions as follows:

"How, in a free society, can anyone justify a regime which requires a player to submit intensely personal decisions to determination by others?"⁴⁸

Mr Justice Wilcox said that the appeal should be upheld and the draft invalidated, his views being encapsulated in the following words:

43 n39.

44 n42.

45 n38.

46 *Newport Association Football Club v Football Association of Wales Limited* [1995] 2 All ER 87. Various Welsh soccer clubs took action against the Football Association of Wales Limited for apparently discriminatory conduct in imposing sanctions on them for playing in an English soccer competition. An interlocutory injunction was issued on the basis that the Association had engaged in an illegal restraint of trade. The Court in reaching its conclusions cited a number of well known restraint of trade cases in the sporting field, [*Eastham v United Football Club Ltd* [1963] 3 All ER 139 (Soccer); *Buckley v Tutty* (1971) 125 CLR 353 (Australian Rugby League); *Nagle v Feilden* [1966] 1 All ER 689 (Racing); *Greig v Insole* [1978] 3 All ER 449 (Cricket)].

47 See Adamson (n20). For details of the draft see Appendix to the writer's article at n22.

48 n20 [Full Court Decision at p53, 035]. For decision of Hill J at trial also see n20.

“Hill J concluded his discussion of the case by commenting that it was a ‘borderline’ one which he had not found easy to resolve. I have not felt the same difficulty about the merits of the matter. As I have already indicated, my opinion is that some of the findings and assumptions made by Hill J were unduly favourable to the respondents. On the view I take, the internal draft rules do very little to protect the interests of the respondents. They do much to infringe the freedom and the interests, economic and non-economic, of the players. The attempted justification fails.”⁴⁹

It is obvious enough that the Full Federal Court has imposed a high onus on any sporting body seeking to justify its drafts. The liberty of the subject to conduct his business as he wishes is, in the view of the Full Federal Court, of paramount importance. Indeed, it is virtually inviolable. Claims of sporting benefits will obviously be difficult to prove. Even the establishment of an independent Appeal Tribunal is of no great assistance unless it can be demonstrated what, in practice, it will do⁵⁰ — an impossible task, one would think, when, in fact, the Tribunal has never sat.

5. Conclusions as to sporting drafts at common law

The common law restraint of trade doctrine is often forgotten when more heady competition issues are being evaluated. However, the doctrine is far from dead in the sporting arena. It was the determining doctrine of the NSW Rugby League Draft. By specific statutory provision the doctrine survives the enactment of competition legislation in both Australia and New Zealand.

The overwhelming impression one receives from a reading of the various common law restraint of trade cases is the emphasis given by courts to the importance of the “freedom” of the individual. This is, of course, quite a different thing to evaluating competition in a market. Economists are prepared to sacrifice individual freedom in the interests of efficiency. Lawyers are much more likely to tolerate some inefficiency in order to preserve traditionally valued liberties.

I have also said a lot about sporting drafts at common law in light of the *New Zealand Commerce Commission Authorisation Decision* of December 1996⁵¹ which is, in essence, a decision on a football sporting draft. It is appropriate that we look at this recent Commission decision⁵² and see how it compares with common law principles applicable to sporting

49 n20 [Full Court Decision at p53, 036]. Sheppard and Gummow JJ agreed that the justification for the restraint had not been made out broadly for the same reasons as those stated by Wilcox J. Wilcox J refers to some “unduly favourable” assumptions made at trial by Hill J in favour of the NSW Rugby League. The comments of Wilcox J appear justified. Hill J at trial made his decision on the basis that a player could stipulate the terms and conditions on which he would play and this could include the geographic location of a club. If this interpretation of the draft rules was right, it would have made the draft ineffectual and, not surprisingly, the League appealed against this interpretation. His Honour also found, as a matter of evidence, that no club would pressure a player to play with it if such player did not want to do so. This was contrary to actuality but, again, if this were so the whole draft would have been ineffectual. The League also argued against this interpretation.

50 In *Buckley v Tutty* (n32), the High Court of Australia stated in relation to Appeal Committees as follows:

“a player is completely in the hands of the Committee; he has no right to require it to decide in a particular way or in accordance with any suggested principle, and it cannot be assumed that the decisions of the Committee will always and necessarily ensure that the restraint imposed by the rules is no more than a court would consider reasonable”.

This requirement means that a Tribunal, in order to satisfy a court evaluation, will have to have highly specific terms of reference and that these must not infringe the doctrine of restraint of trade as that doctrine would be interpreted by a court. This is no easy task. Certainly it rules out Tribunals which have wide, and probably vaguely expressed, discretionary powers.

51 n28.

52 As we do in PART IX.

drafts. This comparison is an important one both because of the inherent value of making it and because the restraint of trade doctrine at common law still operates on the New Zealand Rugby Draft regardless of any Authorisation given by the Commerce Commission.

Whether the New Zealand Rugby Draft passes muster at common law is something we consider at PART IX. It is sufficient here only to note that the number of sporting drafts which have survived court evaluation is minuscule. I could find only one — and this is a single judge decision which is unreported⁵³. It should be immediately stated that I rule out, in this calculation, the United States cases involving football restraints. The United States has numerous cases on football drafts, and a number of these have validated such drafts. However, the American cases are decided under quite different law and have little bearing on the Australasian restraint of trade doctrine⁵⁴.

V. THE RELATIONSHIP BETWEEN CLUBS, COMPETITION ORGANISERS AND INDIVIDUAL PLAYERS: ISSUES UNDER COMPETITION LAW AFFECTING INDIVIDUAL PLAYERS

1. Prior holdings that “player services” are exempt from competition law

Section 4(1) of the Australian *Trade Practices Act* and s2(1) of the New Zealand *Commerce Act* defines “services”, as covered by each statute, as excluding “contracts of service” i.e. contracts of work or employment. Other statutory provisions also exempt employment contracts from various provisions of competition law.⁵⁵

⁵³ n36. Note the American decisions are not directly in point for the reasons set out at n37.

⁵⁴ See n37.

⁵⁵ Relevantly, s4(1) of the Australian *Trade Practices Act* [s2(1) of the New Zealand *Commerce Act* being in akin terms] provides:

“Services” include:

“... any rights (including rights in relation to, and interests in, real or personal property), benefits, privileges or facilities that are, or are to be, provided, granted or conferred in trade or commerce, and without limiting the generality of the foregoing, includes the rights, benefits, privileges or facilities that are, or are to be provided, granted or conferred under -

(a) a contract for or in relation to -

(i) the performance of work (including work of a professional nature), whether with or without the supply of goods;

(ii) the provision of, or the use or enjoyment of facilities for, amusement, entertainment, recreation or instruction; or

(iii) the conferring of rights, benefits or privileges for which remuneration is payable in the form of a royalty, tribute, levy or similar exaction;

(b) ...

(c) ...

(d) ...

but does not include rights or benefits being the supply of goods or the performance of work under a contract of service”.

The New Zealand *Commerce Act* (and the Australian *Trade Practices Act*) has additional provisions which may be relevant in this context, these being:

• *Commerce Act* s44(1)(c) (in akin terms to s51(2)(b) of the Australian *Trade Practices Act*) which reads:

“Nothing in this PART of this Act applies to the entering into of a contract of service or a contract for the provision of services insofar as it contains a provision by which a person, not being a body corporate, agrees to accept restrictions as to the work, whether as an employee or otherwise, in which that person may engage during, or after the termination of, the contract.”;

• *Commerce Act* s44(1)(f) (in akin terms to s51(2)(a) of the Australian *Trade Practices Act*) which reads:

“Nothing in this PART of this Act applies to the entering into of a contract, or arrangement, or arriving at an understanding insofar as it contains a provision that relates to the remuneration, conditions of employment, hours of work, or working conditions of employees.”

On the interpretation of the definition of “services” as excluding “work” and “employment”, prior to the 1996 *News v ARL Case* in Australia the following was the Australian (and also, it is submitted the New Zealand) law:

- the exclusion of “work” from the definition of “services” meant that:
“a club does not come within s45(3) of the Act (which relevantly defines “competition” for present purposes) when it acquires rights or benefits granted or conferred under a contract for the performance of work”;⁵⁶
- the right or privilege of a club to enter into a contract of service was not the acquisition of services by a club;
- the exemption of “work” from the definition of “services” in s4(1) meant that not only were restrictions which related to the “actual performance of work under a contract of service” exempt from the *Trade Practices Act* but also exempt were the antecedent formation of contracts where those contracts provided for the performance of work.
- The above being so, arrangements between the clubs in relation to the employment of footballers were not within the *Trade Practices Act*.

In the Full Federal Court decision in *Adamson v NSW Rugby Football League*⁵⁷, the inapplicability of the *Trade Practices Act* to contracts relating to the employment of footballers was confirmed. Mr Justice Wilcox in his appeal judgment was moved to comment, however, that he thought the League Draft before the Court would have been both anticompetitive and an illegal collective boycott but for the definition of “services” in the *Trade Practices Act*. His Honour concluded that:

“From a policy viewpoint, some people might think it unfortunate that s45 does not apply to a case such as this. As I have pointed out, the internal draft rules undoubtedly have the purpose of restricting the supply of footballers’ services (in the ordinary sense of that word) and the effect of substantially limiting competition in the marketplace for those services. It is difficult to see what policy purpose is achieved by leaving inviolate arrangements under which potential employers agree not to compete amongst themselves. It is certainly not in the interests of employees. They find themselves, uniquely so far as the Act is concerned, having to suffer any collusion amongst those with whom they would negotiate. It seems to me that the present position is anomalous”.⁵⁸

2. Utilisation of the “player exemption” interpretation by the ARL in rugby league contracts

Decisions prior to the *News v ARL Case* meant that sporting organisers could require players to contract as individuals. This requirement attracted the “contract of service exemption” from the *Trade Practices Act*. Thus both clubs and sporting organisers could act with virtual competition

56 *Adamson v NSW Rugby League* at trial (n20 p 52, 310) following Northrop J in *Adamson v West Perth Football Club Incorporated* (1979) ATPR 40-134 at p18466.

57 n20 (Full Federal Court).

58 n20 (Full Federal Court) Wilcox J at p53,007. Sheppard J did not specifically discuss the “work” exclusion from the definition of “services” but he stated that he agreed with the conclusions of Wilcox J and Gummow J that the appeal should be allowed. Wilcox J specifically covered the question of the reasonableness of the restraints at common law. Gummow J dealt with the issue primarily from the viewpoint of a common law restraint. He thus did not become involved as to whether the restraints did or did not infringe the Trade Practices Act though he utilised a number of American antitrust cases to compare “reasonableness” in the United States with “reasonableness” at common law. One would think that his Honour’s analysis is misplaced. The United States antitrust cases are analogous to Australian Trade Practices Act law and not to the Australian common law restraint of trade doctrine. There is an American common law doctrine of restraint of trade quite separate from antitrust considerations. A comparison between this doctrine and the akin Australian doctrine would have been the more appropriate one to have made.

impunity as regards their dealings with players. The ARL did exactly this. It mandated a form of contract that prevented clubs from contracting with players other than on an individual basis under a contract of employment.

3. “Player exemption” as interpreted in *News Ltd v ARL*

In *News v ARL*, Justice Burchett at trial was, on the basis of the authority cited above, able to hold that there was no competition for the services of premiership players because these players were employees. He held:

“None of the clubs was, or was likely to be, in competition with any other club in relation to the supply or acquisition of any services of premier players except upon the standard player contract of the (ARL). That form of contract was ‘a contract of service’, that is of employment. It was not a contract otherwise providing for the supply of services. It was a form of contract, on the evidence, that had been chosen deliberately because it took the employment of players outside the Trade Practices Act. There was no likelihood that the (ARL) or the clubs would agree to a change in this respect. Since the clubs were not seeking, and were not likely to seek, in competition with each other, the services of rugby league players except upon the terms of employment contracts expressly excluded from the services to which the Act relates, they were not relevantly competitive.”⁵⁹

The Full Federal Court, whilst saying that it did not have to determine the question of whether the player contracts before it were outside the coverage of the *Trade Practices Act*, nonetheless stated that the better view would appear to be that there was competition, in *Trade Practices Act* terms, for premium players. The Court said that, in any event, players might well seek to contract with clubs other than as employees if the standard ARL contract did not prevent this.

Thus, said the Full Federal Court:

“In these circumstances, it seems to us that in the competition and rivalry between clubs for premier players there was a real chance or possibility that there could be competition to engage players otherwise than under a contract of service. It thus follows that, at the time the Commitment Agreements and Loyalty Agreements were executed, the clubs were likely to be in competition for the ‘services’ of premier players.”⁶⁰

4. What the New Zealand Commerce Commission says about “player exemptions”

The New Zealand Commerce Commission was of the view in its draft Rugby Union Determination that there was no market for player services because of the definition of “services” in the *Commerce Act*. However, following the line of the Australian Full Federal Court in *News Ltd v ARL*⁶¹, the Commission in its *1996 Rugby Union Authorisation Final Determination*⁶², concluded that there was a market for player services. In this regard, the Commission said:

59 *News Ltd v ARL* (at trial) n8 at p41699-41700.

60 *News Ltd v ARL* (Full Federal Court) n10 at 42654.

61 *News Ltd v ARL* (Full Federal Court) n10.

62 *New Zealand Rugby Football Union Incorporated* Decision No. 281: 17 December 1996 para 87 and following. This decision is, at the time of writing, under appeal.

“The Commission will not make a categoric determination of this issue but will proceed on the basis that some of the contracts might be contracts for services or that the market for player services might develop in such a way as to cause many contracts to be construed as contracts for services.”⁶³

5. The future of the “player exemption”

The equation of “work” with all steps taken to negotiate work contracts involves difficult logic. Arrangements between competitors to restrict bidding for services would seem a far cry from restrictions in a contract between an employer and an employee involving a job of work. In policy terms, it seems that the courts could easily distinguish the two cases. The prior cited comments of Justice Wilcox in *Adamson v NSW Rugby League Football League* show that there are clear policy reasons for the adoption of such a distinction.

The Full Federal Court in *News Ltd v ARL* was clearly less than enthusiastic about the “player exemption” in the broad terms in which it has been interpreted to date. One predicts, should the matter directly arise in either Australia or New Zealand in a Court of appropriate authority, there is likely to be an attempt to interpret the “player exemption” as narrowly as possible. However, in many, probably most, areas the effect of s51(2)(a) of the *Trade Practices Act* in Australia and s44(1)(f) of the *Commerce Act* in New Zealand will mean that employers can agree restrictive terms between themselves and impose these on employees with whom those terms have not been negotiated. This is what happened in *Adamson* in relation to the NSW Rugby League Player Draft. There is a very good case for amending the law to provide that the exception in the above sections relates only to arrangements collectively bargained between employers and employees and not to agreed arrangements between employers being imposed on employees without any negotiation with them⁶⁴.

63 n62 para 92. The same logic applies in New Zealand as in Australia to arrangements agreed between clubs as to player employment. Section 44(1)(f) of the Commerce Act [see Australian Trade Practices Act s51(2)(a)] permits contracts, arrangements or understandings between clubs relating to employment conditions but does not specifically authorise clubs to mandate that players must contract as individual employees. Neither does section 44(1)(c) exempt joint arrangements between clubs mandating the form in which players must contract. [The provisions of these sections are reproduced at n55]

64 The definition of “services” in Australia and New Zealand is, for all present relevant purposes, the same. [See n55] Section 44(1)(c) [see n55] which permits the entering into a contract of service whereby a person agrees to accept post contractual restraints would easily bear an interpretation that this relates only to the employer/employee relationship and not to collective arrangements by employers about employee conditions. Section 44(1)(f) (Australian Trade Practices Act s51(2)(a)) [see n55] clearly permits collective arrangements relating to conditions of employment. There are two types of such negotiations. The first is a negotiation between employers as a group and employees as a group. It is this type of negotiation at which the section appears to be aimed. The second type of negotiation is one between employers as to conditions which they jointly agree to impose on employees. This was the type of negotiation engaged in by the NSWRF in *Adamson’s Case*. There seems to be no policy reason why this type of arrangement should be exempted from the Commerce Act. Yet, on the wording of the section, such negotiations would appear to be so exempt. No doubt this exemption was a relevant factor in *Adamson’s Case* relating to the NSW Rugby League Draft being substantially fought on common law grounds rather than under the Trade Practices Act. It is, of course, always possible that a court may hold that some of the terms agreed by employers amongst themselves were not restrictions related to work, conditions of employment etc but this would require an evaluation as to the actuality of the terms agreed. For example, it may be that “transfer fees” would be held not to be “conditions of employment” and, in this event, these would not be covered by the exemption in s44(1)(f) of the Commerce Act.

6. Sporting organisations can no longer, by joint action, compel how sportspersons are to contract

Whatever the future, it is now clear that sporting organisers can no longer compel individual employment contracts as the only way of engaging players. Because of this, players should, in future, obtain additional protection under the competition provisions of the *Trade Practices Act* and the *Commerce Act*. Players have gained from the *News v ARL Decision* the opportunity to contract in such structural form as is appropriate to their needs. It may well be that footballers and other sportspersons will soon be incorporating themselves in the same manner in Australasia as they have for many years been doing in the United States.

VI. WHAT INTRA-ENTERPRISE RESTRAINTS ARE PERMITTED IN THE CONDUCT OF SPORTING COMPETITIONS?

1. *News Ltd v ARL* has been seen by some to be the death knell of sporting joint ventures

The *News v ARL Decision* concerned the ARL signing up its constituent clubs for five years and prohibiting them from playing with the rival “Super League” competition being organised by News Limited. It is thus concerned primarily with inter-enterprise restraints. Nonetheless, predictably I suppose, the decision has drawn the wrath of some commentators who seem to regard it as the end of joint venture co-operation and thus as heralding in the demise of sporting ventures in particular and joint ventures in general.⁶⁵

2. Joint ventures under competition law: the difference between permitted intra-venture restrictions and prohibited inter-venture restrictions

It is appropriate briefly to note the difference between those intra-venture restrictions so important to the conduct of sporting joint ventures, and joint ventures in general, and contrast those with inter-joint venture restraints which require a different competition approach.

There is no doubt that the ARL, or for that matter any other sporting league, has co-operative characteristics. Co-operation is necessary to produce the sporting “product” and to ensure its quality. No rugby league competition can eventuate without, for example, rules, determinations as to venues, “sin bins”, “blood bins” and procedures for adjudication of, and punishment of, breaches of the rules, to mention but a few areas in which technical co-operation is necessary to make the competition work.

⁶⁵ See, for example, the commentary of Michael Gray of Freehill Hollingdale & Page — “Paper delivered to the Commercial Law Association” in Sydney on 14 February 1997; see also article contributed by Freehills and published in *Business Law Section of the Law Council of Australia Newsletter* Dec 1996/Jan 1997 (Vol 7 No 6) pp10-16. Gray notes that the decision in *News Ltd v ARL* has:

“serious implications for all forms of joint commercial activity — joint ventures, consortium bids, research and development syndicates, networks, cross licensing arrangements and strategic alliances of all forms — and in the long run may prove to be anticompetitive rather than pro-competitive”.

Gray criticises the Full Federal Court decision because the Court, in his view:

- failed to distinguish between inter-joint venture and intra-joint venture competition; and
- failed to recognise the necessity of mutual transactions/restraints to create the sports league joint venture and give it long run competitiveness.

In this regard, Justice Burchett at trial in *News Ltd v ARL* was quite right when he stressed the co-operation and trust which clubs place in each other in order to run a competition. Each club no doubt also derives genuine financial benefit from this aspect of inter-club co-operation. But his Honour fell into error in extrapolating this type of co-operation to the general. In doing this, his Honour confused the necessary and beneficial aspects of joint venture activities with the non-beneficial activities of a unified single entity⁶⁶.

The acceptance of co-operative restraints necessary to conduct a competition cannot be seen as limiting the supply of services to anyone. Without such an acceptance of restraints, the relevant “service” (i.e. the competition) would simply not exist. These restraints are, therefore, not illegalised under competition law⁶⁷. However, when independent actors join together to achieve a mutual advantage or jointly to disadvantage another entity, the position changes. Here there is joint activity not to create or conduct a competition necessitating some jointly accepted restraints but to act as a single entity using the market power of collaboration to the detriment of outsiders. In this scenario, we have a group seeking to achieve by mutual coercive power that which its members cannot achieve individually. Such joint coercive activities must be held to be subject to competition law scrutiny. To exempt them would sanction, for example, both price fixing and collective boycotting purely because the parties involved had a joint venture structure or had joint venture needs.

3. What the Full Federal Court did not say in *News Ltd v ARL*

The Full Federal Court in *News Ltd v ARL* did not say a great deal about the conceptual interaction between joint ventures and competition law. Possibly for this reason, some commentators believe that intra-joint

66 Co-operation as such has never been illegal under competition law. Co-operation is, for example, the *raison d'être* of trade associations. Yet, of course, trade associations can engage in illegal activities and much illegal price fixing has traditionally had its genesis in the activities of trade associations. The co-operative activities of trade associations may well be greater than those of sporting organisers. For example, trade associations, without breach of the Trade Practices Act, can engage in at least the following joint activities:

- (a) promoting better accounting and record keeping methods;
- (b) developing industry leadership;
- (c) operating to provide liaison for members with government;
- (d) providing publicity and public relations for the industry;
- (e) fostering technical research;
- (f) maintaining labour relations services;
- (g) issuing information bulletins to members;
- (h) gathering industry statistics;
- (i) publishing industry specialist data;
- (j) conducting training courses for members;
- (k) supplying services such as credit reporting, joint insurance services and economic studies;
- (l) furnishing the industry with specialist technical advice that few small members, individually, would be able to afford.

[See WJ Pengilly: *Trade Associations, Fairness and Competition*: (Law Book Co. 1981) p10.] At trial, Justice Burchett sought to distinguish the ARL from commercial trade associations saying at one point that the activities of league club officials would have been illegal if engaged in by trade association members but, because of the special nature of the AFL, not illegal when engaged in by league club officials. Yet the ARL and trade associations are conceptually akin. Each have substantial areas in which they can be co-operative whilst, at the same time, members must compete in relation to their commercial activities.

67 In this regard, see the logic of the United States Supreme Court in *NCAA v Board of Regents of the University of Oklahoma* 1984-2 Trade Cases 66,139 at p66,387. In relation to college football, the Court noted that:
“What is critical is that the case involves an industry in which horizontal restraints on competition are essential if the product is to be available at all. Some activities can only be carried out jointly. Perhaps the leading example is league sports.”

venture co-operation is now outlawed or at least endangered. This is reading far more into the *News Ltd v ARL Decision* than can possibly flow from it. The undeniable fact is that the Full Federal Court decision was concerned only with the ARL acting coercively as a single entity. At no time did the Full Federal Court deal with the mechanics of sporting competitions, their rules and the restraints involved in these. It is not true to say that the Full Federal Court has created new doubts as to the validity of intra-enterprise joint venture restraints. The Court said virtually nothing about these restraints.

4. What sort of intra-venture restraints are permitted in sporting competitions?

It is impossible here to encompass a full study of those intra-venture sporting restraints permitted and those prohibited under competition law. Generally speaking, however, the following is the position:

- Restraints necessary to the rules of play including rules as to player penalties, referees' powers and the like do not infringe competition law. These are permitted because without them no competition exists.
- Rules as to eligibility to enter tournaments provided that these rules are fairly administered do not infringe competition law. The United States *Professional Golfers Case*⁶⁸ is one example of the point. In that case it was alleged that there was a wrongful exclusion of a player from a PGA tournament and that this was an illegal collective boycott. The United States Ninth Circuit Court of Appeals had no difficulty in holding that the PGA rules relating to admission to tournaments did not breach the *Sherman Act*. It was clearly shown that professional golf tournaments had to be limited to 150-160 golfers as this was the maximum number of golfers who could play 18 holes of golf during the daylight hours of a normal day. The rules were designed to so limit the number of golfers and were impartially administered, so far as was possible, on an ability basis. The court held that "the PGA is entitled to adopt reasonable measures for holding the tournaments to a reasonable number".
- Anticompetitive actions and/or collective boycotts have been found in the United States⁶⁹ and in such Australian authority as there

⁶⁸ *Deesen v The Professional Golfers Association of America* 1966 Trade Cases 71,706.

⁶⁹ See *Radiant Burners v Peoples Gas Light & Coke Co* 364 US 656 (1961); *Silver v New York Stock Exchange* 373 US 341 (1963). See also the following statement of the US Federal Trade Commission 83 FTC 1849 (1973-1974):

"The law is well established that whenever membership in a trade association is a vital competitive factor for a business then arbitrary or discriminatory refusal of membership to a qualified applicant or arbitrary or discriminatory dismissal from membership constitutes an unfair method of competition ~ dismissal from membership should be allowed only for failure to comply with specific, non-discriminatory, objective criteria that adhere closely to the requirements of the law." The United States Courts have applied this general principle to football competitions. In *Northwest Wholesale Stationers Inc v Pacific Stationery & Printing Co* 1985-1 Trade Cases 66,640, the United States Supreme Court applied its decision in *NCAA v Board of Regents of the University of Oklahoma* (n67). The court noted that restrictions on televised college football were not banned *per se* despite the obvious restriction on output. This was because college football is an activity in which restraints on competition are essential if the product is to be available at all. An enquiry thus has to be made as to the purpose of any restriction involved. *Per se* illegality is applicable only if the conduct involved must be "conclusively presumed to be unreasonable and, therefore, illegal without elaborate enquiry as to the precise harm they have caused or the business excuse for their use". Reasonable rules as to the furtherance of a competition will not be conduct which will be condemned pursuant to such an enquiry. A purpose to restrict competition must be found. Arbitrary or capricious conduct may be evidence of such a purpose but the application of specific, non-discriminatory, objective criteria to further the competition would not be.

is⁷⁰ only when exclusions from joint venture activities can be characterised as “arbitrary” or “capricious”.

The expulsion of a club from a competition will be permitted if such expulsion is necessary to the fostering of the game and the competition and if appropriate good faith is exercised in making the expulsion decision. In 1985, for example, it was held that the NSW Rugby League could drop Western Suburbs from the then Sydney competition in view of the necessity to reduce competition numbers from 13 clubs to 12 and in view of the fact that Western Suburbs was chosen to be dropped after an evaluation of its match record (1 win in 24 matches) and other relevant criteria such as finance, administration, junior league and grounds⁷¹. There seems no reason to believe that the expulsion conduct in that case would run foul of competition law and, in my view, the *News Ltd v ARL Decision* does not mandate this result. More is said on this later.⁷²

70 See, for example, Trade Practices Tribunal Decision in *Obidiah Pty Ltd* (1980) ATPR 40-176; *TPC v JW Bryant* (1978) ATPR 40-075 (Federal Court); TPC Decisions in *Ogden Industries* (1979) ATPR (Com) 16376; *Wholesale Wine and Spirit Merchants Association of NSW* (1974-1975) ATPR (Com) 8651; *Wine and Spirits Merchants Association of South Australia* (1974-1975) ATPR (Com) 8651; *Australian Federation of Travel Agents* (1974-1975) ATPR (Com) 8862, 8617, 8628, (1976) ATPR (Com) 16542, 15553; *Australian Funeral Directors Association (Queensland Branch)* (1979) ATPR (Com) 15558; *Third Annual Report of Trade Practices Commission* (1977) Par 2.26 citing activities of Caravan Trades and Industry Association of South Australia. On occasions issues under s4D (collective boycotts) and the wider anticompetitive prohibitions become intertwined. This is not surprising as a collective boycott is simply conduct that is so unredeemingly anticompetitive that it has been legislatively deemed *per se* illegal.

71 *Wayde v NSW Rugby League Limited* (1985) 180 CLR 459. The expulsion was contested by Wests under s320 of the then *Companies (NSW) Code* which permitted the court to intervene if a company's conduct (in this case the conduct of the NSW Rugby League Limited) would be unfairly prejudicial to, or unfairly discriminatory against, a member or members. The expulsion of Wests was because, in 1984, Newtown dropped out of the Sydney competition and thus thirteen teams remained instead of the fourteen from the prior year. This necessitated a bye being introduced. There were also complaints, amongst other things, that the competition was too long, that too many matches had to be crammed into the beginning of the season and that players did not have an opportunity between matches to recover from even minor injuries. The High Court held that Wests had not been unfairly prejudiced or unfairly discriminated against. There was no suggestion that the League Board had failed to have regard to relevant considerations or that it took irrelevant considerations into account. The High Court said that no amount of sympathy for Wests could obscure the fact that the League was expressly constituted to promote the best interests of the sport of rugby league and to determine which clubs should be entitled to participate in competitions conducted by it. Further, in view of the expertise of the Board of the Rugby League, the court must exercise caution in putting its view in place of decisions reached by sporting organisers.

In his judgment Brennan J (as he then was) noted that:

- the organisation of the premiership competition was essential to the fostering of the game of rugby league and the control of the number of competitors is an integral part of the organisation of the premiership competition;
- a club is not necessarily discriminated against by being excluded. The countervailing interests to be considered are the considerations of the efficient organisation of the competition and the interests of the clubs within it; and
- the League Board knew that the competition was burdensome to, and perhaps dangerous for, players and that a shorter season was conducive to a better premiership competition. It was entitled to take these matters into consideration in any decision it reached.

There was nothing arbitrary or capricious in what the NSW Rugby League had done. Its actions were related to the fostering of the competition. As Justice Brennan held, the number of competitors in a competition is an integral part of its organisation. As furthering the competition was the relevant purpose of the expulsion and, as Wests had not been treated in an arbitrary or capricious manner, my view is that the case would not have run foul of competition law. The *Companies Code* test and the *Trade Practices Act* test of legality is effectively the same.

Ironically, despite the litigation victory by the NSW Rugby League, the League decided to re-admit Wests to the competition, but the club relocated from Lidcombe to Campbelltown.

72 See PART VII.4(iii).

VII. WHAT FOLLOWS FROM THE AUSTRALIAN SUPER LEAGUE CASE IN RELATION TO THE PREVENTING OR HINDERING OF ACTIVITIES OF RIVAL COMPETITION ORGANISERS?

1. The nature of the restraints before the Court in *News Ltd v ARL*

The *News Ltd v ARL Case* did not involve an evaluation of any restraints necessary to create, or continue, a competition. The court, insofar as such restraints drew comment, accepted their legality. What was involved in the *News v ARL Case* was a group of clubs and a sporting organiser, the ARL, seeking to achieve by mutual coercive power that which its members could not achieve individually. Once the Full Federal Court had ruled that there was no fiduciary duty compelling all clubs to act for the sole benefit of the ARL and to hold their assets for the sole benefit of the ARL (as discussed in PART III earlier), it was inevitable that the Court would also hold that the ARL five year Loyalty Agreements infringed the *Trade Practices Act*.

2. Trial judge decision on competition and misuse of market power submissions by News Ltd

News Ltd argued that the conduct of, and arrangements between, the ARL and the respective ARL clubs were substantially anticompetitive, a misuse of market power and constituted an "exclusionary provision".⁷³

At trial, Mr Justice Burchett, largely based upon his theory that all clubs had a fiduciary duty to act for the benefit of the ARL, and only the ARL, dismissed the claim that the conduct of the clubs and the ARL had any substantial anticompetitive purpose or effect. He also dismissed the claim that an exclusionary provision was involved. His Honour, basing his decision both on the fiduciary relationship theory which he had found and on his finding of a wide market definition (discussed in greater detail in PART VIII following) also dismissed the News Ltd claim that there had been a misuse of market power.

3. The exclusionary provision issue

(i) *The exclusionary provision issue was the only issue decided by the Full Federal Court*

The Full Federal Court found it necessary only to determine whether or not there was an illegal exclusionary provision involved in the conduct in question. It held that there was. As News Ltd was successful in one of its claims, this sunk the ARL ship and the Full Federal Court did not find it necessary to determine the competition issue or the misuse of market power issue.

The Full Federal Court's judgment was almost totally an analysis of the structure of the ARL and the duty of clubs to it (which we have discussed in PART III) plus an evaluation of whether or not an exclusionary provision was involved. It is this latter question which we now discuss.

73 In more common parlance an "exclusionary provision" is known as a collective boycott.

(ii) *What is an exclusionary provision?*

An “exclusionary provision”, often referred to as a collective boycott, is a *per se* offence in Australia and New Zealand⁷⁴. An anticompetitive purpose or effect does not, therefore, have to be shown to result from the arrangements involved and illegality follows on proof of the relevant facts without more.

As a broad generalisation, it can be said that the legislative objective in illegalising exclusionary provisions is to prevent power groups agreeing not to deal with certain entities or classes of entities. This is illegal because it is presumed to be anticompetitive and to have no redeeming justification. It can also be argued that collective boycotts are *per se* banned, as much as for any other reason, because they are a form of economic bullying of the less powerful by a group of entities who, by combination, have market power and thus the conduct constitutes “a low down social trick”⁷⁵.

Applying the statutory exclusionary provisions⁷⁶ relevantly to the *News Ltd v ARL Case*, illegality followed if:

- there was “a contract, arrangement or understanding”
- between *parties which were competitive with each other* (in this case between rugby league clubs which had to be found to be competitive with each other)
- which had the purpose of limiting the supply of services by competitive rugby league clubs to News Ltd (as organiser of the Super League competition) or limiting the acquisition of services by competitive rugby league clubs from News Ltd.

(iii) *The trial judge and exclusionary provisions*

(a) *Trial judge's findings*

The trial judge found none of the three limbs of the above statutory requirements for illegality were satisfied.

There was, he found, no contract, arrangement or understanding because any agreement involved was not one between competitive clubs but consisted of a series of individual agreements between clubs and the ARL, a non-competitor of the clubs.⁷⁷ This was despite the fact that the terms of

74 Trade Practices Act (Australia) s45(2)(a)(i) and s45(2)(b)(i). The definition of “exclusionary provision” is set out in s4D of the Act; Commerce Act (New Zealand) s29. The material in the text is abbreviated and generalised for simplicity of presentation.

75 JA Rahl: “Per Se Rules and Boycott — Some Reflections on The Klors Case”, 45 Virginia LR 1165 (1959).

76 n74. The emphasis is that of the present writer to highlight the crucial issues to be determined in the case.

77 His Honour found that there could be an agreement between companies in circumstances where there was a discussion in a joint forum, documents were then taken away and each company executed the same agreement with an organisation of which each was a member. There could only be an agreement if there were a “wink or nod” arrangement between the companies involved and, by this, a separate horizontal agreement between the clubs additional to the series of “vertical” agreements between each club and the ARL was entered into. His Honour believed that executives of a trade association, if they had done what the executives of the rugby league clubs did, would have entered into a contract, arrangement or understanding. This was because the arrangement involved would have been engaged in by astute businessmen as a method of avoiding the Trade Practices Act. But, said his Honour:

“the chairmen and chief executive of the clubs included persons who were relatively unsophisticated so far as the *Trade Practices Act* was concerned and did not advert to it at all”. (n8 at p41, 708) His Honour regarded the relationship between rugby league clubs and the ARL as quite different to that between a trade association and its members. He said:

“The relationship of the clubs to the (ARL) is not like that of the members of a trade association. The (ARL) is a special body, which has grown out of aims that are not commercial no arrangement

the agreements were discussed at a meeting of clubs and it was resolved that no club could enter the 1995 competition unless it signed a five year Loyalty Agreement to the ARL. One would think, though Justice Burchett did not, that only in a technical sense were the agreements between individual clubs and the ARL. The terms of the agreements, and the fact that every club had to sign them to enter the competition, were decisions reached jointly between the relevant clubs.

Neither did Mr Justice Burchett find that the clubs were in competition with each other.⁷⁸

His Honour also found that there was no "purpose" to limit the supply of services by rugby league clubs to News, or the acquisition of services of rugby league clubs from News. The ARL and league clubs' purpose was to "preserve the joint participation" of all the clubs in the premierships competition and that they had other "commercially proper" and "entirely reasonable" reasons for doing what they did.⁷⁹

(b) Comment on the basis of the trial judge's findings

His Honour's conclusions at trial were heavily influenced by his conceptualisation of the ARL and the clubs as being in a fiduciary relationship.

It was also the case that his Honour's view of the facts was highly favourable to the ARL. The genesis of the five year Commitment and Loyalty Agreements was in a hasty return by Mr Ken Arthurson (ARL President) from a Kangaroo Representative Tour in England when he heard rumours of the possibility that a rival competition might be started. On arrival in Sydney, Mr Arthurson immediately spoke to Mr John Quayle of the NSW Rugby Football League to see what could be done to prevent a new competition being established. When it looked as if News Ltd might move to do this, the five year Commitment Agreements and the subsequent five year Loyalty Agreements were seen as a method of stopping it. The agreements prevented News Ltd from signing clubs to its competition and,

or understanding between the clubs is necessarily to be inferred from the Commitment Agreements or the Loyalty Agreements, or from what was said at meetings at which they were discussed" (n8 at p 41, 708)

The present writer believes that the executives of rugby league clubs and members of a trade association are in precisely the same position insofar as arrangements between them are concerned: see n66.

⁷⁸ On this point Burchett J said:

"Competition within the meaning of s4D would be contrary to the history of rugby league, the constituent documents of the (ARL) and the clubs and the terms on which the clubs were admitted to the competition. From the beginning, the rugby league football competition was a joint activity between the (ARL) and the clubs which had been admitted to the competition at any particular time ..." (n8 at p41693)

⁷⁹ On this point Burchett J said:

"I conclude that the purpose of (the ARL) was to preserve the joint participation of all the clubs. Since each club, of which there was a limited number, could only have one top team, that required securing the involvement of the top teams. Since many of the contracts relating to grounds, sponsorship, television, players and coaches and other matters, were relatively long term contracts, it was commercially necessary to ensure that the participation of the clubs would not terminate abruptly at the end of a season. The fact that admission to the competition had previously been on an annual basis does not, and cannot, deny this obvious requirement; all it shows is that in the past no-one had doubted the maintenance of this competition, which, on the evidence, had been recognised as the best rugby league competition in the world. Having regard to the long term commitments affecting the (ARL) and the clubs, and the lead times involved in preparing a team to compete, I am satisfied that the period of five years contained in the Commitment Agreements and the Loyalty Agreements provides no ground for inferring any proscribed purpose. It was commercially proper and, from the point of view of the parties, entirely reasonable" (n8 at p41, 704)

without this ability, the ARL thought that the News Ltd competition could not get off the ground. The necessity for a five year tie for commercial reasons had a hollow ring to it. The ARL had refused previously to admit clubs to the competition other than on a year to year basis, though some clubs had asked. All clubs had, in fact, been admitted to the 1995 competition in May 1994 in accordance with the ARL Rules. Yet in February 1995, immediately prior to the commencement of the 1995 competition to which all clubs had been previously admitted, all clubs were required to execute a five year Loyalty Agreement to the ARL. This was a new price exacted for participation in the 1995 competition to which all clubs had, in fact, been admitted the best part of a year earlier.

(iv) The Full Federal Court on exclusionary provisions

The trial judge held with enthusiasm that none of the three legislative requirements set out earlier was satisfied. The Full Federal Court held with equal enthusiasm that all requirements were satisfied.

(a) Was there a "contract, arrangement or understanding between clubs?"

There was, said the Full Federal Court, clearly a contract, arrangement or understanding between clubs.⁸⁰

(b) Were the clubs "in competition" with each other?

The Full Federal Court found that there was competition between clubs for the services of the ARL as a competition organiser. This was because the clubs each year competed for re-admission to the ARL competition. Annual re-admission was not a formality. This was because there had been lengthy discussions at various times as to how the number of teams in the competition might be reduced. It was thus impossible to resist the conclusion, said the Full Federal Court, that at least some of the clubs which had executed the five year Commitment and Loyalty Agreements were in competition with each other, or likely to be so, to retain their position within the national competition.

The Full Federal Court also held that there was competition for rival organisers and that clubs were in competition to secure the services of such organisers. The trial judge had held that, as there was a total fiduciary duty of clubs to the ARL, the question of clubs engaging the services of a rival competition organiser was not one even open for consideration. Having swept away the fiduciary duty concept, the Full Federal Court found it easy to conclude that there was competition between clubs for the services of a rival competition organiser. This was because, on the quite obvious facts of the case:

"(The history) of the relevant events shows that the threat posed by News' potential rival competition was very much at the forefront of the minds of the representatives of the ARL and of the clubs. The Commitment and Loyalty Agreements were designed, in large measure, to prevent any of the clubs from choosing to participate in the rival competition".⁸¹

⁸⁰ On this point, the Full Federal Court said:

"The discussion at the meeting of 14 November 1994 speaks eloquently of the fact that the participants perceived News to be a rival competition organiser, whatever assurances Mr Cowley (of News Ltd) might have given Mr Arthurson (of the ARL) about the control of the game. It is plain that the (ARL) brought the clubs together, in circumstances which were redolent of great urgency, for the purpose of arresting the nascency of News as a rival competition organiser. The participants at the meeting were told repeatedly of the importance of sticking together. The Commitment Agreements were clearly aimed specifically at News as a rival competition organiser and were understood that way by the representatives of the clubs. The position was very similar in relation to the meeting of 6 February 1995 and the Loyalty Agreements executed shortly thereafter." (n10 at p42659)

⁸¹ n10 at p42652.

Finally, having, as we have seen⁸², swept away the “player exemption” from the *Trade Practices Act*, the Full Federal Court found that clubs were, or were likely to be, in competition with each other for the services of premiership players.

(c) Was there a purpose to limit the supply of services by competitive rugby league clubs to News Ltd or limit the acquisition of services by competitive rugby league clubs from News Ltd?

The essential question here was the “purpose” of the actions of the ARL and its constituent clubs. The Full Federal Court relied upon s4F of the *Trade Practices Act* stating that a particular purpose exists in an arrangement or understanding if that purpose is a substantial purpose, even though the arrangement or understanding may have other purposes.

Pragmatically on the facts, the Full Federal Court had little difficulty in concluding that limiting the supply of clubs to News Ltd or limiting the acquisition by clubs of the services of News Ltd as a competition organiser were:

“substantial purposes (of the respective arrangements) on any view open of the word ‘substantial’”.⁸³

4. What follows from the case?

The case clearly illustrates not only that the premiership rugby league competition does not command the fiduciary loyalty of clubs for perhaps an eternal period (see Discussion PART III above) but that clubs can infringe the exclusionary provisions of the *Trade Practices Act* by concerted refusals to deal. I certainly thought that this was the law prior to the *News Ltd v ARL Case* but the fact that the trial judge could find the opposite conclusion so comprehensively⁸⁴ shows that the point needed to be established at appellate level.

There are also a number of conclusions which follow in a sense from what the Full Federal Court did not say.

(i) Purpose”

The Court did not agree with the trial judge’s conclusion that the five year Loyalty Agreements were “commercially proper” and “entirely reasonable”.⁸⁵ This does not, however, mean that exclusivity for a period of longer than year to year is illegal.

The case must be looked at on its facts, as must any other legal precedent. It is a question of assessing the “purpose” of the particular conduct involved.

The reasons for the non-acceptance by the Full Federal Court of the ARL’s justification for the five year restraints in the Loyalty Agreements are not stated in detail in the Full Federal Court judgment. However, they are not hard to imagine. To my way of thinking, they are:

- the whole circumstances in which the arrangements were entered into and the fact that News Ltd was continually seen as the target of the

⁸² See generally PART V and in particular PART V.3, n59, n60 and related text.

⁸³ n10 at p42659. The Full Federal Court conceded that “the clubs and the (ARL) may have had other objectives in entering the agreements”. The Court noted the debate in the cases as to whether “purpose” was to be evaluated on an “objective” or “subjective” basis. The court held that it was “not necessary to address this issue since, on (its) view of the evidence, it makes no difference whether a subjective or objective test is used”.

⁸⁴ n8.

⁸⁵ n79.

ARL conduct. Mr Arthurson, ARL President, returned in haste from England when he heard about the possibility of News Ltd starting another competition. His first action, on arriving in Australia, was to consult Mr John Quayle of the NSWRL on how the News Ltd threatened competition could be stopped. Everything else sprang from this genesis;

- the fact that the ARL competition had run without a five year restraint in the past and this apparently caused no real detriment to any clubs;
- the fact that in the past some clubs had requested entry into the ARL competition for longer than one year but this had been rejected;
- the fact that the clubs had in May 1994 been admitted to the 1995 competition on the ARL's "year to year" invitation basis yet but six months later were being informed that anything less than a five year agreement was inadequate to advance the commercial interests of the clubs. This complete about face in policy must have raised huge credibility issues as to the genuineness of the justification argument put by the ARL for a five year tie; and
- the almost total absence of credible evidence that sponsors, clubs or advertisers needed or wanted a five year agreement. This was in marked contrast to the clear evidence that News Ltd was the target of the ARL's conduct.

Given credible evidence of a commercial need for longer than one year arrangements, there is no reason why such arrangements should not be entered into by competition organisers. The *News Ltd v ARL Decision* does not say anything to negate this. Similarly, there is no reason why clubs should not be signed to competitions on other than a "year to year" basis. But the evidence must be real and, if challenged, must be strong enough to withstand rigorous cross examination.

(ii) *Business justification*

Linked in with the question of "purpose", and in many cases the opposite side of the "purpose coin", is the issue of the business justification for a particular action. The Full Federal Court, in not accepting the ARL's "business justification" argument, did not say that this argument was never available. Specifically, the case does not say that there is no business justification for exclusivity arrangements which exceed one year. A prime consideration in each case of exclusivity is whether there are legitimate business reasons for what is done, these to be balanced against exclusionary factors. This involves the balancing of:

- the duration of the agreements and the need for such duration; with
- the business reasons for the exclusive tie such as, for example:
 - assurance of product supply;
 - reduction of cost; and
 - the need to recoup any investment made.

If there are adequate legitimate business purposes for conduct, then this will negate the inference that a substantial purpose is to limit or restrict the supply of goods or services to a named person or class of persons. The following are some of the reasons for this:

- At a minimum, it shows that the purpose is not wholly to exclude. The presence of a legitimate business purpose for conduct prevents an exclusionary inference being drawn from the conduct alone. A legitimate business reason for conduct makes it unlikely that the court will conclude

that “clearly” the relevant purpose of the conduct is exclusionary.

- A legitimate business purpose bears on the court’s prediction of effects and the court’s analysis of the purpose involved. A legitimate business purpose presents a cogent reason, other than an exclusionary one, as to why the conduct is engaged in. A legitimate business purpose shows that a party has reason for engaging in the relevant conduct other than a reason which involves competitive detriment to another.
- Even if there are detrimental effects on another, a legitimate business purpose reduces the possibility that, on balance, it will be held that a “substantial” purpose was to produce those effects.

(iii) *Non admission to, or expulsions from, competitions*

One conclusion which some may, and seemingly have, drawn from the Full Federal Court decision is that it is not now possible to exclude clubs from a competition and that perhaps it is now also illegal to refuse to admit clubs to a competition. The argument reaching this conclusion is that the excluding parties are acting under a contract, arrangement or understanding to limit the supply of services to the excluded club. Admittedly, so the arguers of this proposition state, the Full Federal Court decision in *News v ARL* was concerned with the exclusion of a whole rival competition. But, they say, it is only a matter of degree, not principle, whether a single club, a number of clubs or a whole new competitive organisation is the target of the joint conduct involved.

Clearly, in excluding a club from a competition, the excluding clubs are acting under a contract, arrangement or understanding. They are also, in accordance with the views of the Full Federal Court “in competition” with each other. Further, they are limiting the supply of services to the excluded club. But these things are not illegal either singly or in combination. The action must be done for “the purpose” of limiting the supply of services to the excluded entity if an illegal collective boycott is to be found.

As we have noted,⁸⁶ there can quite properly be a substantial purpose of furthering a competition and its benefits. The expulsion of a club from a competition, if bona fide made, comes within those objectives. Furthering the objects of a competition, even to the extent of expelling a club from the competition involves no competition illegality. There is nothing in the *News Ltd v ARL Case* which can fairly lead to the conclusion that it changes the law in this regard.

(iv) *In conclusion*

The *News v ARL Case* involved a huge expenditure of money and other resources, as has the whole launch of the News Ltd backed Super League competition.⁸⁷ Perhaps I am blessed with that great asset which many

⁸⁶ See PART VI and, in particular PART VI.4 and n71.

⁸⁷ The *Australian Financial Review* of 14 March 1996 gave the following figures as being the amount spent up to that date by News Ltd on the Super League launch:

- \$75 million setting up Super League with well over \$100 million committed to paying players up to 1999;
- \$13 million spent on “sign on” fees for players;
- \$8 million spent on administration;
- \$9 million spent on advertising and promotion;
- \$5 million spent on ground improvements;
- \$12 million injected into franchise clubs on top of \$2.5 million in loans to clubs;
- more than \$10 million on legal fees.

The writer has not seen any subsequent quantification of the News expenditure though, obviously

commentators appear to possess — 20/20 hindsight! However, the case, to my way of thinking, does not establish any earthshakingly new principles of competition law. The major conclusions in relation to the activities of competition organisers is that there is a difference between intra-venture restraints and inter-venture restraints. The former will be tolerated under the *Trade Practices Act*, the latter may well run foul of it. The fact that it has been established at the appellate level that sporting clubs are in competition and can collectively boycott others is the most important finding in the case, elementary as one might have thought this conclusion to be.

The case cannot be read for more than it holds. Regrettably, however, there will be those who will read the case on a worst case scenario and conclude, as have some already⁸⁸, that it has serious implications for all forms of joint commercial activity, joint ventures and consortium bids and that the decision may well prove to encourage anticompetitive rather than pro-competitive activities. This is a conclusion I do not share and which I do not think can be fairly read from the case.

VIII. WHAT IS THE RELEVANT MARKET AGAINST WHICH QUESTIONS OF MISUSE OF MARKET POWER BY SPORTING ORGANISATIONS MUST BE EVALUATED?

1. Background Information

One of the interesting questions raised in the *News Ltd v ARL Case* was the definition of the relevant market. The same question was also raised in the 1996 Commerce Commission's decision in relation to the *New Zealand Rugby Union Player Draft*⁸⁹. A comparison of the two decisions and some comments on the relevant "market" in the context of rugby league and rugby union competition is of considerable interest.

enough, there have been significant amounts spent since March 1996.

The legal statistics are also interesting. The trial occupied 50 hearing days. News Ltd briefed eight counsel including three Queen's Counsel. The ARL briefed six counsel including two Queen's Counsel. Four respondents were separately represented by junior and senior counsel.

On the appeal, Super League was presented by two senior counsel and four junior counsel. The "rebel" clubs were separately represented by two senior counsel and junior counsel. The ARL was represented by senior counsel and four junior counsel. The "loyal" clubs were represented by senior and junior counsel. Senior and junior counsel appeared for those players and coaches who had signed the Super League contracts. The Full Federal Court noted in its judgment that the text of the various submissions on the appeal (leaving aside the transcript of oral argument) ran into thousands of pages. The various submissions were supported by extensive documentation, including summaries and extracts from statements, exhibits and other evidence at trial. In all, apart from a dozen or so volumes of authorities, each of the three members of the Full Federal Court sitting on the appeal was presented with about 70 folders of documents. In addition, the transcript of the trial proceedings was available on disk.

The trial judgment in original text was 220 pages long. The Full Federal Court judgment in original text ran to 233 pages plus two appendices totalling 20 pages.

⁸⁸ n65.

⁸⁹ *Re New Zealand Rugby Football Union Incorporated* — New Zealand Commerce Commission Authorisation Decision No. 281: 17 December 1996. This determination, at the time of writing, was subject to an appeal to the New Zealand High Court. Subsequent to the writing of this paper, the High Court delivered judgment confirming the decision of the Commerce Commission (Cox CL 2/97 Judgment 14 August 1997). An appeal from this High Court decision has been made to the Court of Appeal but judgment of the Court of Appeal has not, at the time of submission of this article for publication, been given.

The market issue in Australia was discussed in *News Ltd v ARL* only at trial⁹⁰. It was not necessary for the Full Federal Court to discuss misuse of market power or competition issues, and hence it was not necessary to discuss "market definition" issues. As we have seen⁹¹ the Full Federal Court found that there was an illegal exclusionary provision entered into between the ARL and its constituent clubs. An exclusionary provision is a *per se* offence and involves no market definition analysis. The Full Federal Court, having found against the ARL on the exclusionary provision issue, saw no reason to waste either judicial time or Australia's timber resources in a commentary on a matter which could not affect the ultimate issue of liability.

Presumably the approach taken by the Full Federal Court means that the observations of Justice Burchett at trial constitute the Australian judicial precedent as to the relevant market definition where premiership football is involved.

The market definition issue is fundamental to a determination of whether it is possible for sporting organisers to misuse market power and thus breach s46 of the *Trade Practices Act*.

It is not intended here to canvass the possible actions which may constitute a misuse of market power but merely to debate the market definition against which any such action may have to be evaluated.

If the market is a widely defined one, as Justice Burchett found, and includes rugby league, rugby union, Australian football and basketball, it is obvious that it would be difficult for an Australian sporting organiser of any of those four sports to have sufficient market power to come within the misuse of market power statutory prohibitions under s46⁹². However, if market definition is restricted to, say, one sport, it is obvious that those sporting administrators will have to take s46 into account in decisions which they take. The same general proposition would also be applicable in New Zealand though appropriate adjustments to the above logic would have to be made to take account of the absence of Australian rules football in New Zealand and the far stronger position of rugby union in New Zealand compared with the various football codes in Australia.⁹³

2. The "market" as pleaded by News Ltd

News Ltd confined its pleading of the relevant market to the sport of rugby league. None of its market definitions as pleaded embraced any other sport or any other form of entertainment. The real question of market definition in the case at trial was whether the market could be confined to rugby league or whether it also included other sports and other

⁹⁰ n8.

⁹¹ See discussion in PART VII.

⁹² The Australian Trade Practices Act s46 brings the misuse of market power provisions into play when there is a "substantial degree" of market power involved. The New Zealand Commerce Act requires market "dominance" before s36 of the *Commerce Act* comes into play. In assessing the New Zealand position, as contrasted to the Australian, a three sport market (rugby union, rugby league and basketball) would be the appropriate equivalent of Justice Burchett's four sport market analysis because of the lack of Australian football in the Dominion. Even with a three sport market definition in New Zealand, rugby union would seem to be in a strong market position in New Zealand because of the strong following of rugby, nation wide, in comparison with the other sports. In Australia, sporting support is much more widely diversified. Australian rules football would be the most popularly supported game of football but, though played in NSW and Queensland, its major strength is in other States. The major support for rugby league and rugby union is in NSW and Queensland though these games, too, are played in other States.

⁹³ See comments in n92.

entertainments. Predictably, News Ltd tried to narrow the market definition as this would mean that the ARL's actions would have a more significant impact. Equally predictably, the ARL sought to widen the market definition.

News Ltd alleged two basic markets and a series of alternative markets. For purposes of this paper, we shall refer only to the two basic markets which were:

- A "Rugby League Competitions Market" in Australia or Eastern Australia being a market for the supply of the service of conducting national premier league competitions. In this market the organiser supplies, as services to customers, the following:
 - viewing of rugby league matches supplied to members of the public attending the ground;
 - television broadcast rights;
 - transmission rights supplied to pay television proprietors;
 - intellectual property rights supplied to manufacturers of retail products (merchandising rights);
 - sponsorship rights supplied to commercial and other entities.
- A "teams market" in Australia or Eastern Australia being a market for the supply of teams of premier players for participation in the rugby league premiership competition.

In the "teams market", each club competed for:

- money and prizes;
- gate receipts;
- sponsorship rights;
- corporate boxes and merchandising rights;
- players;
- supporters; and
- spectators.

3. The relevant market definition principles applied by Justice Burchett at trial

Mr Justice Burchett at trial undoubtedly applied the generally accepted principles of law in relation to market definition when he concluded that:

- a market is an area of close competition between rivals;
- the borders of a market are to be found by whether there is substitution between two products — at least in the long run if given a sufficient price incentive. In this regard, both cross elasticity of demand and cross elasticity of supply are relevant;
- market definition must be sufficiently flexible to bend to accommodate the particular situation or process to which it may have to be applied;
- market definition should comprehend the maximum range of business activities;
- market definition issues should take into account long-term considerations;
- the term "market" is not capable of precise comprehensive definition. Value judgments must be made upon which there is room for legitimate differences of opinion.

The real question is whether his Honour, in applying the above correct legal principles, reached the correct market definition on the facts.

4. The market as found by Justice Burchett at trial

His Honour rejected the News Ltd submission that the applicable market involved rugby league only. He found a wide “four sport” product market consisting of rugby league, rugby union, Australian rules and basketball. In making this finding, he took into account the following considerations:

(i) *Industry evidence*

Industry perception of the relevant market is recognised as very important in evaluating market definition. This makes good sense. Those in the industry are more conversant with market issues than are others.

Not surprisingly, therefore, there was a lot of evidence about industry marketing plans and the marketing tactics of other sports. Rugby union, for example, steered clear of playing its matches on the same day as rugby league. This indicated to his Honour that these codes were in the same market. Similar analyses were run with other sports.

His Honour’s conclusion was that rugby union, rugby league, Australian rules football and basketball were the sports which might attract significant proportions of the rugby league crowd (both as spectators and TV viewers) if the ARL tried to exercise market power. This conclusion was based on many pages of evaluation of industry evidence into which it is not possible here to delve. His Honour, in relation to the ARL’s own marketing material that rugby league sponsorship was “a unique weapon in an increasingly competitive environment”, held that the word “unique” was, in the League’s promotional material, “plainly not used in any measured way”. All ARL promotional material as to the uniqueness of rugby league was thus given no weight.

(ii) *The explanation as to why rugby league had been slow to respond to changes brought about in other sports*

It was conceded by the ARL⁹⁴ that the ARL had not reacted speedily to innovations introduced by other sports.

The reason for this slow reaction to innovations introduced by other sports raised involved an evaluation, in his Honour’s view, of two alternative propositions. Rugby league may be a monopoly sport in a narrow market and thus unresponsive to market pressure for change. Alternatively, rugby league may be a part of a wide market but have special factors which account for its slow responses despite long-term forces in a wider market compelling such change.

One would think that, normally, the former situation would be the logical one in the absence of unusual circumstances. However, his Honour found unusual circumstances and opted for the latter proposition (i.e. there was a wide market with special explanatory factors as to the slow change of the League to market forces) making the following observations as to the reasons for the slow League response to market pressures:

“Like, for example, 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, just as the hospital has a religious and moral mission — the Good Samaritan delayed his business, and expended some of his funds to serve a higher duty.”

⁹⁴ This concession must have been made in light of the comments in his Honour’s judgment. However, the precise nature of the concession made is not clear from his Honour’s judgment.

Given the moral mission which his Honour found in the ARL, lack of effective competition from other sports was not the reason for slow League reaction and the League's slow reaction was not a reason to find rugby league as being in a market of its own. His Honour further noted that the League's slow reaction to other sporting competitive pressures was also explicable because:

"it is necessary too to take account of the co-operation between the clubs inherent in a sporting competition, and of the interdependence between all the clubs and the League, as factors affecting economic judgments upon their actions".

(iii) His Honour's view of the applicability of s4E of the Trade Practices Act

Section 4E of the *Trade Practices Act* says that goods or services "otherwise substitutable with" other goods or services are to be considered part of the same market. His Honour concluded that this legislative provision necessarily meant that a wider, rather than a narrower market definition was Australian legislative policy.

(iv) The applicability of United States precedents

His Honour declined to accept the value of all but one of the American case precedents put before him. With the exception of the one case with which his Honour expressed sympathy, all the United States cases cited to him had held that particular sports constituted a separate market. The one case with which his Honour found himself in sympathy had peculiarities which led to the market being held to be the finance market. It involved a dispute as to whether investors could own teams in competing leagues.⁹⁵

⁹⁵ *Toolson v New York Yankees* (1953) 346 US 356 (baseball market definition not applicable to Australia because of the complexity and forms of entertainment in the US which are not available to the same degree in Australia); *Mid-South Grizzlies v National Football League* (1982) 550 F.Supp 558 (American finding rejected as applicable because based on sub-market analysis); *International Boxing Club of New York v US* 358 US 242 (1959) (market for championship boxing, not for professional boxing as a whole — not accepted because US Supreme Court merely stated that it could not declare that the market definition reached by the District Court was "clearly erroneous" but did not embrace District Court definition with enthusiasm); *National Collegiate Athletic Association v Board of Regents of the University of Oklahoma* (1984) 468 US 85 (College football a separate market — rejected as court reasoning seemed to imply that college football, baseball and professional football "might, presumably, at least for some purposes, constitute one market". Dissenting judgment in US Supreme Court preferred); *Philadelphia World Hockey Inc v Philadelphia Hockey Club* (1972) 351 F.Supp 462 (market found to be major league professional hockey. Rejected as being a sub-market and thus inapplicable to Australia); *US Football League v National Football League* (1986) 644 F.Supp 1040; (1988) 842 F.2nd 1335 (market held to be major league professional football. Rejected because the judgment really has little to say about the principles of United States law delineating the market for antitrust purposes"); *Fishman v Wirtz* (1986) 807 F.2d.520 (market held to be professional basketball. Definition rejected because case did not deal with market definition but only with the question of whether District Courts' findings were "clearly erroneous"). *Sullivan v National Football League* (1994) 34 F 3d.1091 (Jury held product market to be National Football Leagues in general and the New England Patriots in particular. Rejected because jury reached this conclusion in the course of making a decision which was set aside.)

The one US judgment which did receive sympathy from his Honour was *National Football League v North American Soccer League* (1982) F 2d. 1249. In this case, it was held that there was a capital skills market rather than a market limited to a single sport. To this writer, such a market definition is an extremely wide one and could only be reached in the context of the case which was a dispute about prohibitions on investors owning teams in each of two competing leagues.

The American cases were not followed because:

“The (United States) decisions often turned on jury questions or on whether the ruling below was ‘clearly erroneous’. Generally, the judgments are as much concerned with the Rule of Reason under which it may have been appropriate to start with a narrowly defined market, and then to consider a wider market in the context of the pro-competitive colour it might give a practice that appeared anticompetitive in the narrower setting”.⁹⁶

5. Commentary On The Market Definition As Found At Trial

(i) *The influence of television*

As everyone involved in the *News Ltd v ARL Case* knew, the real issue was television rights. The case formally involved the ARL trying to stop another rugby league competition. However, the rival competition was funded by News Ltd, a telecaster. The reason why the ARL broke off negotiations with News Ltd was a direction by Mr Kerry Packer, owner of Channel Nine — the exclusive telecaster of ARL matches — that this be done.

In other words, television was what the whole case was about even though it was formally a fight between two rugby league competition organisers.

Clearly a wide sporting market is more justifiable when one looks at two telecasters as being the relevant combatants. Telecasters provide sporting entertainment. They have to fill a TV screen with sporting entertainment for a certain number of hours per week. If they cannot telecast one sport, they will telecast another and there will be significant substitutability of one sport for another.

Had his Honour’s decision stated on the face of the record that the real issue was one between two telecasters and had his Honour determined the market definition on this basis, there would be less controversy about the wide market definition found. However, this was not the basis upon which the judgment was given. The judgment concerned one sporting organisation preventing a competitor from entering the market. On this basis, the market definition found by his Honour is open to significant criticism.

(ii) *Criticisms of the market definition found at trial*

The market definition question must firstly be approached on the basis of “what is said to have been done”⁹⁷. Given that, on the face of the record, “what is said to have been done” is that one competition organiser attempted to exclude another from setting up a rival sporting competition, the following criticisms can be made of his Honour’s “four sport” market definition:

(a) *The interpretation of industry evidence*

[See VIII.4(i) above]

Market definition is far more than simply enquiring as to whether one producer looks at the pricing and marketing tactics of another in deciding what to do. *Re Tooths and Tooheys*⁹⁸ was cited by his Honour for the quite

⁹⁶ n8 at p41677.

⁹⁷ *Queensland Wire Industries Pty Ltd v The Broken Hill Proprietary Company Pty Ltd* (1989) ATPR 40-925 per Deane J. For a penetrating analysis critical of the market definition of Burchett J at trial and significantly built on the principle stated by Deane J, see GA Edwards: “From Super-League to Super-Market — The appropriate emphasis in market definition”, *Competition & Consumer Law Journal* Vol 4 No 3 (May 1997) pp.220-224. See also Sweeney n17.

⁹⁸ (1979) ATPR 40-113.

proper proposition that the market must be looked at long term and on a broad basis. Nonetheless it was the area of close competition which was held to be relevant in that case. So the market in *Tooths and Tooheys* was found to be “beer, both bulk and packaged”. Excluded were other forms of alcoholic drinks. Yet all beer manufacturers commonly regard themselves as “in competition” with other alcoholic drinks and certainly take the tactics of the producers of such drinks into account when making their own marketing decisions. One has only to look at the pre-Budget representations by Australian beer brewers each year complaining about the inequalities of beer excise duties compared with those on wine readily to appreciate the fact that beer producers are very sensitive to wine prices. But sensitivity does not put them in the same market.

Similarly, there is little doubt that tea distributors and coffee distributors take each other’s actions into account in determining their marketing and pricing strategies. Many lay observers may believe that tea and coffee are in the same market on the simple principle that many people drink both. The question “Would you like tea or coffee?” must be asked in hundreds of thousands of Australian households each day. Yet in *Arnotts Limited v TPC*⁹⁹ a unanimous judgment of the Full Federal Court said that:

“No doubt there are many people who sometimes drink tea and, at other times, coffee. But, if for example, a particular company dominated the sale of tea in Australia, it would thwart the objectives of provisions such as s46 of the Trade Practices Act to deny their application because the company did not dominate the ‘hot beverage market’. The fact is that tea and coffee are distinct beverages, for each of which there is a distinct demand.”

Market definition, in the ultimate, is a matter of factual evaluation. His Honour adopted an extremely wide market definition largely based on what considerations sporting bodies take into account when determining when they will conduct their own events and how they will price them. This may well be a factor to be taken into account in working out who is in the relevant market but it is not the largely determinative one which his Honour has made it. It would, for example, be a foolish rugby league administrator who would schedule the rugby league grand final at the Sydney Football Stadium on the same day as the Pope’s visit to Randwick racecourse (or perhaps vice versa in the case of a church administrator). Yet it is inconceivable that rugby league and papal blessings could be considered to be in the same market.

(b) *The “Good Samaritan”*

[See VIII.4(ii) above]

“The Good Samaritan” featured prominently in his Honour’s evaluation of why the ARL only reacted slowly to innovations in other sports. The “higher duty” to promote rugby league was given as the reason for this. If this is so, however, it must follow that rugby league and other sports are in separate markets. Non substitution of one sport for another or non- reaction by one sport to the innovations of another may well be for non-price reasons. But non-price issues can be just as much a relevant market delineation factor as pure price issues. The major point from his Honour’s conclusion, assuming it to be correct, is that the ARL is not interested in participating in other parts of the “four sport” market and the ARL is not reactive to changes in that market, even given a sufficient price incentive.

⁹⁹ (1990) ATPR 41-061.

It may well have been that on appeal a different view would have been taken of the “Good Samaritan” principles found by his Honour. Just as the Full Federal Court conceptualised the whole ARL structure differently to the trial judge and found differently on the collective boycott issue substantially for this reason, so this different conceptualisation may well have led to a different conclusion in relation to market definition — or, at least to a different conclusion as to the bearing of the “Good Samaritan” principles on such definition. It is not as if the point is without authority. In *QCMS*,¹⁰⁰ the Trade Practices Tribunal said:

“Firms may be public spirited in their motivation; but if their business conduct is not subject to severe market constraints, this is not competition. In such a case, there is substituted the values, incentives and penalties of management for the values, incentives and penalties of the marketplace.”

(c) *The application of s4E*

[see VIII.4(iii) above]

Section 4E of the *Trade Practices Act* which brings “substitutable goods” into the same market as those goods for which they are substitutable does not mandate that the market must be defined widely. The section only defines legislatively what economists have said that a market means, i.e. the legislative provisions simply are aimed to ensure that different substitutable services are considered to be in the same market. The section was inserted to ensure that lawyers don’t get it wrong when determining this economic issue. Perhaps the purpose of the section is to guard against too narrow a market definition. But it does not compel the result his Honour seemed to believe i.e. that there is a legislative intent that the market must necessarily be defined widely. His Honour concludes, quite correctly, that too narrow a market definition will give a false appearance that competition will be restricted when it is, in fact, being enhanced. His Honour, however, pays no corresponding attention to the opposite proposition which is equally apparent. Defining the market too widely may well give the result that there is no restriction on competition whereas, in fact, such restriction is very real.

(d) *The application of United States precedents*

[See VIII.4(iv) above]

His Honour went to painstaking lengths to distinguish American precedents and American law from the Australian position. Because the law in Australia and America is different, it is, no doubt, always possible to distance oneself from American jurisprudence. However, one can also look positively at analyses performed elsewhere. The principles of market definition are broadly akin throughout the world whenever such an exercise has to be engaged in. A number of the reasons for his Honour’s non-acceptance of United States cases appear to be fundamentally procedural rather than substantive¹⁰¹ For his Honour to take the view that virtually

¹⁰⁰ *QCMS and Defiance Holdings* 1976 ATPR 40-012 at p17246.

¹⁰¹ See n95. The major reason his Honour puts for rejection of United States cases lies in the sub-market issue. He says that many United States judgments were concerned with a “rule of reason” evaluation under which “it may have been appropriate to start with a narrowly defined market and then to consider a wider market in the context of the pro-competitive colour it might give a practice that appeared anticompetitive in the narrower setting”. (n8 at p41677). His Honour’s comments in this regard are conjecture (“it may have been appropriate”). He gives no basis for this view. In the present writer’s view, the comment is incorrect. For a convincing analysis that Burchett J is incorrect in his approach to the United States cases see GA Edwards (n97) at p239 and following.

every United States case on the definition of sporting market is wrongly decided makes one wonder on which side of the Pacific the various errors of analysis have occurred.

His Honour's rejection of the United States cases on market definition is even harder to accept in view of the fact that he relied on so many of those same cases to establish the joint nature of activities involving sporting competitions.

(e) *Realities*

There are some very plain realities which mandate that the actions of the ARL must be considered in a narrower market:

- If the market definition is a wide "four sport" market and there was substitution across the market for sporting teams, why did not the ARL Loyalty Agreements specifically prohibit league clubs from switching to Australian rules football, rugby union and basketball? If these were closely substitutable for rugby league, one would have thought that the possibility of defection of teams to these sports must have been real and would have been covered by the Loyalty Agreements. The reality was that there was no fear of defection to these sports and the ARL was not concerned about such a possibility.¹⁰² This must surely show that rugby league was in a separate market to the other three sports.
- Putting the issue a different way, if a rugby league competition organiser were, in the classic test of *QCMA*¹⁰³, to "give less and charge more", where would rugby league clubs seek out another competition organiser? Would they go to a basketball organiser? The answer must be "no". They would not even go to a rugby union competition organiser. They would obviously seek out a new rugby league competition organiser.
- The ARL obviously believed that it had market power. This is apparent from the fact that it so clearly exercised, or at least attempted to exercise, such market power. If the true market consisted of the four sports found by his Honour and there was team interchangeability between such sports, then the ARL would not have attempted what it did because it could never have had any confidence in the successful outcome of its actions. The fact that the ARL did what it did shows that it believed that it had the market power to effect its plan of action. To then accept a submission by the ARL that the market was so wide that it had no market power in it flies in the face of what the ARL in fact did and how it actually saw its market power situation.

102 The different skills required to play rugby league on the one hand and Australian rules football and basketball on the other are self evident. There would be no defection of either individuals or teams to either of these sports. There has been, and will continue to be, defection of individuals from rugby league to rugby union, which is now a professional sport (previously such defection of players was not possible because rugby league was a professional sport and professional players could not participate in the then amateur rugby union code). However, in this market analysis, we are talking not of the defection of individuals but of teams. The "team market" was what was before the court for evaluation. There will be no defection of teams from one code to another. The New Zealand Commerce Commission in its 1996 Determination relating to New Zealand Rugby Union (n89 at Par 15) suggests that only back line players can readily transfer from rugby union to rugby league and vice versa and, even then, may require one year of "re-training". This is because rugby union forwards have unique rucking and mauling skills not directly applicable to rugby league. If the New Zealand Commerce Commission Decision is correct (and it was a fact found after detailed submission) then it is obvious that there is virtually no chance of teams transferring from one rugby code to another for skills reasons even if the other formidable obstacles to the transfer of whole teams from one code to the other could be overcome.

103 n100.

6. Market Definition: A Suggested Correct Approach

The market definition found by Mr Justice Burchett at trial has many shortcomings. Perhaps, however, the basic inadequacy of his Honour's approach is that he regarded market definition as necessitating the finding of a single market rather than looking at the various markets which may have been affected by the conduct in question.

His Honour's approach is dramatically at odds with the approach taken by the New Zealand Commerce Commission in its 1996 *Rugby Union Decision*¹⁰⁴ In this decision, the Commerce Commission looked at three markets which would be affected by the player draft before it. These were:

- the market for player services;
- the market for the rights to player services (i.e. the field of potential transactions between provincial unions for buying and selling the rights to player services);
- the market for sports entertainment services.

Though the New Zealand decision was in relation to a player draft arrangement, and was thus a far cry from the issue before the Australian Federal Court in *News Ltd v ARL*, the conceptual approach to be used in relation to market definition in each case should, one would think, be similar. The New Zealand Commerce Commission found that the player draft arrangements did not substantially affect competition in the market for sports entertainment services. This view would broadly agree with the views expressed in VIII.5(i) above. Different results followed in the case of other markets found by the Commission.¹⁰⁵

It is submitted that the correct approach of Mr Justice Burchett at trial in *News Ltd v ARL*, both as a matter of principle and utilising the approach of the New Zealand Commerce Commission, would have been for his Honour to have found different markets and to have assessed the different effects of the ARL action in each market.

¹⁰⁴ n89.

¹⁰⁵ The New Zealand Commerce Commission (see n89) had before it for evaluation a player draft. This consisted of a quota system, a transfer period and a maximum transfer fee, each for evaluation in three markets — the market for the rights to player services; the market for player services and the market for sports entertainment services. Brief details of this draft are set out in ATTACHMENT "B" to this paper.

The Commission concluded as follows (see n89 para 298):

- (i) None of the provisions substantially lessened competition in the market for sports entertainment services.
- (ii) The quota system substantially lessened competition in the market for the rights to player services and the market for player services.
- (iii) The transfer period substantially lessened competition in the market for the rights to player services and the market for player services.
- (iv) The maximum transfer fees did not substantially lessen competition in the market for the right to player services or the market for player services.
- (v) The maximum transfer fee was a price fixing arrangement in relation to the market for the rights to player services and the market for player services.
- (vi) The quota system was an exclusionary provision restricting the supply of player services to, or the acquisition of player services from, provincial unions.
- (vii) The quota system, transfer system and maximum transfer fee system in combination were anticompetitive.

The above were findings by the Commission as to the application of the law under s27, s29 and s30 of the New Zealand Commerce Act. The Commission then went on to authorise the player draft arrangements.

NOTE: At the time of writing this determination is subject to appeal. See details set out at n89 for appeal details subsequent to this article.

On this basis, it seems that the relevant markets which should have been assessed on the case as pleaded were:

- a “competitions market” (limited, in my view, to rugby league);
- a “teams market” (again limited, in my view, to rugby league); and
- a “sporting entertainment market”. It is this market which is of relevance to television interests. This market could well incorporate the sports of rugby league, rugby union, Australian rules football and basketball. It may even be wider than these four sports.

It follows from the above that his Honour at trial correctly identified one of the relevant markets — the sporting entertainment market in which market telecasters are the major players. In this market, it is hard to see how any breaches of the *Trade Practices Act* could have occurred by virtue of the ARL conduct. However, News Ltd correctly pleaded the existence of a “competition market” and a “teams market” and, in my view, correctly identified these markets as relating only to rugby league. The failure of the trial judge to find these latter two markets and limit them to the sport of rugby league may have contributed to the fact that, at trial, no trade practices breaches were found.¹⁰⁶

7. A Reunification Of The Two Competitions — Does This Require Authorisation From The Australian Competition And Consumer Commission?

There has been much conjecture in Australia about reunification of the two rugby league competitions though, at the time of writing, all the talk of this is largely conjecture.¹⁰⁷

If my view of the relevant market is correct [see PART VIII.6 above], it follows that a reunification of the two competitions could well result in a substantial lessening of competition and require merger Authorisation under s50 of the *Trade Practices Act*. The public benefits claimed would, no doubt, be that reunification would permit truly representative State of Origin and International Test matches to recommence. No doubt, fans would be pleased for this to happen. However, it may well be that a significant number of players would quite strongly object to a reunified rugby league competition as, undoubtedly, the players have been major beneficiaries in the ARL-Super League joust. Numerous press comments by players have stated that a significant benefit to them, and, in their view, to rugby league

106 Whilst this statement is true, even if such markets had been found, the major reason why the trial judge found no breach of the Act lies in his characterisation of the league and the fiduciary duties involved — as to which see PART III.

107 Reunification rumours will, no doubt, continue to abound. For example, the *Sun-Herald* of April 6, 1997 carried on its front page the headline “League Peace: TV giants on brink of deal”. The paper reported that there had been a secret visit to Australia by a British troubleshooter who “may have stitched up a rugby league peace deal between the pay-TV rivals Optus Vision and Foxtel”. The paper also reported that “the ARL and Super League had approached leading accounting and consulting firm KPMG to broker a deal for a single football competition the push for which is gaining momentum”. The ARL’s chief executive officer, Neil Whittaker, on the Radio 2GB rugby league show on the afternoon of 6 April, however, denied any knowledge of any troubleshooters or ARL-Super League joint approaches to KPMG. The *Sun-Herald* reporter, when interviewed by Radio 2GB commented that the report came from sources other than his own investigations. The state of play at the time of writing (30 June 1997) is probably summed up by the cynical comment of the 2GB sports commentator after interviewing Mr Whittaker that: “all denials make it closer to the truth”.

The question is, of course, which denial do we not believe.

The likelihood of a competition “truce” is becoming greater now that (June 1997) the Packer and Murdoch groups are coming together through their joint interests in Australis TV.

For some observations on the present position see n169.

generally, has been that there are now two competitions. An Authorisation of a merged competition, may not, therefore, be the lay down slam which many assume it to be.¹⁰⁸

We have no experience in Australia of any evaluation of the public benefits involved in football competition restrictions. The only Australasian experience in this area is in New Zealand — admittedly in the quite different area of the player draft. It is to the New Zealand Commerce Commission's 1996 Determination on this issue that we now turn.

IX. WHAT ABOUT PUBLIC BENEFIT? DOES AN AUTHORISATION SOLVE ALL THE FOOTBALL PROBLEMS?: AN ANALYSIS OF THE 1996 NEW ZEALAND COMMERCE COMMISSION'S AUTHORISATION DETERMINATION RELATING TO PLAYER DRAFTS

The Determination of the New Zealand Commerce Commission in relation to the *New Zealand Rugby Union Player Draft*¹⁰⁹ (which decision is, at the time of writing, subject to appeal) showed a refreshingly rational market analysis compared with that of Burchett J in *News Ltd v ARL*¹¹⁰.

1. An Outline of the New Zealand Player Draft Arrangements

I am well aware of the inherent possibility of error when a West Islander attempts to summarise arrangements in the Shakey Isles, with which arrangements he does not have detailed background familiarity. However, I have, nonetheless, attempted to set out at ATTACHMENT "B" the major characteristics of the New Zealand rugby arrangements which were put to the Commerce Commission for Authorisation. In summary, these arrangements are:

(a) The New Zealand Rugby Football Union ("NZRFU") sought to implement a system which had:

- *players "banded" in various "bands" of competency.* [See Par 11 of ATTACHMENT "B" for details of these bands];
- a *quota system* whereby provincial unions were restricted as to the number of players in each "band" who could be acquired each year. In a twelve months' period no more than 5 band classified players could transfer to any one provincial union. An annual quota in individual bands was also set. Not more than one All Black could be acquired by any provincial union in each year. In most bands the quota was two;

108 Mr Rupert Murdoch certainly sees the establishment of Super League as having public benefit and his views cannot be lightly discounted. For example, he commented that:

"Our company has a history of successfully challenging entrenched monopolies and shaking up complacent competitors — discontent with the previous administration of the game provided the very circumstances in which Super League could be created".

[*The Weekend Australian*, 5-6 October 1996.]

To similar effect Mr Murdoch stated in a Television Interview with Jana Wendt ["Witness": Channel 7: 9 April 1996]:

"We were trying to put heart back into the game. It was a decaying game."

"Players were unhappy. Crowds were down. A former secretary was in gaol. It was all a mess."

"Why were the footballers loyal? It was more than money."

The competition and public benefit effects of any competition reunification obviously substantially depend upon any reunification structure — see n169 for the present position and contemplated structures for a reunified competition.

109 n89.

110 Decision in *News Ltd v ARL* at trial — n8. For comments on his Honour's market analysis see PART VIII of this Paper.

- a *transfer period*. Transfers were permitted only between 1 November and 30 November in each year;
- a “*transfer fee*”, the maximum amount of which was set each year. Provincial unions could negotiate with each other about the transfer fee. It could be less, but could not exceed, the maximum fee. In the ultimate, no player could be transferred unless he wished to be and unless (failing agreement as to the “transfer fee”), the acquiring provincial union agreed to pay the maximum transfer fee to the “selling” provincial union.

(b) There were 130,000 rugby union players in New Zealand. About 1,100 were affected by the arrangements. If each of the 27 unions acquired the maximum number of players available to them, the totality of transferred players would be 135 band classified players (27x5). The NZRFU estimated that not more than 54 players (27x2) would move in any one year.

(c) An important aspect of the arrangements, in my view, was that no player could be compelled to transfer from one provincial union to another against his wishes. Further there was provision for “above quota” transfers if there were an extraordinary and/or compelling change in a player’s personal circumstances. This might include a change in employment, family circumstances or the irretrievable breakdown in the relationship between a player and a provincial union. Thus, as it was put in the Commerce Commission’s Determination:

“No player can be compelled to transfer and no player can be prevented from transferring by his Union.”

2. Competition Considerations

The Commerce Commission found that, in various ways, the quota system, the transfer period and the “transfer fee” all individually breached the *Commerce Act* either as an arrangement which was substantially anticompetitive, a price fixing arrangement or an exclusionary provision.¹¹¹ Further, the Commission found that, in combination, the three restrictions were anticompetitive. Thus, the arrangements, in the view of the Commerce Commission, would have been illegal if implemented without its Authorisation.

3. Authorisation — Public Benefits and Detriments

(i) Detriments

In its Authorisation Decision, the Commission found the following detriments caused by the restrictions on competition in the arrangements:

- The maximum remuneration which a club or union would pay placed upper and lower bounds on what a player could expect to earn. The Commission noted that it had been often argued overseas by those who had studied professional team sports that, while labour market controls may ostensibly be maintained to restrict player mobility with the object

¹¹¹ For the precise holdings in the various markets as found by the Commerce Commission, see n105. The Commission found that none of the arrangements were anticompetitive in the “sports entertainment market”. This market appears to be roughly equivalent to the “four sport” market found by Justice Burchett at trial in *News Ltd v ARL*.

of preserving evenly contested games, the controls have had the effect of reducing player remuneration.¹¹²

- The quota arrangements fixed a limit on the number of players in the market which a provincial union could acquire. The time period limitation for transfers added to this in that transfers could take place in only one month per year. This resulted in detriments to:
 - allocative efficiency because players could not be traded in a free market. An economic assessment was made that the value of this was \$NZ62,000 in the first year and \$NZ13,000 thereafter. The quota had been fixed to prevent the formation of a “dream team”, however, and not to impede normal transfers between provincial unions;
 - productive efficiency because negotiations as to players necessitated bargaining costs. However, the Commission thought that these costs would be small, as would “policing” costs;
 - player skills in that, because of the quota system, players may not be able to transfer to provincial unions which valued them. They may thus become disgruntled. However, there were arguments on both sides. Some players might be disadvantaged but the alternative argument was that the NZRFU was seeking to maximise individual skill development in total.

The Commission concluded that, on all plausible assumptions, any detriments were clearly of limited size.

(ii) *Public Benefits*

Public benefits found by the Commission were:

- *competitive balance in teams.* A key outcome to sporting fixtures is uncertainty. An imbalanced league causes audiences to lose interest and attendances to fall. This balance can be sought in a number of ways one of which is control on player transfers, although studies overseas in this area concluded that labour control is an imperfect mechanism for achieving league balance. The Commission accepted that the scope for the NZRFU to restrict transfers was limited because of the semi amateur nature of the game of rugby in New Zealand. However, it was likely that the National Provincial Competition would become more uneven in the absence of some regulation. Thus interest in it would decline. The Commission noted that the regulations were relatively mild compared with overseas labour market controls but, nonetheless:

“it seems likely that (the regulations) will have some effect in terms of avoiding the excesses which might eventuate in a free market where provincial unions could compete for players to stay one step ahead of the others”.¹¹³

- *the promotion of player development.* The Commission accepted that there was some nexus between the regulations and the promotion of player development but that this was likely to be weak.
- *other public benefits.* A number of other public benefits of both a direct and indirect nature were claimed.

112 n89 at para 311. For this conclusion the Commission cited F Carmichael and D Thomas “Bargaining in the Transfer Market: Theory and Evidence”, Applied Economics Vol 25, 1993 pp1467-1476.

113 n89 at para 367.

Direct public benefits claimed were:

- a more attractive National Provincial Competition for spectators and viewers; and
- enhanced domestic sponsorship, merchandising and broadcasting interest and funding.

Indirect public benefits claimed were:

- greater audience enjoyment of New Zealand international matches;
- increased net foreign earnings for NZRFU from television rights and business sponsorships;
- increased foreign sponsorship for affiliated provincial unions and clubs;
- saving on overseas marketing expenses for business;
- enhanced exports of New Zealand goods; and
- greater inflow of foreign tourists.

These direct and indirect public benefits were given low weight by the Commission or, in some cases, were regarded as not being linked to the regulations or to result from them.

(iii) Balancing

The Commission was faced with a situation where it found far from strong public benefit but, by the same token, found that the detriments were clearly of limited size. On balance, the Commission thought that public benefits outweighed the ascertainable detriments and Authorisation was granted.

4. What about common law restraint of trade?

Judging from the case law which I have been able to sleuth out, the Commission's Determination is one of only two curial decisions in which the "balancing of the competition" has been recognised and implemented.¹¹⁴ But, as we have seen,¹¹⁵ the common law doctrine of restraint of trade still has to be satisfied as competition law in both Australia and New Zealand presume the continuance of this doctrine.

(i) How are lawyers and economists different in their approach to trade restrictions?

The approach of lawyers and economists to trade restrictions is fundamentally different. This has been put many ways but never to my mind better than in the following words:

"The approach of lawyers to questions involving economic subject matter is usually quite different from that of economists. The lawyer's approach reflects the centuries old tradition of viewing problems in the context of a case or lawsuit which is the traditional area for settling disputes between parties. In addition much of the common law is the formalisation of rules covering individuals in their personal relationships. Thus when lawyers, judges and law professors are faced with issues having broad social or economic consequences, they tend to approach the subject having certain individuals in mind. Their acceptance or rejection of a practice will often reflect their notion of the fairness of the transaction. Economists on the other hand tend to think with a different tradition behind them. At best they strive for objective, as distinct from moral, attachment and seek systematic verification for conclusions through empirical data and interpretations which they place on empirical data. The economist does not regard himself as affected by matters of individual morality or mutual fairness concerning a transaction between individual parties. His main concern

¹¹⁴ See PART IV.3 For the other decision see n36 and related text. Note, American decisions are excluded from this statement for the reasons stated at n37 and in related text.

¹¹⁵ See PART IV.1.

is how parties are affected generally by a given practice, whether it results in a desirable allocation of resources and, in some cases, whether a return to a class of persons reflects a competitive or monopoly gain.”¹¹⁶

The Commerce Commission’s Determination speaks in the language of economists.¹¹⁷ Economists think in terms of “players not allocated at the margin” and “a price elasticity of supply and demand which would be one”.¹¹⁸ But what about the lawyer? Mr Justice Wilcox when reviewing the NSW Rugby League Draft did not, in his judgment, use words of allocative efficiency. “How”, he asked, “in a free society can anyone justify a regime which requires a player to submit intensely personal decisions to determination by others?”¹¹⁹ Justice Wilcox did not, by these words, reflect efficiency considerations. He reflected the lawyer’s traditional consideration of the fairness of what was being evaluated.

Would the New Zealand Rugby Draft, which found favour in economic reasoning, pass the lawyer’s common law restraint of trade evaluation, focusing as it does on civil rights and individual freedom issues?

(ii) Would the New Zealand Rugby Union Player Draft be an acceptable restraint of trade at common law?

The comparison between the New Zealand player restrictions and those of the invalidated NSW Rugby League Draft¹²⁰ is illuminating.

The essence of the NSW Rugby League Draft was compulsion. Players had to go where they were drafted and had no real say as to the club for which they would play. They were also required to move as drafted notwithstanding employment or family or other considerations which might be applicable.¹²¹ The ramifications on the personal lives and the liberty of rugby league players in the NSW Rugby League Draft was of prime concern to the judiciary.

Probably, however, infringement of the “civil liberties” of rugby league players does not concern economists too much. Economists see no great evil in sacrificing a bit of liberty to achieve efficiency. Indeed the New Zealand Commerce Commission comments in its rugby union evaluation that:

“Whilst the regulations are relatively mild compared with overseas labour market controls, it seems likely that they will have some effect. In other words, the Commission accepts that there is a linkage between the regulations and the evenness of the NPC competition, but believes that the strength of the linkage is low.”¹²²

116 L Masel [then Chairman of the then Australian National Securities and Exchange Commission]: An address to the Committee of Economic Development of Australia [“CEDA”] entitled “*The Regulatory Commissions and the Courts: An uneasy relationship*” 4 May 1982.

117 The Commission uses language such as, for example:

“Subject to market failure reservations allocative efficiency would be enhanced. The impact of market restrictions could harm allocative efficiency this would be measured by the extent to which players are not allocated at the margin” (n89 para 327)

“The Commission made a preliminary attempt to estimate the possible size of the detriment making certain assumptions, the price elasticity of both supply and demand would be one” (n89 para 329).

118 n117.

119 n48 and related text.

120 n20. See generally PART IV.4.

121 There was a Tribunal to which an appeal could be lodged in relation to personal circumstances. However, this was the very Tribunal which drew such scorn from Justice Wilcox — see text applicable to n48.

122 n89 at para 367.

The Commission seems to conclude in this statement that the public benefit of the arrangements before it would be higher if the restrictions involved were more draconian. Yet if this were to happen the judicial hackles would rise on the question of freedom of the subject, the traditional concern of common law restraint of trade when power is exercised against employees.¹²³

One must conclude, therefore, that the New Zealand Rugby Football Union was extremely wise to keep its rules relatively non-violative of the individual player's freedom even if, as the Commerce Commission intimates, this may bring about less economic efficiency. I believe that any challenge to the New Zealand player regulations would have significant common law restraint of trade problems if its administrators were not able proudly to shout from the ramparts:

"No player can be compelled to transfer and no player can be prevented from transferring by his (provincial) union".¹²⁴

The system is also ameliorated in "civil rights terms" by the fact that "over quota" transfers are permissible should there be an extraordinary and/or compelling change in a player's personal circumstances. These circumstances may relate to employment, family circumstances or an irretrievable breakdown in the relationship between a player and a provincial union.

A final factor in making the New Zealand scheme acceptable at common law is the checks and balances applicable to transfer payments. That which the common law finds particularly repugnant is an arrangement that, although a player is "out of contract", he cannot transfer elsewhere until the club's asking transfer fee is met. This was the situation in *Buckley v Tutty*.¹²⁵ As a lawyer, I personally see this situation as nothing but a form of slavery. The New Zealand arrangements have overcome this problem. A player cannot be refused a transfer if he wishes to leave and if the maximum transfer price (which is set each year after consultation with all the provincial unions, both rich and poor) is paid. Price constraints by way of "transfer fees" cannot, therefore, be a weapon of enslavement.

I believe, therefore, that the "relatively mild" approach taken by the New Zealand Rugby Football Union was wisely taken. To do otherwise may well have resulted in the NZRFU arrangements being Authorised under the *Commerce Act* only to be invalidated if challenged at common law.

I have been able to find only one case where player restraint arrangements have been validated at common law, this relating to the NSW Soccer Federation.¹²⁶ The New Zealand rugby union arrangements have many similarities to that case.¹²⁷ In my view, the New Zealand rugby

¹²³ See PART IV.2 and citation in text to *Herbert Morris v Saxelby* (n25).

¹²⁴ n89 para 418.

¹²⁵ n32.

¹²⁶ See n36 and related text. Many player drafts have been validated in the United States but these are under a judicial exemption to the antitrust laws in the United States and not pursuant to common law restraint of trade doctrine as understood in Australia and New Zealand [see n37]. It may be that collectively negotiated agreements become, in Australia, more prevalent if sportspersons obtain union coverage and collective bargains are made by player unions. [See n6 for citation of some cases involving the issue of sportspersons joining unions.]

¹²⁷ See text related to n36.

restraints would be held valid at common law for the same reasons as the NSW Soccer Federation regulations received the blessing of the NSW Supreme Court.¹²⁸

5. What will the Appeal Decision say?

The New Zealand Rugby Union Draft is, at the time of writing, subject to appeal. This appeal, of course, puts the case much more squarely into the New Zealand judicial system. In particular, this is so if the case should go to the New Zealand Court of Appeal. It is hard to believe that a stronger more coercive draft is likely to find greater blessing from the judiciary than the quite modest one blessed by the Commerce Commission. It will thus be of interest to see whether the quite modest restraints in the New Zealand Rugby Union Draft are regarded by the judiciary as too much of an infringement of the “civil rights” of rugby players and whether for this, or some other reason, no public benefit is regarded as being likely to be delivered.

Looking at the position through the eyes of a West Islander, my reaction is that if a draft of the modest proportions of that in the New Zealand Rugby Case cannot obtain competition law blessing, then all mouthed theories about the necessity to have restraints to balance teams in competitions must be regarded as being without substance insofar as judicial recognition of them is concerned.

It is, of course, quite possible that the theory of competitive restraints in the cause of team evenness will be shot down as a factual matter. If this is the case, then all pretences that there is such a theory should be abandoned. For practical purposes, the theory is, in these circumstances, non-existent.

The appeal decision, and any subsequent decisions in relation to the New Zealand Rugby Union Player Draft arrangements, is likely to have considerable repercussions beyond New Zealand. It will be awaited with great interest not only in New Zealand but in Australia and elsewhere.

X. THE CURRENT STATE OF PLAY

What is the current state of play in this pigskin review? It can be reduced to the series of propositions, some not absolutely unequivocal, set out below.

1. Laws other than competition laws are important in football cases

Because it is the most high profile law, competition law is probably the law to which the thoughts of most lawyers turn when there is some restraint imposed on a footballer or a football club. Important as competition law is in the area, it is equally important that we not be myopic and that we recognise the applicability in particular of the doctrine of common law restraint of trade. It is this doctrine which has shaped the traditional “freedom” of footballers¹²⁹ and the case law in this area was significantly established prior to the enactment of competition laws in Australia and New Zealand¹³⁰. The extent to which restraint of trade doctrine is of

¹²⁸ n127.

¹²⁹ See PART IV.

¹³⁰ See PART IV and, in particular PART IV.4.

importance can be gauged by the fact that the proposed NSW Rugby League Draft was invalidated under that doctrine, competition law not being significantly pleaded.¹³¹

Even when competition law is at the forefront of a case, it may still be the position that other law is, nonetheless, paramount. In *News Ltd v ARL*¹³², for example, the real governing law was the equitable doctrine of fiduciary relationships¹³³.

Law can be no more compartmentalised in this area than in any other.

2. Different doctrines of law give rise to different results

Given the different policy objectives sought to be fulfilled by different legal approaches to restraint questions, it is not surprising that the results actually achieved by the law are inconsistent and sometimes contradictory. The economist seeks efficiency. The lawyer seeks to protect individual freedoms.¹³⁴ The two are not necessarily consistent as we well know from history. The praise heaped on Mussolini when he managed to have the Italian trains run on time would not win many plaudits from a lawyer concerned with individual rights.

So, speaking in economic terms, the New Zealand Commerce Commission can perhaps regret that the player draft was “relatively mild” but that “it seems likely they will have some effect” but that this will be “low”.¹³⁵ Presumably the Commerce Commission would have seen more efficiency in a more regimented arrangement. But the more regimented the arrangement, the more likely it will be that the lawyers’ “civil rights” and restraint of trade hackles will rise. As any football restraints must comply both with competition law and with common law restraint of trade law¹³⁶, it is inevitable that compromise between conflicting objectives is mandated in the vast majority of football restraint cases.

3. What individual rights of players have been recognised?

Individual rights of players have been traditionally recognised under the common law restraint of trade doctrine. Central to the freedom of players is the concept that, after their contract with a club has expired, they cannot be bound to that club for the reason that the club seeks a “transfer fee” for the player’s release.¹³⁷ Further, players, for “civil liberties” reasons, have been protected from involuntary geographic transfer for the reason that

131 n.20. See commentary in PART IV and in particular in PART IV.4. One of the reasons for the minor role which competition law played in the court’s evaluation of the NSW player draft was that players were regarded as not being subject to the Trade Practices Act and neither were player arrangements between clubs considered to be subject to it. This doctrine is, however, clearly in a state of change. See commentary PART V.

132 n8 and n10.

133 See commentary in PART III.

134 See Masel n116 and see generally PART IX and particularly PART IX.4.

135 n122.

136 See PART IV.1. It may well be that some form of antitrust exemption for collective bargaining agreements is an appropriate compromise. This is the situation in the United States. Such a system recognises that players are employees or akin to employees. Like employees, they should collectively bargain for their terms and conditions. Thus competition law in the United States exempts such collective bargaining arrangements and clubs who collectively bargain as part of any such arrangements. This system would certainly merit examination and evaluation. It may permit clubs and organisers to get the efficiencies they desire. At the same time, players are hardly liable to bargain away their “civil rights” or, if they do so, they will do so either for money or as a recognition that the competition overall is better for their doing so and this necessarily benefits players as well as clubs. See also PART X.5 below.

137 For general discussion of common law restraint of trade doctrine see PART IV.

clubs have selection rights in a certain specified order and players must play for the club for which they happen to be selected.¹³⁸ Wisely, the New Zealand Rugby Union recognised these points in putting together its player draft, crucial features of which were that no player could be forced to transfer to a provincial union against his will and no player could be prevented from transferring because a provincial union held out for a high transfer fee.¹³⁹ It is my belief that, had the New Zealand player draft not had these player safeguards, it could well have faced invalidation on common law restraint of trade grounds whatever its economic efficiencies and whatever public benefit blessings of the Commerce Commission may have been bestowed upon it in the form of an Authorisation.

Player "freedoms" have, however, also come from competition law decisions though, in this case, as an adjunct to "efficiencies". The most notable of these is probably the holding in *News Ltd v ARL*¹⁴⁰ that sporting organisers cannot mandate to professional footballers the form in which they must contract. This leaves open to professional footballers the possibility of contracting other than as an individual employee. It also seems that the "employee exemption" to competition law is likely to be interpreted restrictively in future.

The blanket exemptions in both Australia and New Zealand for contracts, arrangements or understandings in relation to conditions of employment are, however, far too wide. In the traditional arena of collective bargaining between employers and employees, the exemption is reasonably based. However, the exemption, as currently worded, also seems to permit groups of employers to impose conditions on employees with whom those conditions have never been negotiated. This is what happened in the NSW Rugby Football Draft. Trade practices exemptions then forced the players to mount a case, not under competition law, but under common law restraint of trade. There seems to be no logical reason why competition law should not run in this area.¹⁴¹

Another aspect of player freedom delivered by the Full Federal Court in *News Ltd v ARL* is that players contract with their clubs pursuant to contacts which are administered by, and enforced by, their clubs. The thought that clubs held their player contacts in trust for the ARL, and that the ARL could enforce them, is a matter which the writer finds extraordinary. To find a trust in favour of the ARL in these circumstances would be to have players subject to enforcement of their contracts by a third party stranger to such contracts. This third party enforcement right arose because of the imposition of clubs of a trust arrangement in favour of the ARL which arrangement was completely outside player control.¹⁴² It is obviously of substantial importance to a player to be able to negotiate with his own club without interference from an outside third party stranger in the form of the ARL or other competition organiser.

¹³⁸ n20. See commentary in PART IV and in particular PART IV.4.

¹³⁹ See PART IX and ATTACHMENT "B". No provincial union could hold a player against his will by demanding a high transfer fee. A maximum transfer fee was set after consultation with all provincial unions and a player, if wishing to transfer, had to be released by his prior provincial union on payment of the maximum transfer fee.

¹⁴⁰ On appeal. See n10.

¹⁴¹ See discussion PART V.

¹⁴² The imposition of a trust of player contracts in favour of the ARL was a result of Mr Justice Burchett's conclusion at trial in *News Ltd v ARL* (n8) that all club assets were held under a fiduciary duty to the ARL. The club's "assets" included the club's player contracts. This principle was overturned on appeal (n10). See PART III for general discussion.

4. What individual rights in clubs have been recognised?

Clearly clubs have been severely limited by the common law restraint of trade doctrine¹⁴³ as to what they can do to players in the form of restraining them by the use of transfer fees and the like. However, on the obverse side of the coin, the common law restraint of trade doctrine has been used by clubs to prevent discriminatory treatment of them by national football associations.¹⁴⁴

Clubs must assuredly feel great relief at the decision of the Full Federal Court in *News Ltd v ARL* that all their assets are not held in trust for their competition organiser for a period perpetual. Clubs do owe duties to their competition organiser¹⁴⁵ but only during the period during which they compete in the particular competition. There is no ongoing duty after the expiration of this period.

This lack of perpetual commitment to one sporting organiser is a highly valuable recognition of the independence of the clubs and of their ability both to deal with their players without the outside interference of competition organisers and their ability to sign on, if they wish, with another competition organiser. The birth of Super League was possible only because of a recognition of the freedom of clubs to contract as they wished once commitments to any existing competition had expired.

Clubs may, however, in future have their wings clipped somewhat by one aspect of competition law. The “contract of service” exemption to competition law appears to be running into increasing disfavour and is likely to be more restrictively interpreted in future by the courts. As noted in X.3 above, at the very least, clubs will not be able, by agreement, to mandate that players contract as individual employees and to obtain exemption from competition law by use of this tactic.

5. Have courts recognised that sporting competitions must be between even teams and that competition organisers must have a way of keeping teams approximately equal?

The courts have recognised the principle of competition “evenness” in a considerable number of cases.¹⁴⁶ However, it appears that courts will not allow theories as to competition “evenness” to override the “civil rights” of individual sporting participants.¹⁴⁷ In Australasia, there appears to be only a NSW soccer decision¹⁴⁸ and the New Zealand Rugby Union Authorisation¹⁴⁹ where competition equalisation concepts have been specifically accepted, as distinct from blessed in philosophical theory. Perhaps the bad track record of sporting equalisation schemes before the courts is because most of them have, to date, been fairly draconian. Perhaps

¹⁴³ See Discussion PART IV and in particular PART IV.4.

¹⁴⁴ See n46.

¹⁴⁵ See comment as to breach of duty by clubs, as found in *News Ltd v ARL*, in n18. See n18 also for a comment as to when fiduciary duties of a club might be perpetual. This, however, requires all clubs to be in the one economic “stable” and for clubs and the competition organiser to be one economic entity. Rarely will these conditions be fulfilled and, to the writer’s knowledge, this position has never been found to be applicable to sporting competitions.

¹⁴⁶ See PART IV.3.

¹⁴⁷ See PART IV.4 and PART IV.5.

¹⁴⁸ n36 and related text.

¹⁴⁹ n89.

it is because, ultimately, there is immense doubt in any event as to whether any form of sporting equalisation can be successful in its objective.¹⁵⁰

It seems that there are very real unresolved issues in relation to sporting competition “evenness”, competition law and restraint of trade doctrines generally. There is far too general an exemption from competition law at present. This exemption permits employers collectively to impose terms and conditions on employees with whom those terms and conditions have not been negotiated. This is unfair to employees, as was demonstrated in the NSW Rugby League Draft in *Adamson*. Yet there is merit in employers being able to bargain collectively with employees and for competition law to protect that bargaining process. Hence, though there is no merit in an exemption for one sided arrangements (say terms agreed between employers) which are imposed on others (say employees) without negotiation, there is considerable merit in an exemption from competition law for collectively genuinely bargained employer-employee arrangements. Further, there would seem to be merit in permitting common law restraint of trade rights to be collectively bargained. It may be that employees are prepared to bargain away certain “civil rights” for monetary consideration or it may be that footballers recognise that a more efficient competition is better for everyone, including themselves, and, therefore, they will agree to forgo certain rights to achieve this efficiency end. The problem at the moment is that the law falls between two stools. On the one hand, it permits employers wide freedom of action and leaves employees defenceless to this action. On the other hand, employee “rights” under the restraint of trade doctrine are simply incapable of being negotiated. Hence competitions which might be made more efficient by the bargaining of modifications to employee “restraint of trade” rights cannot achieve this efficiency even though employees themselves may agree that they wish this result.

A collective bargaining exemption along the United States lines would seem to have much to recommend it. This is a judicial exemption to United States competition law. Such an exemption would require statutory enactment in Australia and New Zealand. Three basic characteristics of the United States collective bargaining competition exemption are:

- (i) that it requires a genuine collective bargaining process with a genuinely representative player organisation;
- (ii) that even common law restraint of trade and post-employment “freedoms” can be “bargained”; and

¹⁵⁰ In its *New Zealand Rugby Union Authorisation* (n89), the New Zealand Commerce Commission noted that in five major league sports in the US between 1901 and 1990, none of them had ever come close to attaining competitive balance, despite strong player labour controls over long periods (citing J Quirk and RD Fort: “Pay Dirt: The Business of Professional Team Sports” Princeton University Press (1992) pp 242-258).

Conversely, even without labour controls, it seems as if there can be significant team equality. This was the case in the NSW Rugby League Competition around the time of the attempted imposition of the player draft. The draft was invalidated in 1991. The facts around that period were:

- in the period 1988 to 1993, 13 of the League’s 16 teams were represented in the final five; and
- in 1992, the year after the invalidation of the draft, 4 teams qualified for the final 5 who had not done so since 1988.

[See figures quoted from Dabscheck and reproduced in Pengilly n22.] These figures must make the need for a player draft to “equalise” the NSW Rugby League Competition a very dubious proposition.

(iii) if the bargaining is a genuine collective bargaining arrangement between employers and employees, both the bargaining process and the results of it are exempted from competition law attack.¹⁵¹

6. What is the nature of professional sport and the application of competition law to it?

If ever there was doubt that professional sporting clubs were in trade and commerce or were competitive with each other, this doubt has been removed by the Full Federal Court Decision in *News Ltd v ARL*.¹⁵²

At trial¹⁵³, Justice Burchett found to the opposite effect. It is pleasing to have the issue definitively decided at the appellate level.¹⁵⁴

7. What does competition law say about those intra-venture restraints necessary to conduct a football competition?

It is important to read the Full Federal Court decision in *News Ltd v ARL*¹⁵⁵ in context. The decision was one involving inter-venture restraints, not intra-venture restraints. In my belief, some commentators have wrongly criticised the decision concluding, in one case, for example, that it has “serious implications for all forms of joint commercial activity”.¹⁵⁶ I, for one, simply do not see this at all.

Therefore, we must look at decisions other than *News Ltd v ARL* to conclude how competition law impacts on intra-venture constraints which have to be imposed in order for a competition to work. As stated in this paper,¹⁵⁷ I believe that competition law permits bona fide intra-competition restraints necessary to make a competition work. In the case of rugby league, these are sin bins, “blood bins”, procedures for the adjudication of rule breaches and the like. Rules as to competition eligibility are also, in my view, clearly untouched by competition law if administered on a bona fide basis.¹⁵⁸ Further, as the number of competitors is clearly part of the conduct

151 See comment n136. For some relevant American Cases on the point see n37.

152 n10.

153 n8.

154 “There can be no doubt that rugby league is big business and none of the combatants in the commercial conflict with which the Superleague appeal was concerned was a candidate for holy orders in such a conflict, one would not expect quarter to be given or expected. It was not.” [Sweeney n17.]

In explaining the reasoning behind the trial judge’s conclusion to the opposite effect, Sweeney says:

“How was it then that the (trial) judge was led to characterise the very strong evidence of rivalry between the two camps as commercially inappropriate behaviour by News? The language which was so prominent in the primary judgment, had its source in the messianic opening by counsel for the ARL. There the frame was offered that this was not a commercial conflict between rivals. It was not competition, but a takeover of an Australian institution by someone motivated by unworthy commercial objectives. It was an attempt to sacrifice an important part of Australia’s cultural life on the altar of Mammon. It was not a case which arose under the Trade Practices Act at all. One of the most remarkable of the many unusual features of this case was the length and intensity of the final submissions for the League that its activities were not in trade and commerce, a proposition which many would have considered not arguable.”

(See *C Sweeney* — Article cited at n17 above.)

155 n10

156 See Gray n65.

157 See PART VI.

158 See PART VI.4 and PART VII.4(iv).

of a competition, competition law does not impact on expulsions from a competition if decisions are taken on a bona fide basis.¹⁵⁹ As regards admissions and expulsions from competitions, the only protection that clubs can be offered is that decisions are to be taken for genuine reasons and pursuant to “due process” procedures.

8. Can clubs now be signed to a particular competition on other than a “year to year” basis?

The Full Court decision in *News Ltd v ARL*¹⁶⁰ was on the basis of specific facts. An exclusionary illegal “purpose” in requiring a five year loyalty to the ARL competition was, on the facts, not difficult to find. But it is all a question of “purpose” and commercial justification may well be a reason why a commitment to a particular competition for more than one year is appropriate.¹⁶¹

9. What does the *News v ARL* decision say about commercial sponsorships? Can they now be longer than from year to year?

As with the case of admissions to competitions for more than one year, it is all a question of “purpose”. As discussed earlier¹⁶², proper business justification for conduct goes a long way towards negating an improper exclusionary purpose. Should there be credible business justification for the length of a commercial sponsorship, then such sponsorship will not be illegal. The simple fact in the *News v ARL Case* was that the ARL really had no substantial purpose in wanting a five year commitment other than the prevention of the News competition.

10. What does *News v ARL* say about sporting competitions being involved in illegal collective boycotts?

Once the position had been reached by the Full Federal Court that clubs were in competition and that all clubs did not hold their assets in trust for the ARL, the Full Court decision in *News v ARL* was not earthshaking in its consequences. The decision simply established that professional sporting clubs, like everyone else, can engage in illegal collective boycotting.¹⁶³ It is important conceptually to distinguish in sporting competitions those rules involving technical co-operation necessary to make a competition work, from restraints imposed by clubs acting coercively against an outside entity.¹⁶⁴ Such coercive activity must be subject to competition law. As a policy matter, sporting competition organisers and sporting clubs cannot be exempted from the law of collective boycotting purely because a lot of co-operation is necessary in order to conduct a sporting competition.

11. The unresolved market issue

Mr Justice Burchett at trial in *News Ltd v ARL*¹⁶⁵ found the relevant market in this case to be the “four sport” market of rugby league, rugby union, Australian rules football and basketball. As the Full Federal Court

¹⁵⁹ See generally PART VI.4 and see in particular n71 dealing with the expulsion of Western Suburbs from the Sydney competition.

¹⁶⁰ n10.

¹⁶¹ See PART VII.4(i) and PART VII.4(ii).

¹⁶² See PART VII.4(ii).

¹⁶³ See PART VI and PART VII.4.

¹⁶⁴ See PART VI.2.

¹⁶⁵ n8.

did not discuss this finding on the basis that it was not necessary to do so, the trial judge's finding remains as precedent.

The issue of market definition was theoretical to the decision in the *Rugby League Case* itself in view of the finding that the ARL had engaged in an illegal collective boycott. However, market definition is of importance. In considering whether professional sporting organisations engage in misuse of market power, it is obviously important to define the market. Whether or not illegality flows from certain conduct may depend upon how widely the market is defined. In defining the market widely as the "four sports market", Mr Justice Burchett virtually ruled out the possibility that whatever the ARL did, it could not be guilty of misusing market power.

However, I believe that the market is not simplistically defined in such wide terms. I have argued,¹⁶⁶ following the broad approach of the New Zealand Commerce Commission in its 1996 *Rugby Union Authorisation Determination*¹⁶⁷ that there are three relevant markets, each of which should have been considered. These are:

- a "competitions market";
- a "teams market"; and
- a "sporting entertainment market".

The first two of these markets should be confined to rugby league. The third embraces the four sports found by the trial judge to be within the relevant market, and may be even wider.

His Honour, in assuming only one market to be relevant was, in my view, fundamentally incorrect. I am in good company in this view.¹⁶⁸

I believe that professional sporting bodies in the future would be well advised not to rely on the wide market definition in *News Ltd v ARL* at trial as justification for acting in a way which might, on a narrower market definition, be either a misuse of market power or anticompetitive conduct.

12. If we had a reunited competition in Australia, would this need Authorisation?

The view which I take of market definition (see 11 above) means that any reunification of the News Ltd and ARL competitions would need the Authorisation¹⁶⁹ of the Australian Competition and Consumer Commission.

¹⁶⁶ See PART VIII.

¹⁶⁷ n89.

¹⁶⁸ A narrow market definition is supported by such academic articles as have been published on the *News v ARL* Case to date: see Edwards n97, Sweeney n17 and S Corones: "Super League: 'A Victory for Competition and Free Markets'" 25 *Aust. Bus. Law Review* (April 1977) pp150-156. Lockhart, J, the Presiding Judge in the *News v ARL* appeal commented:

"I, for myself, have difficulty seeing, how one could talk about this market, as including, say, cricket, unless one takes it to the extreme of an entertainments market that is international. One gets to an area of absurdity then and the very intention of the Act is just thrown out the window". [Page 172 of *News v ARL* Transcript cited from Corones (above) at p153.]

The present writer regards the thrust of these observations to be as equally applicable to rugby union, Australian football and basketball as to cricket. Even if the market is national, and not international as Lockhart J comments, the same result follows i.e. "the very intention of the Act is just thrown out the window".

¹⁶⁹ See conclusion reached in PART VIII.7. The competition effects of a reunification will, however, depend upon the structure of any reunification. It is one thing, for example, to have but one reunified competition, presumably with a reduced number of clubs. It is another to have a major national competition coupled with lower grade State competitions. It is the latter which is apparently more likely — at least if the ARL's proposal of 25 June 1997 finds any support in the News Limited camp.

The likelihood of reunification of the competition has increased by virtue of the joint arrangements in June 1997 between the Packer and Murdoch camps in relation to Australis TV. But there is still a long way to go.

13. In conclusion

Football, in its various codes, has spawned a veritable barrage of litigation around the world. In this paper, I have discussed but one segment of this litigation — that involving common law restraint of trade and competition issues, primarily as the cases have been relevant to Australia and New Zealand.¹⁷⁰

Rugby union has been described by New Zealanders as “the game they play in heaven” — one observation in Justice Burchett’s judgment in *News Ltd v ARL* with which I find myself in agreement.¹⁷¹ Australian rules is said to provide “an identification, a sense of belonging and emotional release which used to be provided by the church¹⁷². Rugby league is said to enjoy longer hours of televising and higher ratings in winter in New South Wales and Queensland than any other sport.¹⁷³

There is no doubt that football is important. Football is important to lawyers as well. As I noted in the initial sentence of this paper:

“A review of football litigation around the world may well lead the observer to the conclusion that lawyers feed from the skin of the pig more than from any other part of it.”

For players, clubs, sporting organisers, officials, referees, coaches and lawyers, there is no doubt substantial truth in the now famous comment by Bill Shankley, Manager of Liverpool Football Club that:

“Some people think that football is a matter of life and death. I don’t take that attitude. I can assure them it is much more serious than that.”¹⁷⁴

¹⁷⁰ For some of the football litigation issues not discussed in this paper see PART I and n1 to n7.

¹⁷¹ See n8 and n9 and related text.

¹⁷² L Sandercock & I Turner: “Up there Gazaly” cited from Sweeney n17 at p181 FN21.

¹⁷³ Ken Arthurson, President of the ARL in testimony at trial in *News Ltd v ARL* (Transcript p2531) cited from Sweeney n17 at p182 FN30.

¹⁷⁴ Quoted in Mason “Football” Drake New York 1975.

ATTACHMENT “A”

BRIEF FACTS OF THE ARL — NEWS LTD BATTLE

It is tempting, but incorrect, to believe in such a well publicised case as *News v ARL* that the facts are known to all members of one’s audience. It is therefore appropriate, at risk of reiterating what is well known to many, to sketch in the brief facts of the case.¹ I do this in broad terms and in accordance with the findings of the Full Federal Court. The salient facts were:

- In late 1994, Mr Ken Arthurson, then President of the ARL, was in England on a Kangaroo rugby league tour. He heard reports that News Ltd was planning to set up a rival competition to that conducted by the ARL.
- Mr Arthurson speedily returned to Australia and spoke to Mr John Quayle of the New South Wales Rugby League. He asked Mr Quayle what could be done to prevent the growth of a rebel competition.
- News Ltd subsequently negotiated with the ARL as to the conduct of a new competition under ARL auspices. However, News Ltd got nowhere in these negotiations. A prime reason for this was that Mr Kerry Packer, owner of Channel Nine, which had exclusive telecasting rights to all ARL matches until the year 2000, stated that he had no intention of sharing with News Ltd the televising of any matches conducted under ARL auspices. As television was the prime economic push behind News’ interest in conducting an alternative competition to that then conducted by the ARL, Mr Packer’s stand meant the end of negotiations between News Ltd and the ARL and the end to any possibility of News Ltd establishing a new competition under the auspices of the ARL.
- Accordingly, the negotiations between News Ltd and the ARL broke down. News Ltd then started work on establishing its own “Super League” competition independently of the ARL, such competition to start in 1996.
- News, however, ran into a big hurdle in establishing its independent competition. The ARL had, prior to the ultimate breakdown of negotiations with News Ltd, signed up all the clubs in the Australian premierships competition to a Commitment Agreement. The effect of this agreement was to preclude any club then playing in the Australian

1 No doubt in this summary there are sins both of omission and commission. When summarising facts in “broad brush” terms, one, not surprisingly, sometimes omits facts or summarises facts in a manner which omits or glosses over matters which some readers may regard as important. If this is done here, the writer apologises for his inadequacies. However, to summarise such a vast barrage of facts in a “broad brush” way is no easy task and some considerable generalisations necessarily have to be made.

The facts set out in the text are those found by the Full Federal Court on appeal.

In the text, for purposes of simplicity of expression, the signing only of clubs is referred to. News Ltd also signed players and coaches in addition to clubs. The trial judge found the facts differently to the Full Federal Court. In essence, he found that News Ltd had never intended, on a bona fide basis, to deal with the ARL and always had a blitzkrieg plan to establish a rebel competition. As appears from the text, the Full Federal Court took the view that News Ltd always genuinely negotiated with the ARL and it was only when these negotiations broke down that News Ltd moved to establish its own competition.

The Full Federal Court, in reversing the trial judge, did so significantly because of the different view it took of the facts. The Full Federal Court noted in its judgment that:

“... the major reason for the length of the judgment is the need to set out in detail the course of events leading to the Super League Venture, the execution of the Commitment and Loyalty Agreements and the signing of players and coaches to Super League contracts ...”.

premiership competition from engaging for a period of five years (the seasons 1995 to 1999 inclusive) in any competition other than one conducted by the ARL. Immediately upon the ultimate breakdown of negotiations with News Ltd, the ARL signed up all clubs to a further agreement known as a “Loyalty Agreement”. For present purposes, the Loyalty Agreement had the same effect as the Commitment Agreement though it covered some legal and drafting points not in the Commitment Agreement. The Loyalty Agreement, for all practical purposes, replaced the prior Commitment Agreement though both were the subject of the subsequent litigation brought by News Ltd.

Both the Commitment and Loyalty Agreements were executed by all premiership clubs after meetings of club executives at the NSW Rugby League headquarters, at which meetings the terms of the agreements were approved.

- All premiership clubs had to sign a five year Loyalty Agreement or they would not be able to participate in the 1995 competition. The Loyalty Agreements were put to clubs for signature in February 1995 i.e. at a time when the 1995 competition was due to start. The Loyalty Agreements had to be signed as a condition of entering the 1995 competition even though all clubs had, in accordance with ARL rules, been formally admitted in May 1994 to the 1995 competition. The ARL required this five year commitment from all premiership clubs even though it had previously expressly prevented clubs from having access to the Australian premiership competition other than on a year to year basis.
- In establishing its “rebel” competition, News Ltd had to sign various clubs² to that competition. It was obviously faced with the problem that the Loyalty Agreements bound all clubs to the ARL for five years. News could sign clubs to its competition only if the Loyalty Agreements³ were illegal. On 30 March 1995 News commenced proceedings in the Federal Court alleging that the Loyalty Agreements breached various sections of the *Trade Practices Act* — primarily s45 and s4D covering collective boycotts (or “exclusionary provisions” as they are called in the Act), s45 covering anticompetitive arrangements and s46 relating to misuse of market power.

News Ltd did not seek to upset the staging of the 1995 competition as its competition was not due to commence until 1996. However, News Ltd argued that the clubs participated in the 1995 competition pursuant to their one year formal admission to it in May 1994 and not pursuant to the terms of either the Commitment Agreements or the Loyalty Agreements (the latter, in effect, replacing the Commitment Agreements). The News Ltd case was that the Commitment and Loyalty Agreements were totally void.

2 News also signed up players and coaches as well as clubs. For purposes of simplicity of expression, the signing only of clubs is referred to.

3 News Ltd also took proceedings alleging illegality of the Commitment Agreements. However, as the Loyalty Agreements largely superseded the Commitment Agreements, the Commitment Agreements are not, except where necessary, referred to in the text.

- The ARL defended and counterclaimed. The ARL argued that the agreements were valid and that News Ltd had, by signing up so-called “rebel” clubs, induced breaches of contracts and breaches of fiduciary duties owed by those clubs to the ARL.
- The ARL competition with all clubs participating went ahead in 1995. All clubs had, prior to the commencement of the competition, signed the Loyalty Agreements.
- On 23 February 1996, the trial judge found resoundingly in favour of the ARL.
There was talk of a rebel players’ competition being organised in 1996 but this never got off the ground because of court restraints.
- News Ltd signed up the rest of the world’s rugby league playing countries to it thus ensuring that it had control of international rugby league competition and that any Australian representative team playing the national teams of other countries would be selected only from Super League players.
- An ARL sponsored competition including all clubs was conducted in 1996. The parties went back to court to fight an appeal from Mr Justice Burchett’s decision at trial.
- On 4 October 1996, the Full Federal Court found resoundingly in favour of News Ltd.
- On 15 November 1996, the High Court refused special leave to appeal from the Full Federal Court’s decision.
- Super League kicked off in March 1997 (a year later than planned), as also did an ARL competition. At the present time, there are two competitions, the “loyal” club competition conducted by the ARL and the Super League “rebel” competition conducted by News Ltd.

ATTACHMENT “B”

BRIEF DETAILS OF THE NEW ZEALAND RUGBY UNION PLAYER DRAFT *

THE STRUCTURE OF NEW ZEALAND RUGBY UNION

1. The New Zealand Rugby Football Union [“NZRFU”] is the administrative body governing the participants involved in rugby union in New Zealand. In 1995, it had total assets of \$NZ16.4 million and a revenue of \$NZ13.8 million.
2. The NZRFU is managed by a Board of nine directors elected by delegates from 27 provincial unions plus representatives of the Maori Rugby Board and of the New Zealand Rugby Referees’ Association.
3. There are 27 provincial unions throughout New Zealand with boundaries traditionally set by the Boundary Commission of NZRFU. These provincial unions are independent incorporated societies affiliated to the NZRFU. Each provincial union has teams playing in the Senior A National Provincial Championship (“NPC”) and NPC Development

* These facts are taken from the New Zealand Commerce Commission’s Decision in the New Zealand Rugby Football Union Player Draft Authorisation Case [Decision No. 281: 17 December 1996. At the time of writing (30 June 1997), this Decision is under appeal. [See details at n89 to the main text.]

- Grades. Each provincial union also has affiliated clubs which are predominantly school teams and amateur sporting clubs.
4. In New Zealand there are approximately 130,000 rugby union players. About 1,100 are affected by the NZRFU player draft regulations. If each of the 27 provincial unions acquired the maximum number of players allotted under the quota arrangements (see Par 12 below) then 135 players would move in any one year. The NZRFU predicted that no more than 54 players would, in fact, move each year.
 5. As a result of the development of the Rugby Super 12 and the commencement of professional rugby union in New Zealand, the NZRFU requires all Rugby Super 12 players and all All Blacks to sign a contract with the NZRFU. Some development players also have contracts with the NZRFU. All these players receive remuneration directly from the NZRFU.
 6. Many provincial unions also have contracts with NPC players which vary widely between provincial unions.

SPONSORSHIPS AND BROADCASTING ARRANGEMENTS

7. The NZRFU have a number of prominent sponsors including Air New Zealand, Lion Nathan Limited and Television New Zealand.
8. With the development of the Rugby Super 12 competition in 1995, the rugby unions of New Zealand, South Africa and Australia signed an exclusive agreement with News Corporation Limited (“News”) which provides News with the rights to televise all rugby union matches (including NPC, Rugby Super 12 and Test Matches) played in each of the respective countries for the next ten years. In return for its television exclusivity, News agreed to pay US\$555 million to the three unions over the next ten years. News has subsequently on-sold some of these rights to local television networks such as Sky Network Television Limited, which has further on-sold some of these rights to Television New Zealand Limited.

THE PLAYER DRAFT REGULATIONS

9. Under the regulations, rugby union players are split into a number of “bands”. These bands indicate the level of experience of the player and the competition in which the player had been most recently playing.
10. The Player Draft Regulations affect only players transferring between provincial unions who fall within one of the bands and will play in the receiving union’s Senior A NPC in that or any future year, but the Regulations have consequences for other levels of the sport.
11. The bands are:
 - All Blacks
 - “Star”
 - “Established”
 - “Current”

- All Blacks Former Rugby Super 12
- Senior A NPC
 - “1st Division”
 - “2nd Division”
 - “3rd Division”
- NPC Development
 - “1st Division”
 - “2nd Division”
 - “3rd Division”
- NZ Colt
- NZ U19 Rep
- NZ Schools
- Academy Members.

12. There are three basic aspects of the regulations each of which is established under a “Banding System”:

(i) The Quota System.

Each provincial union is restricted in the number of players from each band or grouping of bands that it may acquire each year. For example, a provincial union may acquire the services of only one All Black (other than former All Blacks) each year.

The maximum number of transfers of band classified players which a provincial union may accept in any 12 months’ period is five. Within this total, an annual quota is also set for every specific band or grouping of bands. For the majority of bands, the quota is set at two players. The exception is the All Black Band (with the exception of former All Blacks). Provincial unions can only acquire the services of one All Black (star, established or current) per year.

Transfers above quota can occur on the basis that there has been an extraordinary and/or compelling change in a player’s personal circumstances. This may include a change in employment, family circumstances, or an irretrievable breakdown in the relationship between a player and a provincial union.

(ii) The Transfer Period.

The transfer of players is limited to the period between 1 November and 30 November in each year.

(iii) The Development Compensation Payment.

The NZRFU specifies the maximum amount of Development Compensation Payment payable with respect to each band of player. These amounts are set following consultation with provincial unions and other interested parties based on the consensus maximum value that the provincial unions place on the skills and experience of players at various levels.

Provincial unions may negotiate as to the Development Compensation Payment payable in respect of any specific player. The payment can, therefore, be zero. It cannot, however, exceed the maximum amount. In the event of non-agreement on this, a mediation process is involved. In the absence of agreement as to the compensation payment involved (either negotiated or mediated), there can be a transfer if and only if the player agrees to the transfer and the acquiring provincial union agrees to pay the

maximum applicable Development Compensation Payment to the selling union. Absent these agreements, the selling provincial may refuse to agree to the transfer and may retain the player.

[The NZRFU submitted that the Development Compensation Payment reflected the cost of developing players, only some of which would reach a certain standard. The Commerce Commission, however, took the view that payment was based not so much on the cost of developing players as on the expected value of the player's services. Hence the Commission concluded that, although the purpose of the payment was to ensure compensation to the losing professional union, the payment was, in effect, a transfer fee. The Commission, in its Determination, referred to the payment as a transfer fee.]

THE NATIONAL PROVINCIAL CHAMPIONSHIPS AND THE PROVINCIAL UNION PLAYER LENDING SYSTEM

13. The NPC Championship is conducted throughout the 27 provincial unions throughout New Zealand in four levels. It is largely amateur but with some professional players. Due to their commitments to All Black Rugby, many professional players are unavailable for NPC teams during part of the season though All Black tour dates are deliberately chosen to enable All Blacks to play for their NPL provinces in key matches.
14. Within the NPC competition, specific rules exist for lending players between specific provincial unions. This system is typically used by provincial unions that have a particular weakness in their teams and wish to acquire a player with particular skills or by players not regularly selected in their home provincial union but likely to be selected by another provincial union. A provincial union may utilise the services of a total of four such players, who are not formally transferred between provincial unions and must return to their home provincial union on request. This lending system is outside the player draft and does not involve transfer fees.

OVERSEAS PLAYERS

15. Any NPC team can include three overseas players subject to their complying with the International Rugby Board's 180 day stand down rule if they have received material benefit from playing rugby. These players are outside the player draft rules. It is anticipated that, because of the growing professionalism of rugby, most overseas players will be subject to the 180 day stand down rule.